mental treatment of those attempting to exercise the right.[1437] Thus, state limitation on the entry into marriage was soon denominated an incursion on a fundamental right that required a compelling justification.[1438] Although denials of public funding of abortions were held to implicate no fundamental interest—abortion's being a fundamental interest—and no suspect classification—because only poor women needed public funding[1439]—other denials of public assistance because of illegitimacy, alienage, or sex have been deemed to be governed by the same standard of review as affirmative harms imposed on those grounds.[1440] And, in *Plyler v. Doe*,[1441] the complete denial of education to the children of illegal aliens was found subject to intermediate scrutiny and invalidated.

Thus, the nature of active review in equal protection jurisprudence remains in flux, subject to shifting majorities and varying degrees of concern about judicial activism and judicial restraint. But the cases, more fully reviewed hereafter, clearly indicate that a sliding scale of review is a fact of the Court's cases, however much its doctrinal explanation lags behind.

Testing Facially Neutral Classifications Which Impact on Minorities

A classification made expressly upon the basis of race triggers strict scrutiny and ordinarily results in its invalidation; similarly, a classification that facially makes a distinction on the basis of sex, or alienage, or illegitimacy triggers the level of scrutiny appropriate to it. A classification that is ostensibly neutral but is an obvious pretext for racial discrimination or for discrimination on some other forbidden basis is subject to heightened scrutiny and ordinarily invalidation.[1442] But when it is contended that a law, which is in effect neutral, has a disproportionately adverse effect upon a racial minority or upon another group particularly entitled to the protection of the Equal Protection Clause, a much more difficult case is presented.

[1437] Zobel v. Williams, 457 U.S. 55, 60 & n.6 (1982), and id. at 66–68 (Justice Brennan concurring), 78–80 (Justice O'Connor concurring) (travel).

[1438] Zablocki v. Redhail, 434 U.S. 374 (1978).

[1439] Maher v. Roe, 432 U.S. 464 (1977); Harris v. McRae, 448 U.S. 297 (1980).

[1440] *E.g.*, Jiminez v. Weinberger, 417 U.S. 628 (1974) (illegitimacy); Nyquist v. Mauclet, 432 U.S. 1 (1977) (alienage); Califano v. Goldfarb, 430 U.S. 199 (1977) (sex).

[1441] 457 U.S. 202 (1982).

[1442] *See*, *e.g.*, Yick Wo v. Hopkins, 118 U.S. 356 (1886); Guinn v. United States, 238 U.S. 347 (1915); Lane v. Wilson, 307 U.S. 268 (1939); Gomillion v. Lightfoot, 364 U.S. 339 (1960). Government may make a racial classification that, for example, does not separate whites from blacks but that by focusing on an issue of racial import creates a classification that is suspect. Washington v. Seattle School Dist., 458 U.S. 457, 467–74 (1982).