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Proportional, Not Strict, Scrutiny: Against a U.S. "Suspect Classifications" Model under Article 14 ECHR in the U.K.

This article maintains that U.K. courts, in applying Article 14 of the European Convention on Human Rights (ECHR), should under no circumstances emulate the U.S. Equal Protection Clause (EPC) approach to justifying state discrimination, and that to do so would fly in the face of Strasbourg precedent and common sense. To support these contentions this article first analyzes some illustrative U.K. discrimination cases to evaluate to what extent and why the United Kingdom appears to lean in the direction of a "suspect classifications" approach to justification of discriminatory treatment. It then explains how U.S. courts handle justification under the EPC, offering a critical assessment of (1) the reasons for the evolution of that approach, and (2) its coherence and success. The article then analyzes, by comparison, the approach of the European Court of Human Rights to Article 14 justification, noting the inconsistency of the Strasbourg teaching with a U.S.-style methodology. The article concludes that the U.S. model arises from a completely different jurisprudential tradition and logic than the ECHR's proportionality model. The United Kingdom should thus reject the U.S. practice of applying discrete levels of scrutiny depending on the degree to which a classification is "suspect."

I. Introduction

Constitutional or treaty provisions that guarantee equal treatment at the hands of the state, such as the Equal Protection Clause (EPC) of the U.S. Constitution and Article 14 of the European Convention on Human Rights (ECHR), generally require, at some point, that courts decide what kinds of unequal treatment are justified. Law, and other acts of government, must obviously make distinctions among people or "discriminate" in the strict sense of the word. When Article 14 or the Equal Protection Clause promise equal treatment,

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they do not seek to proscribe, for example, differentiating between job candidates on the basis of relevant qualifications or between taxpayers on the basis of whether they are employed or self-employed. Instead, those equality provisions prohibit "unjustified" discrimination, such as almost every distinction on the basis of race, and the vast majority of distinctions on the basis of gender. Some might find the phrases "almost every" and "vast majority" surprising, but of course the state might legitimately use distinctions of race, for example in affirmative or positive action,[1] and of gender, such as in the provision of social services for battered women.[2] The fact that some distinctions are allowed and others are not—and that distinguishing on some grounds appears generally justified while on others very rarely justified—requires that the application of these broad equality guarantees rely significantly on some kind of "justification" analysis.

The Equal Protection Clause and Article 14 both differ in an important way from typical statutory anti-discrimination laws. Statutory prohibitions typically specify a regulated area to which they apply, such as employment, or the provision of goods and services, and identify clearly those situations in which the impugned ground of discrimination may not receive any consideration, and under what circumstances it may play a part in decisions. For example, in the United Kingdom, the Race Relations Act 1976 essentially declares that no employment decision may take race into account except where the decision turns on a genuine occupational requirement.[3] The structure of the statute is one that seeks to shield courts from decisions about when race discrimination is justified or not. The legislature has already decided that race discrimination is always unjustified in the employment context, except in specified and very narrow circumstances.

By contrast, Article 14 ECHR does not impose a clear limit on what grounds of discrimination it prohibits and leaves the question of justification to a case-by-case determination.[4] In a similar vein, the U.S. Equal Protection Clause appears completely open-ended with regard to grounds of distinction, leaving the U.S. Supreme Court to develop an elaborate system of differing levels of scrutiny for determining the extent to which different kinds of discrimination are justified.[5] These open-textured equality guarantees appear to grant courts the daunting and controversial power to distinguish between legal differentiation and illegal discrimination. Deciding whether the state may or may not discriminate on a given ground in a given cir-

1. Grutter v. Bollinger, 539 U.S. 306, 326 (2003).
2. (United Kingdom) Sex Discrimination Act 1975 sections 35(1), 46.
3. RRA 1976 sections 4A, 5.
4. R (S) v. Chief Constable of South Yorkshire Police [2004] UKHL 39, para. 48; *Belgian Linguistics* (1968) 1 EHRR 252, para. 10.
5. *See, e.g.*, City of Cleburne v. Cleburne Living Center 473 U.S. 432 (1985).

cumstance ultimately involves a value judgment. When it enacts a statute forbidding race discrimination in employment, the legislature makes a value judgment to the effect that it is wrong to deprive a person of employment opportunities on the basis of an irrelevant but immutable human characteristic. In a slightly different way, a legislature makes a value judgment when it enacts a law making a student loan program available only to people under the age of fifty-five: it has decided that the benefits of the program, for society as a whole, outweigh the harm to those over fifty-five, or that the exclusion of those over fifty-five does not deprive them of anything fundamental to human dignity or to their participation in society. If a person over fifty-five challenges this limit—it is clearly discrimination, if not necessarily unjustified discrimination—under a constitutional equal treatment guarantee, this seems to require the court to second-guess the legislature's judgment.[6]

Some would assert that legislatures have a superior claim to legitimacy in making these value judgments and thus courts should limit their scrutiny to the question of whether the political process has been undermined or whether the act of the legislature conflicts with clear and entrenched principles.[7] These views sit at one extreme of a continuum between judicial activism and judicial deference and commentators on every part of that spectrum seek to resolve the same problem: how, and to what extent, should judges arrive at answers to disputes that turn on value judgments, without substituting themselves for the legislature or abdicating their responsibility to protect against abuses by the majority? How courts in the United Kingdom should answer this question, in applying Article 14 ECHR under the Human Rights Act 1998 (HRA), forms the central focus of this article.

Since the coming into force of the HRA in 2000, U.K. judges have been struggling to come to terms with an Article 14 analysis that has transformed judicial oversight of allegedly discriminatory state action.[8] The proportionality-based justification analysis called for under Article 14 diverges markedly from the standards applied in ju-

6. *See, e.g.*, Wilson v. First County Trust Ltd [2003] All ER 97 (HL), paras. 61-63.

7. *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 87 (1980); CASS SUNSTEIN, DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO (2001).

8. The HRA makes the ECHR, including Article 14, directly enforceable in the U.K. courts. The specific way in which it does this places a great deal of responsibility on the courts to declare whether state action violates ECHR treaty obligations. *See generally* Francesca Klug, *The Human Rights Act—A "Third Way" or "Third Wave" Bill of Rights*, [2001] EUR. HUM. RTS. L. REV. 361; Ian Leigh, *Taking Rights Proportionately: Judicial Review, the Human Rights Act and Strasbourg*, [2002] PUBLIC LAW 265, 282-86; Jeffrey Jowell, *Beyond the Rule of Law: Towards Constitutional Judicial Review*, [2000] PUBLIC LAW 671; Mark Elliott, *The HRA 1998 and the Standard of Substantive Review*, 60 CAMBRIDGE L.J. 301 (2001); PAUL CRAIG, ADMINISTRATIVE LAW (4th ed, 1999) 546, 556-57, 561.

dicial review and statutory discrimination cases. In the last seven years, several high-profile cases with significant political or social ramifications have put the judiciary under pressure to come quickly to terms with the process of making value judgments about discrimination.[9] Unfortunately, the European Court of Human Rights in Strasbourg (ECtHR) offers little in the way of step-by-step instruction in how to perform a justification inquiry. Owing to its role as a supervisor of sovereign states party to an international treaty, the ECtHR observes a "margin of appreciation," leaving national governments to decide how to resolve questions of justification. The Strasbourg court tells the Contracting Parties when they have exceeded this margin, but does not illustrate the mechanics of performing a proportionality balancing.[10] Therefore these formative years have seen U.K. courts needing to fashion a justification doctrine on the fly, where the functions they seem called upon to perform sit in tension with the judicial review functions and statutory anti-discrimination functions they have performed in the past.

These circumstances have produced a tendency toward paying much more attention, in the justification inquiry, to evaluating the benefits procured by a challenged measure than to its discriminatory impact. U.K. courts incline, once they have identified some kind of discriminatory impact, to shrink from fleshing out any specific extent of the impact, preferring to place grounds of discrimination (e.g., sex, race, religion) in categories requiring a greater or lesser weight, in terms of advancement of legitimate aims, to counteract a standardized discriminatory impact.[11] The U.S. "suspect classifications" approach under the EPC illustrates this paradigm, in that it expressly provides for graduated levels of scrutiny of government distinctions depending on whether they turn on more or less "suspect" forms of classification.[12] The House of Lords (the U.K.'s court of last resort) has recently spoken with approval of the suspect classification model, without unequivocally adopting it as the orthodox U.K. justification analysis.[13]

This article maintains that U.K. courts should under no circumstances emulate the EPC approach to justification and that to do so would fly in the face of Strasbourg precedent and common sense. To

9. *See, e.g.*, A and Ors v. Home Secretary [2004] UKHL 56; Ghaidan v. Godin-Mendoza, [2004] UKHL 30; R (S) v. Chief Constable of South Yorkshire Police [2004] UKHL 39.

10. *But see* Dudgeon v. United Kingdom [1981] 4 EHRR. 149, paras. 59-61, where the Court demonstrates by example the kinds of considerations to be weighed in a proportionality inquiry.

11. Board of Governors of St Matthias Church v. Crizzle, [1993] IRLR 472 at 475; R (Carson) v. Secretary for Work and Pensions, [2005] UKHL 37, paras. 18-27; Allonby v. Accrington and Rossendale College [2001] IRLR 364, 370.

12. *Cleburne*, 473 U.S. at 440-46.

13. *Carson*, [2005] UKHL 37 at paras. 55-57.

support these contentions, this article first, in Section II, analyzes some illustrative U.K. discrimination cases to evaluate to what extent and why the United Kingdom appears to lean in the direction of a "suspect classification" approach. Section III explains how U.S. courts handle justification under the EPC, offering a critical assessment of (1) the reasons for the evolution of that approach, and (2) its coherence and success. Section IV then analyzes, by comparison, the approach of the ECtHR to Article 14 justification, noting the inconsistency of the Strasbourg teaching with a U.S.-style methodology. The article concludes that the U.S. model arises from a completely different jurisprudential tradition and logic than the ECHR's proportionality model and the United Kingdom should thus reject the U.S. practice of applying discrete levels of scrutiny depending on the degree to which a classification is "suspect."

II. THE U.K. JUDICIARY AND JUSTIFICATION

The judiciary of the United Kingdom handles justification like an opera director handles a fading star soprano whose voice might crack at any moment. The star must go on stage or the seats will be empty, but all of the challenging bits are flattened out and masked by the orchestra. "Challenging bits" in this simile (which hereafter we will leave in peace) refers to the principle of proportionality. Proportionality is a concept that has been well developed in Europe, but incorporated in U.K. adjudication only grudgingly, and often because European obligations required it.[14] It has been formulated in a variety of ways, not only in different jurisdictions but within jurisdictions, but it essentially requires, in its simplest sense, that the costs of applying a challenged distinction or rule do not outweigh the benefits to the public interest.[15] In the human rights and discrimination context, it functions as a kind of "sliding scale" scrutiny that applies to measures that *prima facie* discriminate, or invade a right.[16] As such it operates as a defense and effectively places the burden on the state to prove that the balance vindicates the impugned act. However, by its nature it adapts on a case-by-case basis, calling for greater benefits to be shown by measures that impose substantial burdens and fairly minimal justifications for negligible burdens. It is in the performance of this balancing, and especially in the assess-

14. R (Daly) v. Home Secretary [2001] UKHL 26, paras. 26, 27, 32; R (Brind) v. Home Secretary [1991] 1 AC 696, 766-767; MURRAY HUNT, USING HUMAN RIGHTS LAW IN ENGLISH COURTS (1998).

15. *Belgian Linguistics* (1968) 1 EHRR 252, para. 10; A and Ors v. Home Secretary [2004] UKHL 56, para. 50; Ghaidan v. Godin-Mendoza, [2004] UKHL 30, para. 133; Lord Hoffmann, *The Influence of the European Principle of Proportionality upon U.K. Law, in* THE PRINCIPLE OF PROPORTIONALITY IN THE LAWS OF EUROPE (Evelyn Ellis ed., 1999), 107 (Lord Hoffmann is a Law Lord in the U.K. House of Lords).

16. DAVID FELDMAN, CIVIL LIBERTIES AND HUMAN RIGHTS IN ENGLAND AND WALES 146 (2002).

ment of the burden side of the equation, that U.K. judges have come up short.

A. *Justification in Indirect Discrimination Cases*

Although the British courts flirted with proportionality in their judicial review jurisprudence,[17] the primary role of proportionality outside the ECHR and the HRA has been in areas heavily influenced by European Community law such as indirect discrimination.[18] Indirect discrimination involves a claim, for example under the Race Relations Act 1976, that a facially neutral rule has a disproportionate impact on persons of the claimant's race (in the United States this is called "disparate impact" discrimination).[19] The proportionality under discussion here has nothing to do with measuring "disproportionate impact," which is generally done with statistics.[20] Proportionality comes into play because the Race Relations Act 1976 and similar statutes allow defendants to "justify" indirect discrimination by way of a form of proportionality defense. Good illustrations, both of the formulation of this defense and of a U.K. court dancing around proportionality, come from *Board of Governors of St Matthias Church v. Crizzle*, where the Employment Appeal Tribunal (Wood, J.) found indirect discrimination against an applicant for a head teacher position justified on the facts.[21]

The school had advertised a head teacher post with the requirement that the applicant be a "communicant" in the Church of England or the Catholic Church, so that he or she could lead the morning assemblies in prayer. The claimant, an Asian woman who was not a communicant but was otherwise a well-qualified member of the Church of England, demonstrated that a much smaller proportion of Asians could satisfy the communicant requirement than could whites. The Employment Appeal Tribunal set out the following test, the satisfaction of which would allow the school to justify the indirect discrimination:

> (a) Was the objective of the governors a legitimate objective (it is not for the Industrial Tribunal to redraft or redefine the objective)? In the present case it was to have a head teacher who could lead the school in spiritual worship and in particular the administering of the sacrament at the weekly mass to those who were confirmed. The head teacher should have

17. R (Pegasus Holdings (London) Ltd) v. Transport Secretary [1988] 1 WLR 990.
18. Allonby v. Accrington and Rossendale College [2001] IRLR 364, paras. 23-29; Evelyn Ellis, *Proportionality in European Community Sex Discrimination Law, in* THE PRINCIPLE OF PROPORTIONALITY IN THE LAWS OF EUROPE (Evelyn Ellis ed.,1999), 170-72.
19. RRA 1976 section 1(1A).
20. Jones v. University of Manchester [1993] IRLR 218.
21. [1993] IRLR 472 at 475.

> full membership of the Church in order to foster the Anglo-Catholic ethos of the school.
>
> (b) Were the means used to achieve the objective reasonable in themselves? and;
>
> (c) When balanced on the principles of proportionality between the discriminatory effect upon the applicant's racial group and the reasonable needs of the governors, were they justified?[22]

The opinion then carefully explained the school's objective, including a discussion of why it was appropriate to describe the objective in such a way that the objective differed in no meaningful way from the means adopted to meet it. This discussion was in response to the finding by the tribunal below that the "legitimate objective" should have been that of blending an "Anglo-Catholic ethos" with efficient education and that therefore the means (requiring a communicant head teacher) was not reasonable.[23] The Employment Appeal Tribunal's entire justification analysis centered, like that of the tribunal before it, on assessing the legitimacy of the school's aims and the extent to which the rule in question suited those aims. Leaving aside the questionable lucidity of both analyses, not a word was written by either tribunal on the subject of the impact of the discrimination on the claimant, or upon the local Asian community, or upon relations between whites and Asians in the local community. In other words, the tribunals treated the "discriminatory effect" from element (c) as if it had an assumed weight. The Employment Appeal Tribunal opinion left the impression that although indirect discrimination was bad, the weight of its badness could never be great enough to outweigh a legitimate objective, reasonably pursued.

Indirect discrimination cases throughout the 1980s and 1990s frequently employed this approach. Discriminatory effect would be mentioned as an element but not really weighed,[24] or weighed in an improperly restrictive way.[25] The Court of Appeal finally pointed out this failing to the lower courts and tribunals in 2001, after the HRA had elevated the importance of proportionality to the judiciary:

> Once a finding of a condition having a disparate and adverse impact on women had been made, what was required was at the minimum a critical evaluation of whether the [employer's] reasons demonstrated a real need to dismiss the ap-

22. *Id.*
23. *Id.* at 476.
24. Barry v. Midland Bank plc [1998] 1 All ER 805; Brook & Others v. London Borough of Haringey [1992] IRLR 478; Enderby v. Frenchay Health Authority and another [1991] IRLR 44.
25. Barry v. Midland Bank plc [1999] 3 All ER 974 (HL) (by Lord Nicholls).

> plicant; if there was such a need, consideration of the seriousness of the disparate impact of the dismissal on women including the applicant; and an evaluation of whether the former were sufficient to outweigh the latter.[26]

Despite this admonition, it remains hard to find cases where a tribunal actually attempts to give a weight to the effects of indirect discrimination,[27] and appellate courts are much more insistent on careful weighing when exhorting the troops than when applying proportionality themselves.[28]

One obvious reason why judges shy away from weighing impacts and balancing them against an employer's interests (or the public interest, as the case may be) is an understandable hesitancy, born of judicial restraint in the judicial review context, to substitute their judgment for that of the decision-maker. An additional reason for suppressing the impact side of the analysis arises from the fact that anti-discrimination statutes in the United Kingdom focus almost entirely on the conduct of the alleged "discriminator." For arguably defensible reasons, a critique of which falls outside the scope of this paper, the Race Relations Act 1976, and similar statutes generally treat discrimination as a thing that is done, not as a thing that happens to people. The questions they ask are not so much about the experience of the claimant, but about the actions of the employer (or provider of goods or services, etc.). Indirect discrimination claims—always a minority as compared with direct discrimination—offer one exception to this rule, but I suggest that this exception makes judges uncomfortable. For them, the question in these tort-like cases is whether the defendant committed the wrong or not.[29] When it comes to damages the claimant's experiences come into play, but it does not mesh well with the statutory discrimination paradigm to allow the "guilt" or "innocence" of the defendant to turn on the effects of the discrimination on the person or group of people affected.

B. Justification under Article 14

Article 14, by contrast, does not initially focus on the actions of the state but on the effects of those actions on the claimant or the

26. Allonby v. Accrington and Rossendale College [2001] IRLR 364, 370.

27. In Ms J Mitchell v. David Evans Agricultural Ltd 2006 WL 1078886 EAT, paras. 7-17, the EAT was forced once again to reverse a decision of a tribunal that failed altogether to mention impacts or the need to consider them; in Hardy & Hansons Plc v. Lax [2005] EWCA Civ 846 CA (Civ Div), paras. 35-49, the Court of Appeal carefully critiqued and approved a tribunal decision, in favor of the employee, that rested exclusively on the reasons given by the employer, without reference to the effects of the discrimination; in Mrs. A Azmi v. Kirklees Metropolitan Borough Council 2007 WL 1058367 EAT, paras. 58-74, the EAT cited *Lax* while performing a justification analysis involving no consideration of impacts whatsoever.

28. Huang v. Home Secretary [2007] UKHL 11, para. 19.

29. RRA 1976 section 1.

group to which he or she belongs.[30] Article 14 of the Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms reads as follows:

> The enjoyment of the rights and freedoms set forth in this convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Strasbourg has placed only two relevant glosses on this apparently straightforward guarantee. The first is that Article 14 applies only where the facts of the case fall within the "ambit" of other Convention rights, where the "ambit" is shorthand for an area in which the enjoyment of the relevant right is rendered unequal by the challenged measure.[31] The second is that a distinction on the basis of a "status" covered by Article 14 does not amount to discrimination in violation of the article if it is justified:

> A difference of treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim; Article 14 is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realized.[32]

It has subsequently been made clear that this renders impermissible a regulatory distinction that produces "harms to other legitimate interests" disproportionate to the advancement of a legitimate aim secured by the measure.[33] Thus, a finding of *prima facie* discrimination turns exclusively on whether state action had the effect of unequally burdening the claimant's enjoyment of a right on a covered ground. The intentions of the government come into play only in justification and only as balanced against the harms to the claimant or to society.

It is important in this regard to distinguish clearly between the state's motive or intention on one hand, and what basis for distinction the state actually uses on the other. The state might, for example, be motivated to adopt a certain rule because of differences in the cost of living but then manifest that intention through the proxy of residence: cost of living is the motive, but residence is the ground of

30. Thlimmenos v. Greece (2001) 31 EHRR 411, paras. 39-42.

31. Aaron Baker, *The Enjoyment of Rights and Freedoms: a New Conception of the 'Ambit' under Article 14 ECHR*, 69(5) MODERN L. REV. 714, 718-25 (2006).

32. (1968) 1 EHRR 252, para. 10.

33. A and Ors v. Home Secretary [2004] UKHL 56, para. 50; Ghaidan v. Godin-Mendoza, [2004] UKHL 30, paras. 19-20; National Union of Belgian Police v. Belgium 1 EHRR. 578, para. 49 (1975).

distinction. A good example of the line between motive and ground occurs in *Abdulaziz v. U.K.*,[34] in which the ECtHR upheld an Article 14 claim on the ground of sex but rejected one on the ground of race. The race claim was denied because, although the challenged immigration measure clearly caused a disproportionate impact on one racial group over another, it did not use race as a basis for differentiation but instead relied on immigration status.[35] Although the Court noted an absence of discriminatory motive, the holding turned on the facts that (a) the measure did not use any racial characteristic as a ground of distinction and (b) immigration measures will by their nature have differential impacts along racial lines.[36] Meanwhile, the Court held that sex discrimination had taken place because, despite the government's demonstration of gender neutral reasons for its actions, "it was not disputed that under the 1980 Rules it was easier for a man settled in the United Kingdom than for a woman so settled to obtain permission for his or her non-national spouse to enter or remain in the country for settlement."[37] In short, if the treatment differed on the relevant ground (gender), then the neutral immigration-related motive made no difference; nor did the motive make a difference where the ground of distinction was not the ground complained of (race).

Recent Strasbourg judgments have made it even clearer that a finding of discrimination does not rely on the presence of a discriminatory motive. Article 14 discrimination can also be established on an indirect or disparate impact theory. In *Thlimmenos v. Greece*, the Court found discriminatory the state's failure to treat differently a conviction for conscientious objection to military service—on the ground of religion—in applying a rule prohibiting those with "serious convictions" from receiving appointment as an accountant.[38] In *D. H. and Others v. Czech Republic* the Grand Chamber of the ECtHR held expressly that a race-neutral policy, shown by statistics to impose an unequal burden on an ethnic group, constituted a *prima facie* case of Article 14 discrimination.[39] The *D.H.* opinion made explicit what a substantial body of earlier case law had implied: discriminatory impacts establish the existence, or not, of discrimination; motive can play a part only in justification.[40]

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34. 94 (1985) EHRR 471.
35. *Id.* at para. 85.
36. *Id.* at paras. 84-85.
37. *Id.* at paras. 74-80.
38. Thlimmenos v. Greece (2001) 31 EHRR 411, paras. 39-42.
39. D. H. and Others v. Czech Republic [2007] ECHR 57325/00.
40. *Thlimmenos* (2001) 31 EHRR 411, paras. 39-42; *Abdulaziz* 94 (1985) EHRR 471, paras. 74-80; Paulik v. lovakia [2006] ECHR 10699/05, paras. 54-58 (Court recognized that the state's motive was to maintain legal certainty but found discrimination on the basis that adjudicated fathers experienced obstacles not faced by presumed fathers) (discussed more fully below at *infra* notes 164-66 and accompanying text);

Under the HRA in the United Kingdom, then, the state can incur Article 14 liability purely as a result of the unforeseen impact of a challenged measure regardless of the intentions behind it.[41] This authorization to focus on effects has not in practice, however, left U.K. judges any more comfortable with weighing impacts in post-HRA Article 14 cases. U.K. courts seem determined to apply the state's intentions and reasons to dispose of a case before being required to attribute *prima facie* discrimination to the government. A look at the decisions at the trial, appeal, and House of Lords levels in the case of *R (Carson) v. Secretary for Work and Pensions*[42] provides a classic example of courts not only ignoring the impact side of the justification analysis, but bending over backward to avoid the justification inquiry altogether.

C. *The Carson Case*

The *Carson* case began in the Administrative Court and was decided in the Court of Appeal together with *R (Reynolds) v. Secretary for Work and Pensions*; both cases were ultimately heard in the House of Lords.[43] Mrs. Carson, a U.K. citizen who had retired to South Africa, complained that the state discriminated against her by failing to increase her pension each year by the same amount that it increased the pensions of U.K. residents, and of residents of some other countries like the United States.[44] The Secretary for Work and Pensions defended the policy on the ground that the uprate in pension was intended to ameliorate the effects of inflation in the United Kingdom, not just on the pensioners themselves but on the U.K. economy as a whole, and that therefore the reasons for the expenditure of public funds represented by the uprate did not apply to other countries.[45] The few foreign countries where the uprate did apply had negotiated pension reciprocity treaties with the United Kingdom, so concerns of foreign policy made the uprate expenditures necessary for

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Evans v. UK [2006] ECHR 6339/05 (no unlawful discrimination was found but the Court assumed the state's motive was administrative manageability and legal certainty, and based its holding on the conclusion that the differential impact on women was not sufficiently strong to outweigh the state's justification).

41. Aaron Baker, *Comparison Tainted by Justification: Against a "Compendious Question" in Article 14 Discrimination,* (2006) PUBLIC LAW 475, 483-85 (hereinafter *Comparison*); Ian Leigh, *Taking Rights Proportionately: Judicial Review, the Human Rights Act and Strasbourg,* PUBLIC LAW 265, 282-86 (2002); Jeffrey Jowell, *Beyond the Rule of Law: Towards Constitutional Judicial Review,* PUBLIC LAW 671 (2001); Mark Elliott, *The HRA 1998 and the Standard of Substantive Review,* 60 CAMBRIDGE L.J. 301 (2001); PAUL CRAIG, ADMINISTRATIVE LAW 546, 556-57 (4th ed., 1999).

42. [2005] UKHL 37.

43. *Id.*; [2002] 3 All E.R. 994 (Admin); [2003] E.W.C.A. Civ 797 (CA).

44. [2002] 3 All E.R. 994, paras. 2-7, 61-65; [2003] E.W.C.A. Civ 797, paras. 9-10, 62-64; [2005] UKHL 37, paras. 5-7, 18-27.

45. *Id.*

pensioners in those countries.[46] In short, the state pursued its interest in not spending its funds unnecessarily by denying the uprate to pensioners where economic or foreign policy reasons for the uprate did not apply and Carson claimed this constituted discrimination on the ground of her place of residence.

Judges at all three levels of *Carson* got the Article 14 analysis badly wrong. That is not to say that they reached the wrong result. On the contrary, the decision to distinguish on the basis of residence—or to put it in Equal Protection Clause parlance, to "classify" on the basis of residence—probably satisfies a properly applied Article 14 analysis.[47] The problem is that *Carson*, a key House of Lords precedent, did not employ a correct Article 14 analysis. Section IV of this article will provide more detail on what this should look like. That section (1) rejects the suggestion in *Carson* that the Strasbourg teaching on Article 14 resembles the U.S. "suspect classifications" model, and (2) demonstrates that the modern ECtHR approach to proportionality conflicts directly with that taken in *Carson*. For the present purpose of evaluating the *Carson* decision, however, a crude sketch of the elements of an Article 14 claim will suffice.

First, the claimant must establish that the discrimination of which she complains involves her enjoyment of the rights and freedoms guaranteed to her under the Convention.[48] In *Carson*, the courts at each level agreed that the distinction affected the claimant's enjoyment of her possessions under Article 1 of Protocol 1.[49] Second, the claimant must show that she suffered different treatment than chosen comparators on a ground covered by Article 14.[50] Burnton, J., in the Administrative Court, treated the "ground covered by Article 14" issue as a separate question but each court agreed that place of residence qualified. Third, in cases where any doubt exists as to the true basis for the challenged classification, the claimant must show that her situation is "analogous" to that of the chosen comparators, in every respect *relevant to the challenged decision* other than the alleged ground of distinction, in order to demonstrate that the impugned ground was in fact the basis of the distinction.[51] In *Carson*, the parties agreed that Mrs. Carson had been denied the pension uprate exclusively because of her place of residence, and not, for ex-

46. *Id.*

47. *But see Carson* [2005] UKHL 37, paras. 92-104 (Lord Carswell, dissenting, found the discrimination disproportionate and a violation of Article 14, owing to the overbreadth of the rule in denying the uprate to pensioners where local conditions did not reflect the rate of inflation).

48. Gaygusuz v. Austria (1996) 23 EHRR 365, paras. 36-41.

49. [2002] 3 All E.R. 994, para. 53; [2003] EWCA. Civ 797, paras. 32-41; [2005] UKHL 37, paras. 11-12.

50. Petrovich v. Austria (1998) 33 E.H.R.R. 307.

51. *Gaygusuz*, (1996) 23 EHRR 365, paras. 42-50; Aston Cantlow v. Wallbank [2002] Ch 51 (reversed on unrelated grounds [2003] UKHL. 37).

ample, because of any information she provided about the cost of living in South Africa. If (1) the parties do not dispute the ground of distinction, and (2) the ground of distinction is one covered by Article 14, then there is nothing left for the court to do but proceed to the final question of whether the state can demonstrate that its discriminatory treatment is justified.[52] A distinction on a ground covered by Article 14 that affects the equal enjoyment of one or more Convention rights or freedoms is *prima facie* discriminatory. However, the state may prove that its classification does not amount to discrimination in violation of Article 14 by showing that the classification (1) pursues a legitimate objective, (2) employs a means reasonably suited to advancing that objective, and (3) does not impose burdens on rights interests disproportionate to the extent to which it advances the legitimate state objective.[53]

1. The Lower Courts in *Carson*

The Administrative Court and the Court of Appeal badly bungled the analysis by applying the third question (analogous comparators) where it served no purpose and then treating it as an opportunity for the state to justify its classification without needing to satisfy proportionality.[54] Judges in both courts found that differences in cost of living between the United Kingdom and South Africa in effect rendered the impugned distinction *prima facie* non-discriminatory: people in one country could not serve as analogous comparators for people in another because the economic circumstances in each country differed.[55] Although this article does not focus on the analogous comparator issue, it requires discussion here because of its interrelation with justification.[56] An understanding of how erroneously and unnecessarily the *Carson* courts used the comparator issue to avoid appearing to require a justification from the state shows just how uncomfortable the judges were with the kind of inquiry required by Article 14 under the HRA.

Once it has been decided that a challenged distinction (1) affects the equal enjoyment of convention rights, and (2) amounts to a difference in treatment on a ground covered by Article 14, what could be left to analyze other than whether the distinction is justified? The classic role of the analogous comparators question is to separate, for example, discrimination based on sex from distinct treatment based

52. *Comparison*, *supra* note 41, generally; FELDMAN, *supra* note 16, at 142-45.

53. *Belgian Linguistics* (1968) 1 EHRR 252, para. 10; National Union of Belgian Police v. Belgium 1 E.H.R.R. 578, para. 49 (1975); A and Ors v. Home Secretary [2004] UKHL 56, para. 50; Ghaidan v. Godin-Mendoza, [2004] UKHL 30, paras. 19-20.

54. *Carson*, [2002] 3 All ER 994, paras. 61-67; [2003] EWCA Civ 797, paras. 61-63.

55. *Id.*

56. Baker, *supra* note 31, generally; *Carson* [2003] EWCA Civ 797, para. 64.

on a difference in qualifications. If a woman claiming discriminatory denial of promotion compared herself to a man who got the promotion, a court would properly ascertain whether, with respect to circumstances relevant to the promotion decision, she was analogous to the man in every respect other than sex. It would be absurd to claim that the two were not analogous comparators because they lived in different neighborhoods, if that had no legitimate bearing on promotion decisions. It would be just as absurd to claim they were not appropriate comparators because women, statistically, tend to take more time off for family reasons than men do. This might be true, and it might even be relevant in the employer's mind to the decision about whom to promote and in whom to invest time and training. However, it cannot mean that the comparators are not analogous because (1) it is an implication of the very ground of discrimination whose legitimacy is under challenge, and (2) the employer did not actually use "likelihood to take time off of work for family reasons" as a criterion for promotion and did not collect non-gender-dependent information about whether this man or this woman were more likely to take time off. In other words, where the parties dispute the actual ground of distinction (e.g., gender or qualifications), the comparators must share all of the attributes *properly taken into account and assessed* in making the decision, with the exception of the allegedly illegitimate ground and *any characteristics for which that ground was used as a proxy*.

Neither party in *Carson* disputed the fact that the cost of living in South Africa had never been a factor in processing Carson's pension claim. Indeed, no evidence of cost of living or any economic differences between South Africa and the United Kingdom were received by the Administrative Court;[57] there was never any challenge at any stage of the proceedings to the fact that Carson was refused the relevant pension increases solely *on the ground that she resided* in South Africa. This meant that the most obvious product of a comparison—isolation of the true ground of discrimination—was well established. If one imagines a "decision-maker" at the Department of Work and Pensions preparing to rule on Mrs. Carson's case, and on that of a U.K. pensioner with the same contribution record (i.e., a history of paying contributions based on wages in the United Kingdom) but living in the United Kingdom, that decision-maker would have only the contribution records and the places of residence on which to base the decision. No information on relative costs of living would come into the decision; it would not even be available. Therefore, at least in the eyes of this notional decision-maker, the cases to be determined would be not only "relevantly analogous" but completely identical except for one factor: the place of residence. It is clear then that purely

57. *Carson*, [2002] 3 All ER 994, para. 62.

on the basis of the correct model for the analogous comparator inquiry, the *Carson* courts erred by factoring cost of living into the comparison. The error is made more arresting, however, by the fact that the correct next step in the analysis, justification, was the obvious vehicle for taking account of differences in cost of living and the economic purposes of pension schemes. Instead, the courts used the very information, which they could properly have relied on in justification incorporating proportionality, to dispose of the *prima facie* case through a meaningless step that did not involve a proportionality balancing.

Almost, it seems, in recognition of this anomaly, both Burnton, J., in the Administrative Court, and Laws, L.J., in the Court of Appeal, went on to discuss justification, in case they had been wrong on the *prima facie* case.[58] Unsurprisingly, neither court made an effort to assess the impact of the resident/non-resident distinction on Mrs. Carson, other non-resident pensioners, or on, for example, the liberty interest in freedom of movement.[59] The justification analysis in both decisions turned exclusively on the state's prerogative to make the decision in question. Burnton, J. opined that the challenged policy involved two state interests that fell especially outside the province of judiciary: resource allocation and foreign relations.[60] He saw the claimant as asking the court to interfere where it had no expertise or authority and where the Secretary had chosen a means that he could rationally believe would advance a legitimate aim. In essence, Burnton, J. applied what Americans call "rational basis" review by using deference as an excuse not to perform a proportionality balancing.

Laws, L.J., at the Court of Appeal, preferred not to depend on the word "deference" and eschewed ring-fencing entire subjects from review, but nevertheless rested his decision on "an area of discretionary judgment" reserved for the executive and a prudential requirement that courts restrain themselves from interfering with that discretion.[61] He reasoned that good management of funds constituted a legitimate aim and that denying the uprate to non-U.K. pensioners in non-reciprocal countries numbered among the reasonable options the Secretary might choose for achieving it. However, he never mentioned either necessity or proportionality, summing up his conclusion in this way:

> Addressing the case in the light of all these matters, I conclude that there is no consideration which remotely consti-

58. *Carson*, [2002] 3 All ER 994, paras. 67-75; [2003] EWCA Civ 797, paras. 65-74.

59. *Id.*

60. *Carson*, [2002] 3 All ER 994, paras. 68-70.

61. *Carson*, [2003] EWCA Civ 797, paras. 68-74.

> tutes so powerful a legal imperative as to deny the justifications I have discussed for the government's refusal to uprate the pensions of Ms Carson and those in like case.[62]

Lord Justice Laws might claim, if challenged, that the foregoing implies a proportionality balancing resolved in favor of the state. However, in light of the clear failure of the trial court below even to imply proportionality or necessity, the Court of Appeal at best authorized a cavalier, one-sided approach to proportionality. Worse, by agonizing over the issues of deference, discretion, and the legitimacy of the state's aim, the opinion appropriates, to the ideas of deference and restraint, a power to obviate proportionality. This power simply does not exist and finds no support in ECtHR jurisprudence. It is one thing for a court to defer to or refuse to interfere with decisions about (1) what aims to pursue, (2) to what extent to seek to realize those aims, and even, to a lesser extent, (3) the best ways to pursue those aims.[63] It is quite another to conclude that having deferred legitimate aim and reasonable means in favor of the state, a court may simply skip the last element of the test and fail even to ask whether the effects of the challenged classification might outweigh the amount of public benefit achieved through the chosen means.

2. *Carson* in the House of Lords

The House of Lords in *Carson* appeared to understand that the use of the analogous comparator inquiry to do the work of justification could not withstand careful scrutiny. However, the Lords offered a cure worse than the disease: if the alleged classification is not "suspect," in that it does not implicate "equal respect," then the court need only ask the question asked by the lower courts in *Carson*: does the measure in question constitute a reasonable means of pursuing a legitimate state objective? Lord Hoffmann, in a leading speech for the majority, advised lower courts not to follow the, until then, popular step-by-step Article 14 analysis set out in *Wandsworth London Borough Council v. Michalak*,[64] which differentiated the analogous comparator step and the justification step:

> I have found it better not to use the *Michalak* framework. What matters in my opinion is that (1) there is no question in this case of discrimination on a ground such as race or gender which denies Ms. Carson the right to equal respect, (2) in applying a scheme of social security, it is rational and internationally acceptable to distinguish between inhabi-

62. *Id.* at para. 74.
63. Julian Rivers, *Proportionality and Variable Intensity of Review* 65(1) CAMBRIDGE L.J. 174, 195-201 (2006).
64. [2002] EWCA Civ 271.

> tants of the United Kingdom and persons resident abroad, and (3) the extent to which the claims, if any, of persons resident abroad should be recognized is a matter for parliamentary decision.[65]

In other words, instead of setting the lower courts straight about the comparator inquiry, the Lords simply conjured away any requirement of proportionality in cases not implicating equal respect.

Lord Hoffmann's approach appears calculated to avoid a finding of *prima facie* discrimination in all but the most irrational non-suspect Article 14 cases. In cases not involving an "equal respect" ground, the court must first ask whether there are relevant differences between the comparators: not "relevant" in the proper analogous comparator sense of "factors taken into account in the challenged decision" but in the sense of "relevant to the state's decision to treat the comparators differently." If such differences exist then, for Lord Hoffmann, a court can exercise no constraint whatever on the freedom of the other branches to treat the two sets of people differently:

> Once it is accepted that the position of Ms Carson is relevantly different from that of a U.K. resident and that she therefore cannot claim equality of treatment, the amount (if any) which she receives must be a matter for Parliament. It must be possible to recognize that her past contributions gave her a claim in equity to some pension without having to abandon the reasons why she cannot claim to be treated equally.[66]

This position was approved of by Lords Walker, Rodger, and Nichols, and the only dissenting voice was Lord Carswell. All of the majority fell for the bizarre idea that there is some independent role for an inquiry: (1) whose purpose is not to discover the actual ground of distinction employed, (2) that considers all of the reasons the state might have for wanting to effectuate a difference in treatment, and (3) that nevertheless is not actually a justification incorporating proportionality. If this inquiry yields "relevant" differences between people, they may be treated as differently as the state chooses, *using whatever proxy for the relevant difference it chooses*, so long as it does not choose a proxy that has already been found to impinge on notions of equal respect and dignity.

Lord Walker, additionally, offered an extensive speech to the effect that (1) even though Strasbourg has not clearly adopted a U.S.-style suspect classifications approach,[67] and (2) even though Article

65. *Carson*, [2005] UKHL 37, para. 33.
66. *Id.* at para. 25.
67. *Id.* at paras. 55-57.

14 cases before the ECtHR almost always turn on justification (indeed, he could point to only two examples where the Strasbourg court rejected a case on comparator grounds),[68] the United Kingdom would nevertheless follow the U.S. example on suspect classifications, and treat all non-suspect classifications as requiring no more than a rational relationship to a legitimate aim to pass muster. Neither Lord Walker's nor any majority speech at any point suggested that this test would incorporate proportionality.

3. The *Carson* Rule is Wrong

The majority reasoning relied heavily on the idea that if people differ in ways relevant to a legitimate state objective, the state may differentiate between them in whatever way it wants. Although this sounds attractive, in an authoritarian kind of way, the implications warrant further scrutiny. Consider this hypothetical. A court is unlikely to hold that "obesity," looked at in the abstract, is a suspect classification implicating equal respect or dignity. Medical practitioners use the term without prejudice to connote a particularly excessive level of body fat; society does not generally recognize a history of invidious discrimination on the ground of "obesity." Obesity is in quotes because the law provides no settled definition of what constitutes obesity. Medical people have fairly arbitrary weight-to-height charts that establish a threshold at which they will call a person obese but these charts do not generally employ any diagnostic tools such as a body fat analysis. Against this background, imagine that the government sought to reduce health care costs by limiting to three the number of visits obese people could make to a general practitioner (GP) each year under the National Health Service (NHS). To this end, Parliament adopts a weight-height chart commonly used in the NHS as the basis for distinguishing between the obese and the non-obese. When an "obese" claimant challenges the rule under Article 14, the state defends itself on the ground that studies show that obesity leads to health complications and that, on average, non-obese people visit their GP three times a year while those who qualify as obese tend to make far more visits, making obese people relevantly different from non-obese people. The government believes that limiting access of the obese to publicly-financed healthcare effects a fair allocation of limited healthcare funds.[69]

68. *Id.* at paras. 65-68.

69. If this appears fanciful, consider that Parliament has recently outlawed hunting with a dog and a horse, but not with just a dog or just a horse. Legislatures routinely fashion crude distinctions to attack the *bête noir* of the day (in the aforementioned example, foxhunting), and if the public became sufficiently frustrated by long waiting lists clogged by people with what the tabloid press would call "self-inflicted" medical conditions, an assault of some kind on the rights of the obese would not strain the imagination.

Assuming for the sake of discussion[70] that a classification on the basis of weight-to-height ratio in the provision of essential healthcare comes within the ambit either of the right to life or the right to privacy, there is little question that obesity or, strictly speaking, weight-to-height ratio, would qualify as "some other status" under Article 14. However, the *Carson* approach would have a court declaring that people with a weight-to-height ratio above the cut-off differ, as a matter of relevant fact, from people below the cut-off, in that people over the cut-off tend to have greater health complications and make more doctor visits (remember that the state in *Carson* offered no more than broad claims that inflation in the United Kingdom exceeds that of other countries). The claimant and any below-the-cut-off comparators would therefore not occupy analogous circumstances and could be treated in any different way that the state chose. Under the *Carson* rule a Court could not examine this any further than to say that distinctions on the basis of weight are not suspect, that conserving funds is a legitimate objective, and that it is up to Parliament and the Executive to decide how differently to treat relevantly different people.

Meanwhile, a proper Article 14 analysis would have subjected the distinction on the ground of weight to a proportionality inquiry and found that there existed many less restrictive means of saving health care funds, in that the arbitrary weigh-to-height charts include a great many heavy people with no serious health problems and exclude many lighter people with extensive healthcare problems brought on by lifestyle. In light of that, a court should conclude that the severity of the discriminatory impact, including the stigma the measure placed on a particular class of people, possible indirectly discriminatory effects on the basis of gender, race, or age, and negative impacts on public health, the market for health care, and the economy generally, outweighed the benefits to the state of choosing this particular distinction as a means of saving money. The implication of the analysis would be that, as it applied in some cases, the weight-to-height ratio distinction did in fact deny equal respect because it forced on one or more people a diminished right to health care for reasons that did not actually apply to them, simply because of generalizations made about people like them.

As is discussed more fully in sections III and IV below, deciding whether a classification is "suspect" involves balancing interests of individuals or groups against those of the larger society. Proportionality does that balancing on a case-by-case basis, making it possible to discover that discrimination on grounds not generally associated with invidious discrimination might be invidious in certain circum-

70. It does not matter whether this is a safe assumption because the point here is to illustrate the kind of distinction-making that might satisfy the *Carson* standard, not to explore whether obesity distinctions would attract Article 14 protection.

stances (remember that discrimination on grounds of race, sex, or sexual orientation was "common sense" at some time in the past). A suspect classification model requires that society grow to full acknowledgment of the general impropriety of distinguishing on a given ground before a court may subject distinctions on that ground to the kind of scrutiny that might discover discrete examples of improper distinction. By requiring proportionality in each case, Article 14 avoids this "catch 22."

The obesity hypothetical illustrates how leaving proportionality out of the equation forces a court to accept any plausible explanation for differential treatment, regardless of how damaging it is to the non-discrimination principle underlying Article 14 and regardless of how avoidable that damage might have been. This constraint on scrutiny might be appropriate under traditional *Wednesbury*[71] judicial review, but it has no place in applying a human rights guarantee intended to secure the equal enjoyment of specified human rights. The hypothetical also shows that the *Carson* rule fails to subject to scrutiny the choice of a particular ground of distinction like weight-to-height ratio, as opposed to, for example, the underlying ground of suffering from allegedly self-inflicted health conditions or making excessive use of the NHS. As long as some relevant difference can be attributed to the two comparators, in this case the likelihood of their developing obesity-related illnesses and making more doctor visits, then the state never needs to justify its use of a particular proxy for that underlying distinction, in this case a specific cut-off point on a crude weight-to-height chart.

There will remain those who see no fundamental problem with the *Carson* rule. A colorable argument can be made to the effect that an equality provision might properly seek only to require meaningful scrutiny of distinctions on grounds that society has come to view as suspicious. However, what makes the *Carson* decision so surprising is that this option was not really open to the House of Lords, other than in the purely Diceyan sense that Parliament has the power to defy Strasbourg or withdraw from the ECHR. As Section IV below will discuss more fully, the ECtHR jurisprudence is clear: the decision whether Article 14 discrimination has occurred depends fundamentally on whether using a distinction on a ground covered by Article 14 satisfies the principle of proportionality.[72] In *Carson*, the Lords accepted that the state distinguished on a ground covered by Article 14 and yet decided that a court can properly ignore propor-

71. Associated Provincial Picture Houses v. Wednesbury Corporation [1948] 1 KB 223 (a bedrock precedent for judicial review in the United Kingdom, calling for courts not to disturb rules or decisions that fall within the range of decisions that reasonable state actors might make).

72. Paulik v. Slovakia [2006] ECHR 10699/05; *Belgian Linguistics* (1968) 1 EHRR 252, para. 10; FELDMAN, *supra* note 16, at 144-46.

tionality in concluding that the distinction does not amount to Article 14 discrimination. This clear dismissal of Strasbourg teaching, and substantial rewriting of the requirements of Article 14, evinces a profound judicial discomfort with the weighing exercise required by the justification inquiry. This discomfort shows itself not only in the *Carson* trilogy but in the fact that even in cases involving "suspect" categories, like nationality, sexual orientation, or gender, U.K. courts base their decisions, either for or against the state, on a critique of the legitimacy of the state objective, or necessity or suitability of the means, but almost never on the countervailing weight of the Article 14 interests affected.[73]

A finding of unlawful discrimination requires a moral decision, one that rests on weighing impacts, balancing them against state interests, and setting standards for when state interests must yield to rights and vice versa. U.K. judges are not comfortable with making these decisions, which makes the U.S. model extremely attractive. The suspect classifications approach appears (1) to offer clear boundaries to cabin in judicial activism, (2) to avoid judicial moralizing or standard-setting, and (3) to make it possible to ferret out discrimination on grounds generally viewed as invidious, without ever needing to weigh impacts. However, U.S. Equal Protection Clause analysis does not translate to Article 14, as the American and Strasbourg jurisprudence arose out of disparate rights traditions and judicial and political histories. Moreover, as the next section explains, it is true that the U.S. approach allows a court to avoid assessing the effects of discrimination but it fails altogether to shield judges from standard-setting and balancing, and instead forces them to hide the balancing that they must perform whether they like it or not.

III. JUSTIFICATION UNDER THE U.S. EQUAL PROTECTION CLAUSE

Although the HRA does not require the U.K. judiciary to abide strictly by ECtHR precedent,[74] adopting a U.S. model inconsistent with ECHR requirements is not a legitimate option both because it violates U.K. judicial policy[75] and because it will ultimately fail to ensure that the United Kingdom observes its treaty obligations. How-

73. *See, e.g.*, A and Ors v. Home Secretary [2004] UKHL 56; Ghaidan v. Godin-Mendoza, [2004] UKHL 30; R (S) v. Chief Constable of South Yorkshire Police [2004] UKHL 39; R (Douglas) v. North Tyneside MBC [2004] HRLR 14; R (Morris) v. Westminster CC [2004] EWHC 2191; Purja and Ors v. Ministry of Defence [2003] EWCA. Civ 1345; R (Pretty) v. DPP [2002] AC 800; R (Montana) v. Home Secretary [2001] HRLR 8; R (Mitchell) v. Coventry University [2001] EWHC Admin 167.

74. HRA section 2(1) requires courts to "take into account" the Strasbourg case law.

75. R (Alconbury Developments Ltd) v. Secretary of State for the Environment, Transport and the Regions [2001] UKHL 23, at para. 26 ("In the absence of some special circumstances it seems to me that the court should follow any clear and constant jurisprudence of the European Court of Human Rights" (Lord Slynn)).

ever, an even more compelling reason suggests itself for rejecting the suspect classifications approach: it only exists as a result of a unique legal and political history which is not shared by Europe in general and by the United Kingdom in particular, it derives from a different constitutional order and it does not work very well even in its own context. This section establishes these points through three subsections: the first describes and critiques the existing "suspect classifications" model, the second explains how it emerged from and makes sense only in light of its singular context, and the third analyzes the extent to which it actually accomplishes its objectives.

A. Suspect Classifications and Three-Tiered Scrutiny

Suspect classifications jurisprudence elaborates on the guarantee, found in the Fourteenth Amendment to the U.S. Constitution, that the states may not deprive anyone of the "equal protection of the laws."[76] As this was long considered intended purely to protect the slaves freed after the American Civil War, courts initially treated it as only calling for scrutiny of laws that classified according to race.[77] After the famous *Carolene Products* case in 1938, in which Footnote 4 suggested that heightened scrutiny should apply where necessary to protect fundamental rights or "discrete and insular minorities,"[78] the concept of "strict scrutiny" was introduced (although it did not really find expression in EPC jurisprudence until the 1960s). This meant that when the state impinged on a fundamental right or distinguished on a basis that singled out a discrete and insular minority and thus engaged in a "suspect classification," the Court must apply "strict scrutiny." A measure would satisfy strict scrutiny if it was "narrowly tailored to a compelling state interest."[79] Any other classification would satisfy the EPC as long as the distinction bore a rational relationship to a legitimate objective.[80] In essence, the EPC protected against disparate treatment on illegitimate, irrational or purely arbitrary grounds, and adopted a presumption that distinctions inimical to a racial minority, or that restricted fundamental liberties, denied that protection.

By the 1970s, the "discrete and insular minority" underpinning fell away. This is not to say that the U.S. Supreme Court stopped considering it important that a distinction appeared to burden a

76. Although the Fourteenth Amendment applies to the states, an equal protection guarantee applying to the federal government has been inferred from the due process guarantee found in the Fifth Amendment.

77. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 81 (1873); Strauder v. West Virginia, 100 U.S. 303, 306-07 (1880); Afroyim v. Rusk, 387 U.S. 253, 262-63 (1967).

78. United States v. Carolene Prods. Co., 304 U.S. 144, 152, n.4 (1938).

79. Wygant v. Jackson Board of Education, 476 U.S. 267, 274 (1986).

80. Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79 (1911), quoted in full in Morey v. Doud, 354 U.S. 457, 463-64 (1957); FCC v. Beach Communications, Inc., 598 U.S. 307, 313 (1993).

group's ability to participate politically but that insularity and minority status ceased to control whether the Court would view a classification as "suspect." The Court began to view racial distinctions as intrinsically problematic for reasons beyond political participation, such that racial distinctions that burdened whites, like affirmative action, were also treated as suspect.[81] National origin and alienage have also been found suspect without reference to minority status.[82] In 1976, responding almost certainly to a growing conviction that differential treatment of women and men created social problems rather than to a conviction that women were an insular minority that could not participate effectively in the political process, the Court declared that distinctions on the basis of gender are "quasi-suspect," and must face "intermediate scrutiny."[83] Intermediate scrutiny requires that a challenged law "substantially advance an important state interest."[84] The Court subsequently applied this level of review to classifications based on illegitimacy.[85] The Court has declined to make sexual orientation, mental retardation, disability or age suspect or quasi-suspect classifications.

The analysis as it stands today begins by asking whether a challenged distinction rests on a suspect or quasi-suspect ground or burdens a fundamental right. Proving that a measure differentiates on a suspect or quasi-suspect basis requires showing not only that the law has the effect of distinguishing on, for example, the grounds of race or sex, but that it intends to have that effect.[86] Thus a stop-and-search profile that has the effect of stopping only persons of Middle-Eastern or South Asian ethnicity, but not whites, does not receive any height-

81. *Regents of Univ. of Cal.* v. *Bakke,* 438 U. S. 265, 290-93 (1978). There is a Critical Race Theory (CRT) explanation for the development of EPC jurisprudence, with which I do not entirely disagree, to the effect that making the EPC protective of whites and generally prohibitive of true affirmative action makes no sense according to EPC doctrine, but a lot of sense in terms of maintaining the subordination of African-Americans as a group. *See, e.g.*, Victor C. Romero, *Critical Race Theory in Three Acts: Racial Profiling,* Affirmative Action, and the Diversity Visa Lottery 66 ALB. L. REV. 375 (2003). Because my purpose is to establish the incompatibility of the EPC approach with Article 14, and the point is strong without them, I prefer not to use space in the article to defend the CRT claims, which would, if anything, advance the incompatibility argument. However, it is worth noting that the logic of suspect classifications depends on the oppressive uses to which such classifications have been put in the past and the logic thus does not apply to cases of affirmative or positive action.

82. Graham v. Richardson, 403 U.S. 365, 371 (1971). Religion is sometimes listed as a suspect classification but this remains controversial; religious discrimination often receives strict scrutiny on the ground that it invades the fundamental right to the free exercise of religion. Employment Div. v. Smith 494 U.S. 872 (1990).

83. Craig v. Boren 429 U.S. 190 (1976). The case dealt with a law that allowed women to buy beer at the age of eighteen, but required men to wait until the age of twenty-one. There was no suggestion that this law would impair the political participation of persons of either gender.

84. *Id.* at 197.

85. Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972).

86. Bradley v. United States, 299 F3d 197 (3rd Cir 2002); 2002 U.S. App. LEXIS 14960 at 7.

ened scrutiny if the state does not act under a motivation to distinguish on the basis of ethnicity, but instead acts under a motivation to target persons who satisfy an intelligence-based profile.[87] If a challenged state action neither employs a suspect or quasi-suspect classification nor restricts a fundamental freedom, then "rational basis" review applies, calling only for the law to bear a rational relationship to a legitimate governmental purpose. If a measure distinguishes on the basis of gender or illegitimacy, it must substantially advance an important state interest, and if it classifies on the basis of race, national origin, or alienage, it must be narrowly tailored to a compelling state interest.

Rational basis review amounts to almost no scrutiny at all. In the run of cases, the "legitimate state objective" prong of the test requires no more than that the state articulate an interest that the court accepts as legitimate.[88] The court will not generally ask whether this appears to be the true objective of the measure.[89] Provided that what the state claims it seeks to accomplish does not strike the court as illegitimate, then the rational relationship prong of the test demands only the existence of "any reasonably conceivable state of facts that could provide a rational basis for the classification."[90] The claimant bears the burden to prove the absence of any such state of facts and the state need not produce any actual evidence of its rationale.[91] It suffices for the court to imagine a plausible explanation that connects the distinction to the state objective.[92] Overbreadth and under-inclusiveness are not inconsistent with a rational basis.[93] Courts have also refused to question the legitimacy of morality-based objectives like the prohibition of same-sex marriage, which makes it difficult to challenge a ban on such activities as not rationally related to the objective.[94] At least in theory,[95] a claimant who cannot convince a court to apply heightened scrutiny of some kind receives no help from the EPC beyond the basic principle of due process that laws must be reasonable and legitimate.

87. Aaron Baker, *Controlling Racial and Religious Profiling: Article 14 ECHR Protection v. U.S. Equal Protection Clause Prosecution* 13 TEX WESLEYAN L. REV. 285 (2007).

88. Cook v. Rumsfeld 429 F. Supp. 2d 385, 397-99 (Mass. 2006).

89. *Id.* at 399. Compare with *Ghaidan* [2004] UKHL 30 at paras. 15-18, where "legitimate objective" was queried extensively, not only with regard to the legitimacy of the stated aim but regarding whether the workings of the measure suggested this was the real objective.

90. FCC v. Beach Communications, Inc 508 U.S. 307, 313 (1993).

91. *Lindsley,* 220 U.S. at 78-79; *Cook,* 429 F. Supp. 2d at 397.

92. *Cook,* 429 F. Supp. 2d at 397.

93. Citizens for Equal Protection, Inc. v. Bruning, 2006 U.S. App LEXIS 17723, 9 (8th Cir).

94. *Id.* at 7-10.

95. See the discussion of heightened scrutiny in the guise of rational basis review below at notes 142-46 and accompanying text.

Strict scrutiny has been called "strict in theory, fatal in fact," but this is demonstrably not the case.[96] The claim comes from the frustration felt by proponents of affirmative or positive action with the fact that if a law uses a racial distinction, even for a benign purpose, it must satisfy the same strict test, regardless of the difference, in social and human rights impacts, of discrimination in favor of an insular minority as opposed to discrimination against one. The affirmative action cases of *Grutter v. Bollinger*[97] and *Gratz v. Bollinger*[98] help illustrate how strict scrutiny works. *Grutter* concerned the admissions policy of the University of Michigan (graduate) Law School, and *Gratz* concerned the admissions policy of the same university's undergraduate program.[99] Both used race as a factor in admissions, ostensibly to improve diversity for educational purposes. Because the U.S. Supreme Court would not accept "redressing the racial imbalances created by centuries of slavery and second-class citizenship" as a compelling state interest, the admissions policies needed to be narrowly tailored to the compelling interest in educational diversity.[100]

The undergraduate policy in *Gratz* used a point system whereby African-American applicants received additional points because of their race.[101] The law school policy in *Grutter* took race into account, but as one of several factors not given a numerical value.[102] Narrow tailoring requires not only that the distinction adopted actually achieves the objective, but that it imposes no more adverse effects than are necessary to accomplish the objective.[103] Therefore the *Grutter* system satisfied strict scrutiny because it had the flexibility to account for factors other than race, which might contribute to diversity and to discount race in a case where it might not actually make the student body more diverse.[104] By contrast, *Gratz* did not pass muster because it was possible in some cases for the points boost to lead to the admission of a student who did not improve the diversity of the class and, in some other cases, to the rejection of a white student who might bring some kind of diversity dividend.[105] Thus, any amount of over-breadth or under-inclusiveness, unless unavoidable, is fatal under strict scrutiny. On the other hand, provided that the measure has no more discriminatory impacts than were neces-

96. Grutter v. Bollinger, 539 U.S. 306, 326 (2003).
97. *Id.*
98. *Id. at* 244.
99. *Id.*. at 316; *Gratz*, 539 U.S. at 250-54.
100. *Regents of Univ. of Cal. v. Bakke,* 438 U. S. 265, 305-15 (1978). The effect of *Bakke* on the objectives proffered in *Grutter* and *Gratz* receives further attention below at *supra* notes 147-50 and accompanying text.
101. *Gratz*, 539 U.S. at 255-57.
102. *Grutter*, 539 U.S. at 316-22.
103. *Id.* at 326, 333.
104. *Id.* at 334-41.
105. Gratz, 539 U.S. at 270-73.

sary to accomplish the objective, it will satisfy strict scrutiny regardless of the extent of those impacts.[106]

Owing to the manipulable and variable meanings of the words "substantially advance" and "important," used in intermediate or heightened scrutiny, it suffices to say that it is more searching than rational basis review but less demanding than strict scrutiny. A fuller discussion must await the third part of this section, discussing the indeterminacy of the suspect classifications approach.

B. Suspect Classifications in Context

The system of suspect classifications and three-tiered scrutiny emerged in response to a fear that judges might inject their personal moral philosophies into constitutional adjudication. This is not, of course, a fear unique to the U.S. legal landscape. The basis for this fear, the priority placed on it, and the way in which it found expression do, however, have a particularly American flavor. The most fundamental aspect that sets apart the EPC context is the U.S. constitutional order itself. Long before Europe or the United Kingdom began recognizing human rights, the United States saw the legal world as divided into the government sphere and the individual sphere.[107] The government sphere subdivided further into the federal and state spheres, and into the legislative, executive, and judicial spheres. Constitutional questions initially involved deciding into which sphere a given matter fell, from which it would then follow whether the government could act at all, and if so in what way. Questions of individual liberty called upon the court to decide, on the basis of an interpretation of the Constitution or precedent, if the state had stepped into an area where the individual had sole authority, and if so, the Constitution had been violated.[108] This individual sphere consisted almost exclusively of civil liberties as opposed to human rights.[109] In other words, the individual had whatever freedoms were necessary for full and effective participation in the political system but not substantive social rights like the right to privacy, or to education, or even to non-discrimination: the EPC did not become a part of the Constitution until 1868.

This formalistic approach to constitutional adjudication held sway until the 1930s. In the early twentieth century, the judiciary still saw constitutional law in terms of spheres, leading to results epitomized by, but by no means limited to, the notorious 1905 *Loch-*

106. *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944).

107. David L. Faigman, *Madisonian Balancing: a Theory of Constitutional Adjudication* 88 NW. U. L. REV. 641, 646-48 (1994).

108. *Id.* at 664 ("constitutional questions boil down to a choice between individual liberty and government interests"); DAVID BEATTY, THE ULTIMATE RULE OF LAW 76-118 (2004).

109. FELDMAN, *supra* note 16, at 3-5.

ner decision, in which the Supreme Court struck down worker-protective legislation on the ground of the workers' and employers' freedom of contract.[110] The 1930s saw President Franklin Roosevelt's New Deal which, through its introduction of unprecedented economic and labor regulation, sought to pull the United States out of the great depression. The Court's *Lochner* doctrine defeated several important New Deal measures between 1935 and 1937.[111] Since *Lochner*, there had been a growing clamor amongst academics and jurists demanding a more nuanced and sensitive approach to clashes of community and individual interest, which received a boost of public support sparked by the Court's obstruction of the very popular Roosevelt and the New Deal. In 1937, Roosevelt went so far as to propose his controversial "Court-Packing Bill," which would give him the authority, ostensibly, to assist aging justices on the Court, to appoint a new Supreme Court Justice for every sitting justice over the age of seventy and six months.[112] The bill ultimately was defeated, but many attribute to the very real threat of the bill what is known as "the switch in time that saved nine": Justice Roberts, who had consistently voted with the majority in the *Lochner* line of cases, voted with a new five-to-four majority to approve minimum wage legislation despite its impairment of freedom of contract in *West Coast Hotel Co. v. Parrish*.[113]

Parrish signaled the beginning of a steady rise in the popularity of balancing as a constitutional methodology. By "balancing" I mean the practice of weighing the benefits of a challenged state measure against the significance of the individual liberty interest it invades: it resembles proportionality but does not necessarily involve weighing impacts. Balancing had appeared in cases before *Parrish*[114] but it became increasingly fashionable with the rejection of a rigid "rights are trump" approach. Initially, left-leaning commentators resisted balancing because it allowed individual rights to be compromised by a strong public interest, but it later became clear that balancing could expand rights as well as restrict them.[115] Indeed, in the heyday of balancing, in the 1950s and 1960s, concern began to grow that balancing simply gave judges the freedom to choose which interests they considered more important, in keeping with their own moral or politi-

110. Lochner v. New York, 198 U.S. 45 (1905).

111. Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); United States v. Butler, 297 U.S. 1 (1936).

112. Judiciary Reorganization Bill of 1937.

113. 300 U.S. 379 (1937).

114. *See, e.g.*, Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

115. Thomas Alexander Aleinikoff, *Constitutional Law in an Age of Balancing* 96 YALE L. J. 943, 960-61 (1987).

cal philosophy.[116] Critics feared not only that judges might balance away fundamental rights but that they might second-guess legislative determinations, as in *Lochner*, but with a more subtle and facially appealing tool. Several important voices called for a return to some kind of interpretive approach, which would limit the Court's job to a textual, historical, or precedential analysis to arrive at what the Constitution required.[117]

Thus far the discussion has applied to U.S. constitutional adjudication in general. Balancing did not really have much of an effect on the EPC until the 1960s. From *Plessy v. Ferguson*[118] in 1896 until *Brown v. Board of Education of Topeka*[119] in 1954, the EPC applied almost exclusively to race and nationality claims and pursued a definitional "spheres" approach.[120] When the Court adopted the "separate-but-equal" doctrine in *Plessy* it noted that the Fourteenth Amendment did not guarantee equality in social arrangements but only in political freedoms.[121] From then until *Brown*, almost all EPC cases were brought by African-Americans claiming that separate provision by the state was not really equal.[122] For the EPC to apply, the difference in treatment needed to involve either an unequal provision by the state or a burden on political participation. *Brown* itself went no further than to say that separate was not equal in public education, holding to the same view of the EPC as protecting political equality. There was generally no overt discussion about balancing: the activity affected by the distinction either was or was not covered by the EPC.

The shameful *Korematsu*[123] case represents a notable exception. It is in this case that the idea of heightened scrutiny of racial classifications first appeared. On its way to holding that the U.S. military could lawfully herd all Japanese-Americans into internment camps

116. THOMAS EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 717-18 (1970); MARTIN SHAPIRO, FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW, ch. 3 (1966); Laurent Frantz, *Is the First Amendment Law?—A Reply to Professor Mendelson,* 51 CAL. L. REV. 729, 746-49 (1963); Laurent Frantz, *The First Amendment in the Balance,* 71 YALE L.J. 1424, 1442-45 (1962); Alexander Meiklejohn, *The* Barenblatt *Opinion,* 27 U. CHI. L. REV. 329 (1960); Alexander Meiklejohn, *The Balancing of Self-Preservation Against Political Freedom,* 49 CAL. L. REV. 4 (1961); Alexander Meiklejohn, *The First Amendment Is an Absolute,* SUP. CT. REV. 245 (1961).

117. *See, e.g.,* Bendix Autolite Corp. v. Midwesco Enterprises Inc., 486 U.S. 888, 897-98 (1988) (Scalia, J. concurring); Frank N. Coffin, *Judicial Balancing: The Protean Scales of Justice*, 63 N.Y.U. L. REV. 16, 19 (1988); Louis Henkin, *Infallibility Under Law: Constitutional Balancing*, 78 COLUM. L. REV. 1022, 1047 (1978).

118. 163 U.S. 537 (1896).

119. 347 U.S. 483 (1954).

120. *See, e.g.,* Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938); Smith v. Allwright, 321 U.S. 649 (1944); Shelley v. Kraemer, 334 U.S. 1 (1948); McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950).

121. Plessy v. Ferguson, 163 U.S. 537, para. 2 (1896).

122. Bakke, 438 U. S. at 290-93.

123. Korematsu v. United States, 323 U.S. 214 (1944).

during World War II, the Court did as courts often do: it heralded a capitulation to the state by announcing how tough it intended to be. Justice Black wrote that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect" and that "courts must subject them to the most rigid scrutiny."[124] The Court proceeded to rely, however, on unsubstantiated claims by an Army General to the effect that only internment of the Japanese could safeguard national security and to find the practice constitutional.[125] Thus, the idea of non-categorical protection, where a racial classification is not necessarily barred but calls for a particularly high level of scrutiny, came into being because of what the Court viewed as the necessity of allowing the state to do something which would, under the definitional analysis previously employed, clearly violate the EPC.

The Court came close to articulating the modern version of strict scrutiny in 1964 in *McLaughlin v. Florida,*[126] where it announced that race-based classifications are "constitutionally suspect" and subject to "rigid scrutiny." Thus a racially discriminatory law could stand "only if . . . necessary, and not merely rationally related, to the accomplishment of a permissible state policy."[127] The strict scrutiny test did not take on its final form until the introduction of the "compelling state interest" and "narrow tailoring" language in 1984.[128] As we have already seen, the Court soon found itself faced with challenges that did not relate to race but to gender, or mental retardation, or illegitimacy. In the political climate of the 1970s and 1980s, the Court could not restrict the application of the EPC to racial issues but it honored the history and "original intent" of the Fourteenth Amendment by maintaining tiers of scrutiny. The discipline of first finding at least a quasi-suspect classification warded off complaints that activist judges were legislating new grounds of forbidden discrimination simply to suit their own ideas of social justice. Making the scrutiny "strict" insulated the judiciary from the other complaint about balancing, that it allowed the compromising of basic liberties.

The period during which the suspect classifications approach emerged witnessed a furious debate over balancing and whether a court should apply rules or standards (standards being associated with balancing). Balancing, not necessarily under the EPC but in other areas of constitutional law, had enjoyed such dominance, that a great deal of momentum had developed in favor of limiting the discretion of judges to substitute their judgment for that of the legislature.

124. *Id.* at 215.
125. *Id.* at 218-19.
126. 379 U.S. 184 (1964).
127. *Id.* at 196.
128. *See generally* Palmore v. Sidoti, 466 U.S. 429 (1984).

Professor Alan Chen summarizes the terms of the debate as they applied to the EPC:

> In the context of constitutional law, the rules-standards debate is sometimes described using the nomenclature of "categories" and "balancing." Categories connote that any given government regulation, or any act by a public official, can be placed into a particular category, which leads to a determinate result. The bookends of strict scrutiny and rationality review, which are used to examine the constitutionality of government classification under the Equal Protection Clause . . . . illustrate the use of categorical, or rule-like, constitutional constraints. In theory, the compelling or legitimate state interest tests formally direct the decisionmaker to engage in a kind of balancing. In its actual application, however, strict scrutiny is rule-like, since if a court concludes that a government regulation involves suspect classifications or burdens "fundamental" rights, the result is, for all intents and purposes, determinate—the regulation is invalidated. Rationality review is equally determinate in the other direction—the regulation is virtually always upheld.[129]

In short, although the doctrine arose because of the necessity of allowing a strong public interest to outweigh even the fundamental right of racial non-discrimination (*Korematsu*), its form reflects a grudging victory for the rule advocates (represented today by, for example, Justices Scalia, Thomas, Alito, and Chief Justice Roberts).

This admittedly rough history of the suspect classifications model draws attention to at least three significant circumstances that make that model unique to its context. First, it comes from a tradition where constitutional discrimination cases ask whether the state has attempted to invade the sphere of the individual's civil or political liberties. Although the Court no longer limits the application of the EPC to cases that directly impact the equality of political participation, the idea that the EPC exists primarily to protect civil liberties—not human rights—frequently comes into play to resolve close cases.[130] This characteristic means, inter alia, that the EPC does not even apply unless the state intends to discriminate and only the most persuasive statistics can prove discriminatory intent on the basis of

129. Alan Chen, *The Ultimate Standard: Qualified Immunity in the Age of Constitutional Balancing Tests* 81 IOWA L. REV. 261, 298 (1995).

130. Anderson v. Celebrezze, 460 U.S. 780, 789-806 (1983); The Forty-Second Street Co. v. Koch, 613 F. Supp. 1416, 1985 U.S. Dist LEXIS 17750, 17-20 (S.D.N.Y. 1985); Massachusetts Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973); Graham v. Richardson, 403 U.S. 365, 372 (1971).

discriminatory impacts.[131] It also means that different levels of protection are required in order to recognize that different grounds of distinction implicate different political obstacles. Second, the EPC is associated historically with the protection of a specific racial minority. Given the general reliance of American Constitutional law on textual and historical interpretation, this required that in accommodating different kinds of classifications that ought logically to receive scrutiny, the Court felt constrained to tie the extent of scrutiny to the degree of similarity between a challenged classification and a racial classification.[132] Finally, the suspect classifications model was not adopted as a considered approach to rebutting a *prima facie* case of discrimination. Instead, it was adopted (1) as a means of allowing (perhaps with Roosevelt's court-packing plan not yet a distant memory, and certainly affected by the hysteria of war) the state to override what had formerly been treated as a categorical constitutional protection, and (2) later, to respond to concerns on one hand that fundamental rights might too easily be overridden, and on the other, that the EPC might grow beyond its political, anti-racism roots to become a roving anti-discrimination tool in the hands of an activist judiciary. All of these circumstances have produced an EPC that purposely offers no protection beyond the basic demands of due process, except with regard to a narrow class of distinctions; that focuses on the intentions of the state; that classifies levels of protection in order to respect the centrality of race and political rights as its focus; and that seeks to make outcomes appear to be dictated by categorical rules.

C. *Three-Tiered Scrutiny Collapses into Ad-Hoc Balancing*

The foregoing discussion has highlighted some reasons why the United Kingdom and Strasbourg should reject the EPC approach even if this approach does what it claims to do. However, one of the most compelling reasons not to adopt the suspect classifications/three-tiered scrutiny analysis is that it does not deliver on the one concern common to both the EPC and the ECHR/HRA context: it does not control judicial discretion. As we have seen, distrust of proportionality among U.K. judges, has led them either to suppress the ultimate proportionality balancing or to adopt rules like that in *Carson*. In this they share with their American counterparts the desire to avoid making value judgments and to reduce their task to one of divining the nature of the classification at issue and applying to the state action—not to its effects—the level of scrutiny dictated. They purport, through such a mechanism, to avoid judging the value of

131. Bradley v. United States, 299 F3d 197 (3rd Cir. 2002); Rogers v. Lodge, 458 U.S. 613 (1982).

132. Bakke, 438 U. S. at 290; Beatty, *supra* note 108, at 40-42, 76-118.

particular public interests, to avoid expressing preferences for one social policy over another, and to avoid, except in the most extreme circumstances, being called upon to countermand the will of the majority. Setting aside for the moment the fact that the ECHR as applied through the HRA does not permit U.K. judges to avoid all of these tasks, it would make a sad hash of things indeed if the United Kingdom flouted Strasbourg precedent in favor of borrowing a U.S. approach that does not even work in the United States.

The suspect classifications/three-tiered scrutiny model does not, by acclamation of commentators on both sides of the U.S. balancing debate, work. It fails for four basic reasons: (1) the identification of classifications as quasi-suspect, suspect, or non-suspect involves unconstrained (except perhaps by history and science) balancing of public and private interests, and political and social interests; (2) intermediate scrutiny, which arose in response to the intolerable rigidity of the strict scrutiny/rational basis dichotomy, would be better named "indeterminate scrutiny" as it appears to require a different degree of "substantial advancement" of state interests depending upon (one might say "proportional to") the ground and degree of discrimination; (3) rational basis review has recently grown teeth in non-suspect cases involving substantial discriminatory impact, and justices balance by treating over-breadth as irrational, or by second-guessing the purported legitimate objective; and (4) the identification of "compelling state interests" requires balancing and the interest that the court views as compelling prejudges what will qualify as "narrowly tailored" to that interest. I will substantiate each of these claims in turn.

Deciding to label a classification "suspect" obviously and necessarily involves a balancing of interests. To say, for example, that a distinction on the basis of sexual orientation is suspect requires a decision about what kinds of intrusions on personal liberty we deem acceptable and what kinds of different treatment implicate human rights or civil liberties concerns. The question requires balancing, on one hand, the strength of the claim homosexual persons have to being treated the same as heterosexuals, as well as their history of oppression, against, on the other, any legitimate interests the majority may have in singling out homosexuals for special treatment, and the greater value U.S. jurisprudence places on present political participation over a history of oppression. U.S. legal and social culture tips the scales through its focus on political rights, and on the paradigm of racial discrimination, as well as by a regrettably popular belief that homosexuals—and their non-political activities—are fundamentally

different from and less valued than heterosexuals.[133] The subjectivity of the exercise finds expression in the very fact that the United States does not view sexual orientation as a suspect classification and, according to Lord Walker in *Carson*, the ECtHR does.[134] The status of gender as a quasi-suspect classification in the United States, in contrast to race which is fully suspect, turns on (1) the fact that some gender distinctions are valued, while almost no racial distinctions are valued; (2) the fact that many inequalities suffered by women are social, thus less valued, while most of the inequalities suffered by racial minorities are deemed political, thus more valued; and (3) the fact that the U.S. values protecting political minorities more than protecting a non-minority with a history of oppression. Thus any approach that calibrates its calculus according to varying degrees of "suspectness" simply sweeps its balancing under the rug. Indeed, when the Lords in *Carson* found that residence was not a suspect category they simply made an ad hoc assessment of the relative weights of the claim of non-residents to equal treatment and the reasons society might have for treating them differently and concluded that they valued the latter over the former.

Intermediate scrutiny also leads to balancing: indeed, it exists owing to an irresistible urge to balance. To catalog the cases in which the Supreme Court has applied intermediate scrutiny in context-specific and proportionate ways would simply repeat what many have done amply well before me.[135] Although one could in theory define the phrases "substantially advance" and "important state interest" in determinate ways, it is clear that the Court has not done so.[136] The words "substantial" and "important" invite courts to make value judgments and courts have understandably used them to tailor their decisions to the facts. Some applications have held that "substantially advances" requires no more than that the legislation not be "over-broad" or based on generalizations or stereotypes.[137] By contrast, the most recent authoritative articulation in the gender context went so far as to call for "skeptical scrutiny," requiring an "exceedingly persuasive justification" for discriminatory policies.[138] The

133. *See, e.g.*, Romer v. Evans, 517 U.S. 620 (1996) (the State of Colorado adopted, by popular referendum, a state constitutional amendment outlawing any legislative attempt to protect the rights of homosexuals).

134. Carson [2005] UKHL 37 at para. 58.

135. *See generally* Aleinikoff, *supra* note 115; Faigman, *supra* note 107; Peter Smith, *The Demise of Three-Tier Review: Has the United States Supreme Court Adopted a "Sliding Scale" Approach Toward Equal Protection Jurisprudence?* 23 J. CONTEMP. L. 475 (1997).

136. *Compare* Frontiero v. Richardson, 411 U.S. 677 (1973); Craig v. Boren, 429 U.S. 190 (1976); United States v. Virginia, 518 U.S. 515 (1996); Mathews v. Lucas, 427 U.S. 495, 503-06 (1976); Trimble v. Gordon, 430 U.S. 762, 766-67 (1977); Lalli v. Lalli, 439 U.S. 259, 265 (1978).

137. Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982).

138. United States v. Virginia, 518 U.S. 515 (1996).

Court in *United States v. Virginia* declared that gender distinctions require more scrutiny than the similarly quasi-suspect classification of illegitimacy.[139] This in essence sets up four openly acknowledged tiers of review. This burgeoning of intermediate standards evidences what many have recognized as the inevitability of judges balancing.[140] No matter how their inquiry is structured, courts cannot decide when a difference in treatment is acceptable and when it is not without balancing the value of the state action against the value of equal treatment. It is telling in this regard that several U.S. state supreme courts have, when applying their own states' constitutions, recognized this fact and dispensed with tiers of scrutiny in favor of balancing state interests against discriminatory impacts.[141]

Balancing likewise finds its way into the application of rational basis review: the standard has more or less teeth depending on the severity of the discrimination. The fact that this occurs within rational basis review as opposed to forming part of the proliferation of different degrees of heightened scrutiny, highlights a problem unique to a suspect classifications model. The very existence of the three (or more) -tiered discipline creates a resistance to the entrenchment of new suspect classifications. Because enshrinement as "suspect" tilts the scales for all future cases, the judiciary finds ways to avoid making a commitment in any given case. This creates the doubly problematic situation where (1) courts turn a blind eye to emerging suspect distinctions (like sexual orientation or age), or (2) they reach the "right" result within the rational basis standard, doing violence to that standard in the process. For example, in *City of Cleburne v. Cleburne Living Center, Inc.*,[142] the Court faced a challenge to the denial, by a municipality, of a permit for a group of mentally retarded persons to set up a group home. After a careful balancing, the Court held that mental disability did not amount to a suspect or quasi-suspect classification, and applied rational basis scrutiny. However, the Court in effect shifted the burden to the state, noting that the record revealed no evidence that the home represented a "special threat to the city's legitimate interests," and finding the denial unconstitutional.[143] Similarly, in *Romer v. Evans* the Court struck down a Colorado constitutional amendment, enacted by referendum, that

139. *Id.* at 531-34.

140. BEATTY, *supra* note 108, at 25-35; Smith, *supra* note 140, generally; Peter J. Rubin, *Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny after* Adarand *and* Shaw 149 U. PA. L. REV. 1, 15-25 (2000); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 105 *et seq* (1997).

141. Planned Parenthood of Central New Jersey v. Farmer, 762 A.2d. 620, 631-32 (N.J. 2000); Carson v. Maurer, 424 A.2d 825, 835-36 (N.H. 1988); Marcoux v. Attorney General, 375 N.E.2d 688, 689 (Mass. 1978).

142. 473 U.S. 432 (1985).

143. *Cleburne*, 473 U.S. at 448.

outlawed any legislation designed to protect homosexuals.[144] Rational basis review took the form of a searching assessment of the purpose of the initiative, brushing aside Colorado's proffered "protection of morals" objective.[145] The Court rejected as illegitimate the true purpose of the measure, revealed by the fact that its "sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests." Compare these decisions with the test that should, at least on paper, accept the stated objective at face value along with "any reasonably conceivable state of facts that could provide a rational basis for the classification"[146] and it becomes clear that the balancing imperative expresses itself through the rational basis test as well as through intermediate scrutiny.

Strict scrutiny should afford the least scope for covert balancing. On the claimant's side, a measure not narrowly tailored to a compelling state interest cannot be rescued by even the most pressing public need. On the state's side, no place in the rubric allows the most drastically discriminatory effects to condemn a measure that constitutes the least restrictive alternative available to meet the state's aims. However, because strict scrutiny places the fit of the state action to its objective at the center of the analysis, the nature of the objective itself can dictate the outcome. In the *Gratz* and *Grutter* cases, one affirmative action policy fell and the other stood because the first did both more and less than required by the objective and the second did not. In both cases the state identified its objective as the improvement of diversity for educational purposes. However, the University based the adoption of that particular objective on Justice Powell's opinion in Regents of University of California *v.* Bakke,[147] where a fragmented five to four decision appeared to establish that diversity amounted to a compelling state interest but remedying past injustice did not.[148] Although a solid majority of the Supreme Court has not squarely addressed this issue, other precedents suggests that the Court would not accept as compelling any state interest that consciously favors one race over another any time soon.[149] Had the Court tested the narrow tailoring of the undergraduate policy in *Gratz* against an interest in remedying past injustice, it would almost certainly find the policy of automatically increasing the likelihood of admission of African-Americans narrowly tailored to the objective.

144. 517 U.S. 620 (1996).
145. *Romer*, 517 U.S. at 631-36.
146. FCC v. Beach Communications, Inc, 508 U.S. 307, 313 (1993).
147. 438 U. S. 265 (1978).
148. *Id.* at 305-15.
149. Adarand Constructors, Inc v. Pena, 515 U.S. 200, 237 (1995); Shaw v. Reno, 509 U.S. 630, 642-48 (1993).

Given that the Court generally defers to lawmakers and executives when they claim that national security, or crime prevention, or the protection of fetal life constitute compelling interests, the decision that remedying past racial injustice does not implicate a compelling public interest can only rest on a balancing of interests. Justice Powell's decision in *Bakke* found that the invidious effects of making whites bear the cost of remedying social injustice outweighed the advantages to society of improving the social balance.[150] Thus, it is only in the easy cases when no disagreement exists about the importance of the state aim that even the rigid discipline of strict scrutiny can prevent an ad hoc balancing of interests.

IV. How Article 14 Justification Should Work

The decision of the House of Lords in *Carson* sought to accomplish what the long history of EPC jurisprudence aspired to: an approach to discrimination claims that insulates judges from the task of deciding when a majority-supported policy can displace the liberties guaranteed by law. By emulating the U.S. solution to this problem, however, the Lords not only relied on a false promise of determinacy but chose a direction strikingly at odds with the jurisprudence it was adopted to serve. Article 14 differs from the EPC in four fundamental respects: (1) Article 14 does not focus on race-based distinctions or political liberties, but is a human rights guarantee that the equal enjoyment of rights will not suffer discriminatory burdens on status grounds; (2) ECtHR jurisprudence requires that discrimination, on any of the undifferentiated grounds on Article 14's open-ended list, satisfy proportionality; (3) Strasbourg's treatment of some grounds of distinction as requiring "very weighty reasons" for justification is not multi-tiered scrutiny, but instead operates to calibrate proportionality in the light of prior value determinations; and (4) Article 14 focuses on a different "meaning" of equality from that served by the U.S. suspect classifications approach. All of these differences make Article 14 expressly about the kind of value judgments a suspect classifications model seeks to avoid.

A. *Article 14 is a Human Rights Guarantee*

A facial reading of Article 14 suffices to demonstrate that it does not, by virtue of text, history, or implication, elevate one kind of discrimination over another. The ECtHR has held its list of status grounds protected from discrimination to be open-ended and to include not only immutable characteristics but social circumstances that derive to some extent from choice.[151] Neither the wording of the

150. *Bakke*, 438 U.S. at 307-08.

151. Sidabras and Dziautas v. Lithuania [2004] ECHR 395, para. 41; Kjeldsen, Busk Madsen and Pedersen v. Denmark (1976) 1 EHRR 711, para. 56.

article, the *travaux préparatoires,* nor any Strasbourg authority support the idea that any one or a handful of grounds of discrimination drove the adoption of Article 14. Although racial discrimination certainly weighed on the minds of the drafters of the ECHR, so too did the social and economic impacts of excluding women from full participation in society and the tendency of governments to interfere with the expression by national minorities of their cultural identity.[152] Article 14 does not, therefore, call for different treatment of classifications based on the extent to which they resemble one or more core prohibited distinctions.

There likewise exists no reason to view the ECHR as amounting essentially to a scheme to protect political freedoms. Although many of the rights and freedoms of the Convention do protect civil liberties, and certainly the ECtHR has invoked political participation as an interest the Convention seeks to advance, the ECHR sets out a structure of *human* rights—guarantees of substantive liberty deemed worthy of protection based on the value of human dignity.[153] The Convention cannot support a hierarchy of rights based on the extent of their instrumentality to full political participation. It seeks to protect people from encroachments on their rights because, in the case of some rights, respect for those rights brings not only political but social benefits, but also because it treats them as ends in themselves.[154] Thus Article 14 protects against discrimination not merely where it impairs the political process but where it undermines equal dignity and respect. Lords Hoffman and Walker in *Carson* gestured toward equal dignity and respect as touchstones for a suspect classification.[155] However, while a court might, as the U.S. Supreme Court has, perform an abstract assessment of the impact of a ground of distinction on political participation—asking, for example, whether or not women are a discrete and insular minority—no court can assess the impact of a ground of discrimination on equal respect or dignity without assessing the proportionality of the distinction *as applied.* Whether a distinction on the ground of, say, residence implicates dignity or respect depends upon how senselessly, and to what effect, the distinction burdens the claimant. If a law requires that all people over seventy get an eye test before renewing their driving license, this might not offend equal dignity; if another law requires those same people to wear incontinence undergarments purely on the basis of their age, dignity almost certainly comes into play. Neither case

152. *TRAVAUX PRÉPARATOIRES* OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS, Article 14, 4-5, 23, 25 (Strasbourg: Council of Europe 1967) *available at* http://www.echr.coe.int/Library/DIGDOC/Travaux/ECHRTravaux-ART14-CDH(67)3-BIL1338901.pdf (last visited Mar. 20, 2008).

153. *Id.* at 2; FELDMAN, *supra* note 16, at 3-5, 50-52.

154. Timishev v. Russia, [2005] ECHR 55762/00., paras. 53-59.

155. *Carson,* [2005] UKHL 37 at paras. 15-17, 55-60.

tells us abstractly whether distinctions on the basis of age implicate equal dignity or respect. In the Article 14 context, it is the operation of proportionality itself that tells us whether a classification is suspect, not an *a priori* assessment of the relationship between a classification and a core convention value.

B. Article 14 Requires Proportionality in All Cases

Perhaps for that very reason, proportionality represents a fundamental characteristic of lawful distinctions under Article 14. Recall that in *Belgian Linguistics* the ECtHR defined discrimination in terms of disproportionate differences in treatment.[156] As even the majority in *Carson* could not avoid admitting, the insurmountable weight of Strasbourg authority has resolved Article 14 cases on the basis of a proportionality justification.[157] No ECtHR case involving a difference in treatment on a ground covered by Article 14 has authorized not subjecting the challenged measure to scrutiny and cases involving non-suspect classification routinely apply proportionality to clearly "rational" distinctions, in pursuit of legitimate aims, and find them disproportionate.[158] Although some cases have parried proportionality concerns with reference to the "margin of appreciation," that concept does not apply in a purely domestic context. The "area of discretionary judgment," a domestic analog of the margin, can shift the balance in favor of justification of a state measure but only as a part of that analysis, not as a reason not to engage in it.[159] Indeed, prior to *Carson*, the House of Lords clearly recognized that proportionality formed an integral part of the Article 14 analysis.[160]

In support of his plug for suspect classifications in *Carson*, Lord Walker discussed two cases in which the ECtHR refused to apply proportionality to an alleged distinction on covered grounds, where the case came within the ambit of another Convention right. In *Van der Mussele v. Belgium*,[161] the ECtHR rejected a claim that requiring a pupil barrister to provide free legal services while, for example, doctors or accountants did not incur similar obligations, constituted Article 14 discrimination. Owing to differences in the entire regimes governing various professions, the Court was unable to identify a discrete decision where it could say that the status "lawyer" was used as a criterion for distinction.[162] *Van der Mussele* therefore stands for no

156. *Belgian Linguistics* (1968) 1 EHRR 252, para. 10.
157. *Carson*, [2005] UKHL 37 at paras. 75-76; *Comparison*, *supra* note 41, at 11-14.
158. Sidabras and Dziautas v. Lithuania [2004] ECHR 395, paras. 51-61; Paulik v. Slovakia [2006] ECHR 10699/05, para. 58.
159. *Ghaidan* [2004] UKHL 30, paras. 19-23.
160. *A and Ors* [2004] UKHL 56, para. 50; *Ghaidan*, [2004] UKHL 30, para. 133.
161. (1983) 6 EHRR 163; *compare* Gaygusuz v. Austria (1996) 23 EHRR 365, paras. 42-50.
162. (1983) 6 EHRR 163, paras. 45-46.

more than the proposition that the absence of an analogous comparator, in the sense of someone whose fate was determined by criteria sufficiently similar to pinpoint the ground of disparate treatment as the one complained of, deprives a court of a clear distinction to justify. In *Johnston v. Ireland*,[163] the Strasbourg Court clearly stated that it could not consider the comparators analogous because another basis for differentiation applicable only to the claimants, specifically a failure to be ordinarily domiciled outside Ireland, constituted an express factor in the challenged decision, making it impossible for the Court to conclude that the ground for distinction was wealth (or the lack thereof). Thus neither case supports a restriction of proportionality review to suspect classifications only.

By contrast, the recent (post-*Carson*) Strasbourg opinion in *Paulik v. Slovakia*[164] shows the proper approach to non-suspect cases. There the petitioner complained of the state's refusal to revisit a prior judicial determination of paternity. In Slovakia those whose paternity had been declared by presumption (based on, for example, marriage to the mother) had access to a procedure to challenge the determination through DNA evidence, while those like the claimant, whose determination was based on a judicial hearing—before the availability of DNA evidence—could not (on *res judicata* grounds). In this case the ground of discrimination was the status of having had paternity declared in a judicial proceeding. The Court made no mention of a need for "weighty reasons" in this case of a clearly non-suspect classification. Much like in *Carson*, the state tried to dispose of the case on analogous comparator grounds, claiming that the absence of a *res judicata* prior determination, with its legal certainty implications, made his comparators relevantly different from the claimant. The Strasbourg court did what the Lords in *Carson* should have done:

> The Court accepts that there may be differences between, on the one hand, the applicant and, on the other hand, the putative fathers and the mothers in situations where paternity is legally presumed but has not been judicially determined. However, the fact that there are some differences between two or more individuals does not preclude them from being in sufficiently comparable positions and from having sufficiently comparable interests. The Court finds that with regard to their interest in contesting a status relating to paternity, the applicant and the other parties in question were in an analogous situation for the purposes of art 14 of the Convention. The legal system afforded them different treatment in that, unlike the other parties, the applicant

163. (1986) 9 EHRR 203.
164. [2006] ECHR 10699/05.

> could not request the Prosecutor General to challenge the declaration of paternity in the courts in the interests of society. It remains to be ascertained whether this difference had any objective and reasonable justification.[165]

The Court then applied proportionality, and found that the state's interest in legal certainty could not outweigh the fact that the claimant had no access to a remedy available to others in similar situations. In doing so, the Court observed that "the 'legitimate interest' in ensuring legal certainty and the security of family relationships and in protecting the interests of children may justify a difference in the treatment of persons with an interest in disclaiming paternity," but that in this case the kind and extent of difference in treatment was disproportionate to the strength of that interest.[166]

The Lords in *Carson* were just wrong. Non-suspect classifications must satisfy proportionality, even if there exist rational, legitimate grounds for distinct treatment in the abstract.

C. *Article 14 Proportionality does not Involve Pre-set Tiers of Scrutiny*

The proportionality required under Article 14 calls for an assessment of the impact of the challenged distinction on other legitimate interests and a determination whether the use of that distinction contributes sufficiently to the public interest to outweigh the impact. Proportionality entered into European law through German law, which developed a doctrine of proportionality requiring that state acts or measures be (1) suitable to achieve a legitimate purpose, (2) necessary to achieve that purpose, and (3) proportional in the narrower sense: measures must not impose burdens or "cause harms to other legitimate interests" that outweigh the objectives achieved by the measure.[167] This formulation has not been adopted wholesale into the jurisprudence of Article 14, but the last element, "proportionality in the narrower sense," was incorporated into the Article 14 analysis in the *Belgian Linguistics* case, which was in fact the first mention of the doctrine of proportionality by the ECtHR.[168] The formulation adopted there required "proportionality between the means employed and the aim sought to be realized."[169] Later courts have interpreted this as meaning that "the means employed" (a classifica-

165. *Id.* at para. 54 (internal citations omitted).
166. *Id.* at para. 58.
167. Lord Hoffmann, *The Influence of the European Principle of Proportionality upon U.K. Law, in* THE PRINCIPLE OF PROPORTIONALITY IN THE LAWS OF EUROPE 107 (Evelyn Ellis ed., 1999) (this is the same Lord Hoffmann of the *Carson* decision).
168. Marc-Andre Eissen, *The Principle of Proportionality in the Case Law of the European Court of Human Rights, in* THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS 140 (Ronald St. J. Macdonald et al. eds., 1993).
169. *Belgian Linguistics* (1968) 1 EHRR 252, para. 10.

tion on a given ground) must not produce "harms to other legitimate interests" disproportionate to how far the classification advances a legitimate aim.[170] Proportionality therefore contemplates a situation where the harm of a measure, in terms of the extent of invasion of an individual's rights, or in terms of the damage to common interests in equal dignity and social inclusion for example, could outweigh the benefits of even a narrowly tailored measure aimed at a compelling interest.

Indeed, this is precisely what happened in *Dudgeon v. United Kingdom*,[171] where the ECtHR found unjustified a law in Northern Ireland that outlawed homosexual sex between consenting adults. Although the Court resolved the claim on Article 8 grounds (the right to respect for private life), the Strasbourg Court has made it abundantly clear that it views the application of proportionality under Article 8 as equivalent to that under Article 14.[172] In analyzing whether the measure satisfied proportionality, the Court noted that the state could not have more narrowly tailored its regulation:

> Without any doubt . . . the United Kingdom Government acted carefully and in good faith; what is more, they made every effort to arrive at a balanced judgment between the differing viewpoints before reaching the conclusion that such a substantial body of opinion in Northern Ireland was opposed to a change in the law that no further action should be taken. Nevertheless, this cannot of itself be decisive as to the necessity for the interference with the applicant's private life resulting from the measures being challenged. Notwithstanding the margin of appreciation left to the national authorities, it is for the Court to make the final evaluation as to whether the reasons it has found to be relevant were sufficient in the circumstances, in particular whether the interference complained of was proportionate to the social need claimed for it.[173]

The Court then went on to hold that, "on the issue of proportionality, the Court considers that such justifications as there are for retaining the law in force un-amended are outweighed by the detrimental effects which the very existence of the legislative provisions in question can have on the life of a person of homosexual orien-

170. A and Ors v. Home Secretary [2004] UKHL 56, para. 50; Ghaidan v. Godin-Mendoza, [2004] UKHL 30, paras. 19-20; National Union of Belgian Police v. Belgium 1 EHRR 578, para. 49 (1975).

171. [1981] 4 EHRR 149.

172. Evans v. UK [2006] ECHR 6339/05, para. 74.

173. Dudgeon v. United Kingdom [1981] 4 EHRR 149, para. 59 (internal citations omitted).

tation like the applicant."[174] Earlier in its opinion the Court had catalogued these effects and commented on the vast number of people affected and the sweeping extent of the effect in terms of the ability of those people to act according to their inclinations. The Court's analysis considered not only the effect of the law on the claimant but on all homosexuals, and thus on society as a whole. Proportionality in Strasbourg routinely takes into account impacts not only on the claimant but on the claimant's group, upon society as a whole, and upon the general interest in non-discrimination.[175] Thus there can be no doubt that under Article 14, proportionality means that profound effects of discrimination can outweigh the benefits even of a measure that represents the least restrictive alternative available. By the same token, it means that even very flawed acts of government can withstand scrutiny if they do not cause severe detrimental impacts.

Lord Walker in *Carson* simply made a mistake when he suggested that Strasbourg had identified suspect classifications. The ECtHR has certainly noted that some kinds of discrimination require "very weighty reasons" for justification, but to characterize that practice as akin to the U.S. approach reveals a lack of understanding of the EPC jurisprudence. To have anything in common with the U.S. model, the Strasbourg practice would need to (1) dispense with all non-suspect cases through rational basis review, and (2) subject suspect classifications to a rigid test of fit between the means and the objective. As we have seen, in non-suspect cases, the Strasbourg Court applies proportionality. Not surprisingly, the test the court applies in so-called suspect cases is: proportionality. For example, in *Smith v. U.K.*[176] the Court, confronted with the ban on gays in the military, observed that discrimination on the ground of sexual orientation required "convincing and weighty reasons . . . by way of justification."[177] The Court proceeded, however, carefully to evaluate the kind and degree of the invasion into the private lives of the claimants and the general impacts of the ban and related investigations on gay and lesbian soldiers, and weighed those against a painstaking assessment of the evidence in support of the policy and the state's reasons for maintaining it.[178] The only difference between this inquiry and the one in the non-suspect case of *Paulik* lies in the fact that the

174. *Id.* at para. 60.

175. Unal Takeli v. Turkey [2004] ECHR 29865/96, paras. 59-69 (invoking the impact of a rule requiring wives to take on the names of their husbands on the European interest in advancing gender equality); Smith and another v. U.K. [1999] ECHR 33985/96, 90-94 (cataloguing the impacts of sexual orientation discrimination on homosexuals in the military, including on job prospects); *Sidabras* [2004] ECHR 395, paras. 51-61 (noting the long-term impacts of anti-former-KGB-agent ban on the careers and prospects of those affected by it).

176. [1999] ECHR 33985/96.

177. *Smith*, [1999] ECHR 33985/96, paras. 90-105.

178. *Id.* at para. 94.

Court put on the petitioner's side of proportionality a strong public interest in not treating people differently on the ground of sexual orientation.

The Strasbourg "suspect classifications" practice means no more than that with regard to certain kinds of discrimination, the Court puts its thumb on the claimant's side of the scale but otherwise applies proportionality as usual. The great error of the majority in *Carson* stemmed from identifying, on one hand, Strasbourg's acknowledgement within a proportionality analysis that society places a greater value on preventing some kinds of discrimination than others with, on the other hand, the U.S. paradigm that hinges a three (four?) -tiered scrutiny system on degrees of "suspectness" and purports not to use proportionality at all. As a result of this error (or sleight-of-hand?) the Lords dispensed with proportionality in direct conflict with ECtHR precedent.

D. Article 14 and Suspect Classifications Assume Different "Meanings" of Equality

The *Carson* mistake could flow, at least in part, from confusion about the purposes of equality provisions like Article 14, the Equal Protection Clause, and statutory anti-discrimination laws. Christopher McCrudden has argued that equality can have at least four "meanings," and that laws can evolve or be designed in distinct ways depending on the meanings of equality that underpin them.[179] He identifies (1) "equality as 'rationality,'" (2) "equality as protective of 'prized public goods,'" (3) "equality as preventing 'status harms,'" and (4) "equality as promotion of equal opportunity between groups." He observes that the first meaning is reflected in both the United States and the United Kingdom in the concepts of "rational basis review" and "likes should be treated alike" respectively.[180] These are baseline protections, afforded even to non-suspect classifications in the United States and as a general principle of public law in the United Kingdom. He goes on to observe that EPC jurisprudence gives effect to the second meaning by affording "strict scrutiny" to invasions of fundamental rights ("prized public goods"), and to the third meaning by subjecting discrimination on specified grounds to heightened scrutiny, to avoid (e.g., race-related) "status harms."[181] United Kingdom statutory antidiscrimination laws clearly seek, according to McCrudden, to prevent status harms resulting from, e.g., gender and race discrimination.[182] Article 14, however, he sees as directed at the sec-

179. Christopher McCrudden, *Equality and Non-Discrimination, in* ENGLISH PUBLIC LAW 582-84 (David Feldman ed., 2004).
180. *Id.* at 582, n.3; 608-15.
181. *Id.* at 582, f.3.
182. *Id.* at 637.

ond meaning, the protection of the equal distribution of the "prized public goods" represented by the other rights in the ECHR.[183] Given that Article 14 expressly, and on its face exclusively, guarantees the equal enjoyment of the other Convention rights, it seems difficult to resist the conclusion that it concerns itself predominantly with McCrudden's second meaning of equality.

The suspect classifications approach in the United States, on the other hand, clearly addresses that part of the EPC that protects the third meaning of equality, status harms. If a challenged distinction in treatment does not attract the fundamental rights analysis (which does not involve suspect classifications), nor effect a (political) status harm, then only "equality as rationality" applies.[184] It should strike one as curious, therefore, to employ the status-harms-protective suspect classification model to interpret Article 14, focused as it is primarily on the "prized public goods" meaning of equality. According to McCrudden, however, U.K. courts have tended, long before *Carson*, to treat Article 14 as a status harms measure, probably owing to their greater experience and comfort with the model served by domestic statutory antidiscrimination laws.[185] Strasbourg jurisprudence on Article 14 has also, however, acknowledged some role for status harm protection through its identification of grounds of discrimination that require "weighty reasons" for justification.[186] This might tempt one to argue that the *Carson* test does not defy Strasbourg precedent but merely gives effect to the status harms aspect of Article 14. One should resist this temptation.

The EPC analysis in the United States employs two alternative threshold inquiries to determine whether scrutiny above the level of rational basis review will apply. In order to serve the "prized public goods" meaning of equality, an encroachment on a "fundamental right" will engage heightened scrutiny.[187] The "status harms" meaning receives heightened scrutiny protection only if the case satisfies the "suspect classifications" threshold. Under Article 14 the expressly predominant aim of guaranteeing the equal distribution of prized public goods is protected by a similar "fundamental rights" threshold, with a crucial difference: the relevant "fundamental rights" or "prized public goods" are already clearly identified as all of the other rights and freedoms in the Convention. If one accepts a rough analogy between proportionality and heightened scrutiny, at least in terms of

183. *Id.* at 620.

184. Anderson v. Celebrezze, 460 U.S. 780, 789-806 (1983); The Forty-Second Street Co. v. Koch, 613 F. Supp. 1416, 1985 U.S. Dist LEXIS 17750, 17-20 (S.D.N.Y. 1985); Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973); Graham v. Richardson, 403 U.S. 365, 372 (1971).

185. McCrudden, *supra* note 179, at 620.

186. Abdulaziz v. U.K. 94 (1985) EHRR 471, para. 78.

187. United States v. Carolene Prods. Co., 304 U.S. 144, 152, n.4 (1938).

their function in their respective analyses, then under Article 14 the heightened scrutiny of proportionality is triggered every time a case is found to come within the "ambit" of another Convention right. In other words, Article 14 already has a built-in threshold inquiry and does not need another hurdle such as suspect classifications. The *Carson* pastiche essentially subtracts from the "prized public goods" protection expressly guaranteed by Article 14 and adds nothing to Strasbourg's "weighty reasons" method of giving special protection against status harms. Thus, requiring a suspect classification before applying proportionality not only directly conflicts with recent Strasbourg authority,[188] it erects a non sequitur hurdle associated with one meaning of equality to deny protections clearly targeted at another meaning.

V. CONCLUSION

It is easy to understand the attraction of a rule that claims to distinguish presumptively valid discrimination from presumptively invalid discrimination. Especially for judges who have generally conceived of their role as involving only the interpretation and application of the will of Parliament or the principles of the common law, the prospect of applying what amounts to a form of heightened scrutiny of parliamentary or executive action in every Article 14 case must feel simultaneously like an appropriation of authority and an awful lot of work. Surely, one can imagine them thinking, there must exist a test that can weed out claims that common sense tells us have nothing to do with the wrong that we think of as discrimination. However, borrowing the concept of "suspect classifications"—and the three or four levels of scrutiny that correspond to them—from U.S. Equal Protection Clause jurisprudence cannot solve this problem.

The most obvious reason for rejecting this "solution" lies in the fact that Strasbourg authority already requires an approach inconsistent with the suspect classifications model. ECtHR case law mandates that state actions imposing an unequal burden on the enjoyment of convention rights, on a status ground covered by Article 14, satisfy the test of proportionality. It does not authorize, nor could it logically, a bright line rule that declares certain kinds of discrimination proportionate so long as they are rational. Case law in Strasbourg and the United Kingdom makes it clear that "rational" and "proportional" do not mean the same thing.[189] For the United Kingdom to make some, indeed, most, of the grounds of discrimination covered by Article 14 immune from the proportionality standard defies both reason and its treaty obligations.

188. Paulik v. Slovakia [2006] ECHR 10699/05, paras. 54-58; Sidabras and Dziautas v. Lithuania [2004] ECHR 395, paras. 51-61.

189. *Daly,* [2001] UKHL 26, paras. 26, 27, 32.

Even if the ECHR permitted the United Kingdom to adopt a short cut to avoid careful examination of "obviously reasonable" discrimination, following the lead of the United States in this regard makes no sense. The U.S. EPC emerged from a constitutional tradition in which only civil liberties, as opposed to human rights, receive protection from state encroachment. Moreover, it emerged to deal with discrimination against former African-American slaves after the U.S. Civil War in the nineteenth century. It only began to apply beyond race and national origin in the 1970s, and then only to the extent that the kind of discrimination at issue resembled race discrimination.[190] Therefore the suspect classifications doctrine evolved to distinguish, on one hand, those kinds of discrimination that encroach on political participation in the same way that race discrimination does from, on the other, those that do not. The various tiers of scrutiny applied in connection with differing degrees of "suspectness" bear almost no relationship, in theory, to proportionality. They exist to ensure that race discrimination will almost always violate the Fourteenth Amendment to the Constitution, sex and illegitimacy discrimination will usually violate it, and other kinds of discrimination almost never will. This kind of prejudgment of discrimination cases has been so unpalatable even to the U.S. judiciary that they have in practice begun to apply various improvised levels of scrutiny, or to manipulate intermediate or rational basis scrutiny, in order to approximate the kind of case-by-case balancing of interests that proportionality provides for by its terms.

Article 14 shares neither the history of the EPC nor the rigidities of its doctrine. It forms part of a human rights document concerned with far more than political participation. It seeks to protect against discrimination not only to ensure that minorities have equal access to the political process but because it benefits European society to respect the dignity of each human being, and treat them as an end in themselves. It recognizes that, depending on the facts of each case, discrimination on the basis of age, gender, or sexual orientation can offend the dignity of an individual or a group as much as race discrimination. Article 14 does not satisfy itself with prosecuting instances of certain kinds of discriminatory wrongs but seeks instead to protect people from having their enjoyment of Convention rights rendered less valuable, on status grounds, without a reason so compelling that it outweighs the injury to the individual and society. All of these characteristics demonstrate that emulating the American EPC approach not only departs from Strasbourg teaching but sells Article 14 and the ECHR short.

The truth is that the Strasbourg approach to discrimination, and through the HRA the U.K. approach, has simply matured beyond the

190. Bakke, 438 U.S. at 290.

U.S. jurisprudence. While the United States prosecutes discriminatory acts, Strasbourg protects against discriminatory effects.[191] The United States struggles with ever more fragmented, pre-judged levels of scrutiny for determining whether the state has done the best it can, while the ECHR asks whether the state's action, regardless of how well thought out and well-intentioned, imposes harms in terms of individual or group dignity that outweigh the governmental benefits it procures. The European approach represented by Article 14 recognizes the increasingly accepted fact that discrimination occurs regardless of the state of mind of the "discriminator." It also deals with the fact that judges cannot use "common sense" to determine what kind of discrimination offends human dignity. Yesterday's common sense is today's sexual orientation or age discrimination. Proportionality provides a court with the means to discover whether a law that looks reasonable actually exacts too great a social cost in relation to the advantages it promises. In hobbling this nuanced tool in favor of an outmoded suspect classifications model, the Lords in *Carson* made a retrograde step. If British judges can keep *Carson* an isolated act of legal Luddism, then perhaps the United Kingdom can proceed with the evolution of modern anti-discrimination law.

191. Kent Roach, *Making Progress on Understanding and Remedying Racial Profiling*, 41 ALBERTA L. REV 895, 896 (2004) ("emphasis on effects-based discrimination . . . is a fundamental feature of modern understandings of equality rights, but it is still not widely accepted in popular understandings of racism, which are often tied to the idea of intentional discrimination").