TEARS FOR TIERS ON THE REHNQUIST COURT

Stephen E. Gottlieb[*]

INTRODUCTION: TIERS ON THE REHNQUIST COURT

As Shakespeare might address Brutus: The fault is not in our theories but in ourselves.[1] Pogo was more blunt—"we have met the enemy and he is us."[2] There is no justification for the Rehnquist Court's corruption of equal protection doctrine and the academy must commit itself to the task of making that entirely clear.

The courts "scrutinize" law to make sure it does not violate equal protection. Scrutiny comes in three tiers described as minimal, intermediate and strict, and is supposed to be most rigorous or "strict" when core Fourteenth Amendment values are at stake. Most central to the Fourteenth Amendment is the protection of African-Americans. The Court wrote in *Strauder v. West Virginia*[3] that "the Fourteenth Amendment was framed and adopted . . . to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government . . . ."[4]

It has been clear since *Korematsu*[5] and *Hirabayashi*[6] during World War II that strict scrutiny must be applied to all claims of racial discrimination. Nevertheless, the Court is not applying strict scrutiny with any consistency in this area. Its language is strict—the justification for distinguishing among people on the basis of race can only be a compelling governmental interest, and even then the remedy must be narrowly tailored to the specific problem.[7] But the Rehnquist

---

[*] Professor of Law, Albany Law School; John F. Seiberling Visiting Chair of Constitutional Law, University of Akron School of Law, Spring, 2002; LL.B., Yale Law School, B.A., Princeton University. I would like to express my appreciation to William Conway for expert research assistance, to the members of the Journal and to participants of the Symposium for a very enlightening discussion.

[1] WILLIAM SHAKESPEARE, JULIUS CÆSAR. act 1. sc. 2.

[2] Walt Kelly, *Pogo*, Oct, 18, 1973 (cartoon strip).

[3] 100 U.S. 303 (1879).

[4] *Id.* at 306.

[5] Korematsu v. United States, 323 U.S. 214 (1944).

[6] Hirabayashi v. United States, 320 U.S. 81 (1943).

[7] Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 235 (1995), *cert. granted sub nom.* Adarand v. Mineta, 121 S. Ct. 1401 (2001), *cert. dismissed as improvidently granted*, 122 S. Ct. 511 (2001) (holding that "[f]ederal racial classifications [like those of a state] must serve a compelling governmental interest, and must be narrowly tailored to further that interest").

Court applies that theory only to claims of injustice to whites,[8] not to claims of injustice to blacks.[9] This is not *after* the rational basis era but very much part of it.

The Rehnquist Court has turned the command of the Fourteenth Amendment on its head. There are three crucial areas where tiers of scrutiny, designed to enforce the commands of the Fourteenth Amendment, break down. First is the choice of the philosophical system and goals that will structure how the tiers will be employed. The philosophical system determines the values that will reside in the opposing rights and interests, and the relationships among them, as they will be balanced among the tiers.

Second are the occasions for strict scrutiny, and the identification, scope, and weighting of governmental interests as compelling. All aspects of the tiers of scrutiny need to be specified precisely, or the tiers lose their meaning and cease to be effective in distinguishing actions consistent with the guarantee of equal protection from those that violate it. Without a clear approach to the treatment of compelling interests, any action can be made important enough to override the right to equal protection.

Third is the possibility of exiting the tiered structure via a detour to intent. If the courts can avoid the structure of tiers by resorting to an undefined language of intentions, the tiered structure is irrelevant. The Rehnquist Court has attacked the tiered structure of equal protection jurisprudence from all three directions. This Essay will begin with the detour by way of intentions, move through the Court's goals and philosophical choices, and then explore the way this Court has used tiers and whether those tiers can be tightened.

I. INTENTIONS

The alchemy that allows the substitution of minimal scrutiny where strict scrutiny seems to be called for is the "intent test."[10] The

---

[8] *See, e.g.*, Reno v. Bossier Parish Sch. Bd., 528 U.S. 320 (2000) (holding that Section 5 of the Voting Rights Act of 1965 does not prohibit preclearance of a redistricting plan enacted with a discriminatory but nonretrogressive purpose); Bush v. Vera, 517 U.S. 952 (1996) (applying strict scrutiny to invalidate redrawing of Congressional districts creating racial/ethnic minority districts); Miller v. Johnson, 515 U.S. 900 (1995) (holding Georgia redistricting plan violated the Equal Protection Clause).

[9] *See, e.g.*, United States v. Armstrong, 517 U.S. 456 (1996) (holding that for a defendant to be entitled to discovery on a claim that he was prosecuted on the basis of race, strong statistical evidence of discrimination is insufficient and the defendant must first identify the similarly situated defendants of other races who were not prosecuted); *see also* Joan Biskupic, *Provisions: Civil Rights Act of 1991*, 49 CONG. Q. 3620 (1991) (discussing the findings, purpose, and new remedies for discrimination).

[10] *See* Stephen E. Gottlieb, *Reformulating the Motive/Effects Debate in Constitutional Adjudication*, 33 WAYNE L. REV. 97 (1986) (explaining the way the intent test has muddied the meaning of equal protection).

Court held in *Washington v. Davis*[11] that "our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact."[12]

Since *Davis*, violation of the Equal Protection Clause has been defined by the purpose or intentions of the governmental body or official taking action. The notion of intentions, however, is not clearly defined. As the Court continued in *Davis*: "Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another."[13]

The Court understood that a discriminatory purpose may have to be inferred from the surrounding facts, and implicitly accepted the conclusion that determinations of discrimination will have to be a matter of judicial judgment. One cannot look into the mind of another and glean that individual's purposes. Thus, *Davis* posed the problem of how that judicial judgment is to be informed and operate.

Intentions may be proven either by statements or by effects.[14] Statements have become rare since the days of blatant resistance to school integration have passed, and the Court has often been loath to credit such statements as authoritative.[15] Thus, the courts infer discrimination from the absence of adequate reasons for the challenged behavior. However, though not explicitly, that merely reposes the issue of the proper tiers of scrutiny. It is clear that the Court will accept any and all explanations for actions challenged as racially discriminatory. If the challenged practice were measured against the tiers of scrutiny rather than the muddled concept of intentions, it would clearly be evaluated using the rational basis test. Several examples should make the point.

In *Hernandez v. New York*,[16] the prosecutor excluded all bilingual individuals from the jury, explaining that jurors who spoke Spanish might understand the witnesses' testimony without having to rely on the official translator. Since most of us would view understanding the witness as an advantage when sitting in the jury box, the Court, in accepting that as an explanation for a blatantly anti-Hispanic result, was clearly not applying anything close to strict scrutiny. Indeed, if the prosecutor's explanation was not a mere pretext, it surely could pass only the most minimal scrutiny.

---

[11] 426 U.S. 229 (1976).

[12] *Id.* at 239.

[13] *Id.* at 242.

[14] *See id.* (holding that discriminatory intent may be inferred from discriminatory impact).

[15] *See, e.g.*, Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) (dismissing the statements of a supervisor that the two segregated races in the company's cannery and offices would not get along).

[16] 500 U.S. 352 (1991) (holding that a prosecutor's use of peremptory challenges to strike two bilingual jurors did not violate the Equal Protection Clause).

In *Wards Cove Packing Co. v. Atonio*,[17] the Court refused to draw any inferences from the virtually complete racial segregation of the workforce at an Alaska cannery, the segregation of its recruiting into different communities, and the statement of a manager that the two groups would not work well together. Again, its lenity can only be described as minimal scrutiny.

In *United States v. Armstrong*,[18] the Court refused even to allow a United States district court to exercise its discretion to investigate charges of racial discrimination, charges that an experienced judge thought were worth pursuing. Instead of treating a pattern of discrimination as needing scrutiny, the Court declined to scrutinize for the most obvious explanation—that racial discrimination was at the core.

Partly because of *Wards Cove*, Congress passed the Civil Rights Act Amendments of 1991 and overruled nine cases in all.[19] The original Civil Rights Act of 1964 included provisions barring discrimination in public accommodations, employment, and programs receiving federal funds. One of the provisions of the 1991 Amendments was to make clear that when a plaintiff showed that a defendant's actions produced a discriminatory effect, the defendant had the obligation to explain and to give a good reason for those actions.[20] The Voting Rights Act of 1965 barred election rules that discriminated against minorities and required that changes in voting rules in covered jurisdictions be submitted to the Attorney General for approval.[21] In the Voting Rights Amendments of 1982, Congress changed voting rights law in a way similar to its 1991 changes to the Civil Rights Act in order to clarify the need to explain discriminatory effects.[22] The Rehnquist Court has been responding by challenging the constitutionality of the results test. In the Voting Rights Act cases, the Court is close to finding the results test unconstitutional, pointedly refusing to find that "compliance with the results test" justifies relief,[23] subordinating it to federalism,[24] and refusing to allow any relief if a racial classification's

[17] 490 U.S. 642 (1989) (requiring that the plaintiffs demonstrate specific elements of the employer's practices that significantly impacted nonwhites in order to prove a prima facie case of disparate impact).

[18] 517 U.S. 456 (1996) (holding that a defendant claiming prosecutorial racial discrimination must make a threshold showing that the government declined to prosecute similarly situated suspects of other races in order to be entitled to discovery).

[19] Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991).

[20] 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2001).

[21] Voting Rights Act of 1965, 42 U.S.C. § 1971 (2001).

[22] Voting Rights Act Amendments of 1982, 42 U.S.C. § 1973 (2001).

[23] *See* Bush v. Vera, 517 U.S. 952, 961-76 (1996) (affirming the district court's holding that the congressional districts were unconstitutional because race was the predominant factor in drawing each of the districts).

[24] *See* Reno v. Bossier Parish Sch. Bd., 528 U.S. 320, 336 (2000) (affirming the district court's holding to grant preclearance of respondent's redistricting plan despite the fact that the plan was enacted with a discriminatory but nonretrogressive purpose).

primary purpose is to correct the racial underrepresentation which triggered the application of the Voting Rights Act.[25] The results test is, after all, explicitly racial. The remedies it implies are also explicitly racial. Both are unacceptable to this Court. In other words, while the results test of the Voting Rights Act has not been found unconstitutional, its remedies have been. And since the Voting Rights Act itself is based on Section 5 of the Fourteenth Amendment but goes beyond the Court's interpretation of the provisions of Section 1, it hangs by a slim reed.[26] In the Court's view, intentions define equality to the exclusion of results.

The Court, however, infers racial intent to favor blacks from district lines that follow racial boundaries or create some districts with a majority of black voters—i.e., from the results.[27] Even as a remedy, the Court rejects those districting plans because they are, in its view, intentionally discriminatory on racial grounds. But the Court does not infer racial animus from district lines that give black voters fewer districts in which they are the majority than black voters' proportion of the population.[28] The Court treats the two situations differently to the extent that it finds one discriminatory and the other not, despite the fact that the Court has recognized that districting is always done with an awareness of race.[29] To this Court, intentions can truly mean anything.

II. THE COURT'S GOALS

The Court's goals are manifested in its equal protection jurisprudence. It is hard to find the limits of what the Court will allow to happen to blacks because it has not found cases in which it could define those limits. The Court's expressed insistence on colorblindness does not explain its refusal to see obvious discrimination.[30] The Con-

---

[25] *See* Miller v. Johnson, 515 U.S. 900, 927 (1995) ("[T]he Justice Department's implicit command that States engage in presumptively unconstitutional race-based districting brings the Voting Rights Act, once upheld as a proper exercise of Congress' authority under § 2 of the Fifteenth Amendment [citation omitted] into tension with the Fourteenth Amendment.").

[26] STEPHEN E. GOTTLIEB, MORALITY IMPOSED: THE REHNQUIST COURT AND LIBERTY IN AMERICA 111-12 (2000).

[27] *See, e.g., Vera*, 517 U.S. at 972-76 (holding irregular shape can only be explained by race); Shaw v. Reno, 509 U.S. 630, 658 (1993) (holding segregation by race states an equal protection claim).

[28] *See, e.g.*, Shaw v. Hunt, 517 U.S. 899, 913-15 (1996) (rejecting argument that a lower proportion of black majority voting districts than their proportion of the population would be reason enough to support a districting plan that would make up the difference); *Miller*, 515 U.S. at 923-24 (rejecting the same). In *Bossier Parish School Board*, 528 U.S. at 328-37, the Court held that the districting plan did not violate the preclearance requirements of the Voting Rights Act even though it was discriminatory.

[29] *See Miller*, 515 U.S. at 916 ("Redistricting legislatures will . . . almost always be aware of racial demographics . . . .").

[30] *Compare* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 212-31, 235-39 (1995), *cert. granted sub nom.* Adarand v. Mineta, 121 S. Ct. 1401 (2001), *cert. dismissed as improvidently granted,*

stitution requires government officers to be race-neutral in their decision making. Racial discrimination is obviously a breach of that constitutional requirement. Thus, neither the Constitution nor the principle of colorblindness requires judges to be blind to the misuse of color.

To explore the goals of the majority of the Court more deeply requires analyzing its members individually or in small groups. Justice Rehnquist, who has served the longest, has opposed every form of desegregation and integration since he joined the Court.[31] Justice Scalia has opposed the notion that society has any obligations to repair the damage inflicted by centuries of discrimination.[32] In a case dealing with discrimination against gays and lesbians, Scalia, writing also for Rehnquist and Thomas, suggested a view of discrimination that may help to explain the harshness of their handling of racial discrimination cases. They made it clear that for them, protection against any form of discrimination is itself a form of favoritism. Fat people, bald people, and silly people are discriminated against by society. Therefore, society should also be allowed to discriminate against gays and lesbians. Nothing should be done to protect them. In other words, whereas many people believe that the definition of neutrality or lack of bias is to treat people without regard to the characteristic involved, for Scalia, Rehnquist and Thomas, treating people that way is a form of favoritism.[33]

Scalia also made that point in a private memo circulated among the Justices in a case involving the discriminatory infliction of capital punishment. He was reacting to a study by Professors David C. Baldus, George Woodworth and Charles Pulaski that described the links between the race of the victim, the race of the accused, and the imposition of the death penalty.[34] Scalia wrote:

> I disagree with the argument that the inferences that can be drawn from the Baldus study are weakened by the fact that each jury and each trial is unique, or by the large number of variables at issue. And I do not share the view, implicit in [Powell's draft opinion], that an effect of racial factors upon sentencing, if it could be shown by sufficiently strong statistical

---

122 S. Ct. 511 (2001), *and* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 521 (1989) (Scalia, J., concurring) (requiring colorblindness) *with* United States v. Armstrong, 517 U.S. 456 (1996), *and* Hernandez v. New York, 500 U.S. 352 (1991) (exhibiting blindness to the impact of color).

[31] GOTTLIEB, *supra* note 26, at 76-77.

[32] *Id.* at 93-94.

[33] *See* Romer v. Evans, 517 U.S. 620, 641, 645 (1996) (Scalia, J., dissenting); *see also* GOTTLIEB, *supra* note 26, at 33.

[34] *See* McCleskey v. Kemp, 481 U.S. 279, 286-87 (1987) (describing the Baldus study submitted as an exhibit at trial); *see also* DAVID C. BALDUS, GEORGE WOODWORTH & CHARLES A. PULASKI, JR., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS (1989); David C. Baldus, George Woodworth & Charles A. Pulaski, Jr., *Law and Statistics in Conflict: Reflections on* McCleskey v. Kemp, *in* HANDBOOK OF PSYCHOLOGY AND LAW (D.K. Kagehiro & W.S. Laufer eds., 1992).

> evidence, would require reversal. Since it is my view that the unconscious operation of irrational sympathies and antipathies, including racial, upon jury decisions and (hence) prosecutorial [ones], is real, acknowledged by the [cases] of this court and ineradicable, I cannot honestly say that all I need is more proof.[35]

He concluded that racial discrimination in sentencing gave rise to no rights.[36] In effect, blacks, like gays, must take the world as they find it, filled with prejudice and discrimination, even where life itself is at stake. Consistent with that view, Scalia, Rehnquist, and Thomas have all joined a number of opinions refusing relief even where there was clear discrimination.[37]

Along with his agreement that people should get no favoritism, Thomas has invited some doubt about whether he objects to segregation so long as it is not mandatory.[38] In other words, a form of freedom of association seems to dominate his thinking in this area and may, if limited to the rights of whites, affect the thinking of Rehnquist and Scalia as well.

Justice O'Connor seems driven by a view of proper behavior—one must jump through certain hoops to satisfy her.[39] She would not categorically exclude all forms of assistance for disadvantaged blacks. However, she insists on proof that plaintiffs are the specific blacks injured by discrimination. Where discrimination was practiced generally throughout the society, such proof is very difficult to provide. She eliminates generalized "societal discrimination" so that only those blacks who overcame various hurdles to apply for the specific opportunity in question might be compensated. In *Croson*, for example, she wanted to know how many qualified minority-owned contracting firms there were in Richmond.[40] If one could not move up through the construction industry hierarchy in order to develop an established contracting firm, however, then applying for specific construction jobs only to be rejected would itself be beyond the horizon

---

[35] *See* Dennis D. Dorin, *Far Right of the Mainstream: Racism, Rights, and Remedies from the Perspective of Justice Antonin Scalia's* McCleskey *Memorandum*, 45 MERCER L. REV. 1035, 1038 (1994) (quoting Memorandum from Justice Antonin Scalia to the Conference (Jan. 6, 1987) in McCleskey v. Kemp, 481 U.S. 279 (1987) (No. 84-6811), THURGOOD MARSHALL PAPERS, The Library of Congress, Washington, D.C.); *see also* DAVID A. SCHULTZ & CHRISTOPHER E. SMITH, THE JURISPRUDENTIAL VISION OF JUSTICE ANTONIN SCALIA 195 (1996) (describing Scalia's reluctance to use racial factors to reverse decisions).

[36] McCleskey v. Kemp, 481 U.S. 279, 291 (1987) (holding, in an opinion joined by Justice Scalia, that evidence of discrimination in sentencing did not show discriminatory intent on the part of any relevant persons or institutions).

[37] *See, e.g.*, Hernandez v. New York, 500 U.S. 352, 355 (1991) (Kennedy, J., plurality opinion) (refusing relief on the basis of an ironic pretext); *see also id.* at 372 (O'Connor, J., concurring in the judgment).

[38] GOTTLIEB, *supra* note 26, at 119-21.

[39] *Id.* at 94-96.

[40] City of Richmond v. J.A. Croson Co., 488 U.S. 469, 501-02 (1989) ("[W]here special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task.").

for blacks. Thus, the exclusion of generalized societal discrimination, because of the difficulty of estimating its extent and targets, has had the effect of excluding most if not all claims for relief. Her colleagues further insisted on identifying the specific acts and people responsible for the discrimination and tailoring relief only to their activities. Justice O'Connor refused to shut the door that far, given the difficulties of tracing exactly who hurt whom, but the burden she placed on palliative measures was not considerably less.[41]

Justice Kennedy has joined most of the conservative group's rejection of relief for racial minorities. Where discrimination has been found as a fact, however, he has been more prepared than some of his colleagues to require relief. A prominent example is his opinion prohibiting the use of peremptory strikes to exclude jurors on racial grounds.[42] He has not defined anti-discrimination law as "favoritism" in the way that Scalia, Rehnquist, and Thomas announced in discussing the treatment of gays and lesbians in *Romer v. Evans*.[43] Indeed, Justice Kennedy wrote the majority opinion in *Romer*, overturning an amendment to the Colorado Constitution that would have banned relief against discrimination to gays and lesbians. Justice O'Connor joined the majority opinion as well. Similarly, Kennedy has not joined Thomas and Scalia in their skepticism about differentiating discrimination from favoritism in the voting rights cases.[44] Nevertheless, like his more conservative colleagues, Kennedy requires strict scrutiny for affirmative action, which favors minorities, while accepting minimal explanations for decisions that injure minorities.[45]

One wonders why this rejection of racial relief is so complete among those five Justices. None of them has been particularly attached to liberty in any other context save property.[46] Freedom even from unjust execution by the state seems not to bother the Rehnquist-Scalia-Thomas trio.[47]

---

[41] *Id.* at 469 (relating the level of burden placed by Justice O'Connor).

[42] Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991).

[43] 517 U.S. 620, 636-53 (1996) (Scalia, J., dissenting).

[44] GOTTLIEB, *supra* note 26, at 41-43.

[45] *Id.* at 95-96.

[46] *Id.* at 36-37.

[47] *See* Schlup v. Delo, 513 U.S. 298, 339 (1995) (Rehnquist, C.J., dissenting) (arguing that a death-row inmate claiming that newly discovered evidence shows a miscarriage of justice should have to produce "clear and convincing evidence that but for constitutional error, no reasonable juror would [have found the petitioner] eligible for the death penalty" rather than the probability that he is innocent of the crime for which he is to be executed); Jacobs v. Scott, 513 U.S. 1067 (1995) (Stevens, J., dissenting from denial of certiorari) (noting that the same prosecutor who prosecuted Jacobs presented an inconsistent claim about who actually committed the murder at issue in prosecuting and obtaining a conviction of another individual for the same murder); Herrera v. Collins, 506 U.S. 390, 403-05 (1993) (rejecting the "'probably' innocent" standard for allowing a district judge to consider evidence acquired subsequent to conviction and determine whether further relief is warranted). All three are discussed in GOTTLIEB, *supra* note 26, at 35-36, 207-08.

There are several possible reasons. One is that these Justices are loyal to their class and do not want to share with others. A second is a fear of cultural miscegenation. There is a strand of conservative thought that finds it easier to inculcate "morality" in homogeneous communities. In this view, all forms of integration threaten the morality of homogeneous communities where everyone is each other's keeper and everyone is Big Brother.[48] Privacy, of course, has never been high on the agenda of this Court.[49] Given the consistency of the votes of this trio of Justices on racial issues, it is impossible to exclude the possibility that their racial views are related to their attack on moral relativism.[50]

Those goals—class and racial preferences—are in profound conflict with the Fourteenth Amendment. The expression of those goals via tiers of scrutiny is mediated by the Justices' jurisprudential assumptions—their rejection of relativism and possibly their preference for homogeneous communities, their rough-and-tumble definition of equality as equal vulnerability to prejudice and their assumptions about racial inferiority.

In other words, the most likely conclusion to come from their consistent antipathy to racial remedies and their rejection of what they treat as moral relativism is that no approach to strict scrutiny would have any significant effect on the Court's handling of racial discrimination.

III. ALTERNATIVES AND THE JURISPRUDENCE OF TIERS

There is another reason why strict scrutiny of claims of racial discrimination has become minimal scrutiny on the Rehnquist Court. This Court is philosophically at odds not only with the objective, but also with the method—the mode of reasoning—that strict scrutiny embodies.

Strict scrutiny, the announced standard for cases involving racial classifications, is the most exacting standard of review. The idea behind strict scrutiny is that discrimination on the basis of forbidden categories requires a particularly important justification. One of the usual formulations of strict scrutiny is that members of protected classes must be treated without distinction from others unless differential treatment is necessary to the achievement of a compelling gov-

---

[48] GOTTLIEB, *supra* note 26, at 58-59.

[49] *See, e.g.*, Florida v. Riley, 488 U.S. 445 (1989) (majority opinion joined by Justices Rehnquist, Scalia, and Kennedy holding that police use of low-flying helicopter to view marijuana growth in defendant's greenhouse did not violate Fourth Amendment); *but see* Kyllo v. United States, 121 S. Ct. 2038 (2001) (majority opinion by Justice Scalia holding that use of thermal imaging device to detect marijuana growth in private residence violated the Fourth Amendment).

[50] GOTTLIEB, *supra* note 26, at 57-59.

ernment interest, where the latter term is meant to identify only the most important public purposes.[51]

Intermediate scrutiny has generally been the standard applied to claims of gender discrimination. Gender is not mentioned in Section 1 of the Fourteenth Amendment and was specifically rejected in the discussions of the Thirty-Ninth Congress that wrote it. The Court has concluded, however, that gender-based classifications now require some judicial supervision. Unwilling to treat it in the same manner as the race cases, however, the Court developed a middle category. The usual formula is that discrimination on the basis of gender is not permissible except where it would substantially further an important government objective:

> The State must show "at least that the [challenged] classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.[52]

Rational basis or minimal scrutiny was formed in the argument over the Court's intervention in economic issues in the early portion of the twentieth century. The usual formulation is that the courts will presume that government actions are constitutional if there is any reason supporting them. Rational basis comes in at least two forms of dental health—with and without "teeth." The Court described the stronger version of the rational basis test in *City of Cleburne v. Cleburne Living Center, Inc.*:

> To withstand equal protection review, legislation that distinguishes between the mentally retarded and others must be rationally related to a legitimate governmental purpose. This standard, we believe, affords government the latitude necessary both to pursue policies designed to assist the retarded in realizing their full potential, and to freely and efficiently engage in activities that burden the retarded in what is essentially an incidental manner. The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.[53]

In other words, the legislation must make sense to the Court. The weaker, and more commonly applied, version was described in *Williamson v. Lee Optical of Oklahoma, Inc.*: "[T]he law need not be in

---

[51] *See generally* PUBLIC VALUES IN CONSTITUTIONAL LAW (Stephen E. Gottlieb ed., 1993) (examining what constitutes public policy so compelling that constitutional rights may be sacrificed to them, and exploring its significance and implications).

[52] United States v. Virginia, 518 U.S. 515, 533 (1996) (alterations in the original) (internal citations omitted) (holding sex-based admissions policy of a publicly-funded university violated Equal Protection Clause where Virginia failed to provide exceedingly persuasive justification for the policy and failed to show that the policy was substantially related to the achievement of its stated objectives).

[53] 473 U.S. 432, 446 (1985); *see also id.* at 455-60 (Marshall, J., dissenting).

every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."[54]

In other words, the law does not have to make sense to the Court—it is enough that some others might think it rational. By exercising only minimal scrutiny, especially in the weaker version, the Court defers to the other branches of government, often referred to with some hyperbole and conceptual unclarity as the democratically elected branches.[55]

Together, these form the tiers of scrutiny. Their objective is to tie the levels of scrutiny to the seriousness of constitutional concerns. Minimal scrutiny minimizes judicial oversight and the time and resources it takes to explain a decision to the courts, and makes it easy for the other branches to function without judicial intervention where they govern activities without special reason for concern about official misbehavior. Intermediate and strict scrutiny, however, have the Court evaluating government action skeptically and less deferentially in those areas where there are special reasons for concern. One well-known formulation for those special reasons for concern is that they are areas where the democratic process predictably breaks down.[56] Since democratic self-government is one of the major justifications for law, there is less reason for the courts to restrain themselves from intruding where that process breaks down. And racial prejudice tends to exclude minorities from participation in the democratic process and to exclude them and their needs from consideration by those who wield power.

All of these tiers of scrutiny are scales on which competing values are balanced. In each case, the injury to the right involved is placed on one side of the imaginary scale. On the other side, what is placed on the scale depends on the applicable tier of scrutiny. In strict scrutiny, only the most important governmental objectives are allowed on the scale, and even then only where the means are necessary to the objective. In intermediate scrutiny, only important government objectives furthered by means substantially related to those objectives are allowed on the scale. In minimal scrutiny, any rational notion,

---

[54] 348 U.S. 483, 487-88 (1955).

[55] In some states of course, the judges are also elected though under somewhat different selection provisions. *See* ROBERT JUSTIN LIPKIN, CONSTITUTIONAL REVOLUTIONS: PRAGMATISM AND THE REVOLUTIONARY ROLE OF JUDICIAL REVIEW IN AMERICAN CONSTITUTIONALISM 8 (2000); *see, e.g.*, CAL. CONST. art. VI, § 16; MONT. CONST. art. VII, § 8; N.C. CONST. art. IV, § 9; WASH. CONST. art. IV, § 5; ARK. CODE ANN. § 16-13-903 (2000); GA. CODE ANN. § 21-2-151 (2000); LA. REV. STAT. ANN. § 13:1872 (1999); MICH. COMP. LAWS § 600.803 (2000); MISS. CODE ANN. § 9-4-5 (1999); N.D. CENT. CODE § 27-05-02 (2000); OHIO REV. CODE ANN. § 1901.07 (1998); S.C. CODE ANN. § 14-5-610 (2000); TENN. CODE ANN. § 16-2-505 (2000) (providing for the election of judges); *see also* MD. CONST. art. IV, § 5A; MO. CONST. art. 5, § 25(c)(1) (providing for judicial retention elections).

[56] *See, e.g.*, United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

sometimes described as anything that rational people might think rational, goes on the scale.

To understand the role that tiers of scrutiny play on the Rehnquist Court, it is necessary to examine the philosophical structure of tiers of scrutiny. Tiers fit most comfortably within a consequentialist jurisprudence. The crucial element is that the philosophical approach allow or require some form of comparison.[57] This is minimized in Kantian jurisprudence, which is characterized by the "categorical imperative" and attempts to be categorical rather than comparative. Bruce Ackerman summarized this approach to law as "the idea that Policymakers are not to conceive of their fellow citizens as merely means to the larger end of maximizing social utility, but are instead to treat them as ends in themselves."[58] Even Kantian jurisprudence, which was created in a search for absolutes, can allow some comparisons—either between more or less of the same value or between values of differing import.[59] Consequential thinking extends the point to a greater variety of values and circumstances. Utilitarianism is a maximally consequentialist jurisprudence, allowing comparison of quite different harms and benefits among entirely different people.[60] Utilitarianism "insists that the sum of social satisfactions be maximized."[61] Tiers of scrutiny flow from such an approach because tiers allow the comparison that consequentialism demands.[62]

---

[57] *See* Stephen E. Gottlieb, *The Paradox of Balancing Significant Interests*, 45 HASTINGS L.J. 825 (1994) (exploring the way that formal approaches to law exclude balancing from the formal argument but concluding that it is difficult to do something other than an intuitive comparison).

[58] BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 72 (1977). In a modern translation, Kant's principle is rendered:

> But suppose that there were something the existence of which in itself had absolute worth, something which, as an end in itself, could be a ground of definite laws. In it and only in it could lie the ground of a possible categorical imperative, i.e., of a practical law. Now, I say, man and, in general, every rational being exists as an end in himself and not merely as a means to be arbitrarily used by this or that will .... The practical imperative, therefore, is the following: Act so that you treat humanity, whether in your own person or in that of another, always as an end and never as a means only.

IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 46-47 (Lewis White Beck trans., Macmillan Publ'g Co. 1985) (1785).

[59] Ackerman suggests a kind of calculus for eminent domain cases based on Kantian thinking which provides considerable protection for property owners. *See* ACKERMAN, *supra* note 58, at 72-73.

[60] There are, of course, numerous examinations of these ideas but one of the most interesting and imaginative is that by Bruce Ackerman. *See* ACKERMAN, *supra* note 58, at 41-87.

[61] *See id.* at 71. Ackerman continues that utilitarianism's critics treat utilitarianism as indifferent to the distribution of social satisfaction. *Id.* Utilitarians, however, tend to assume that the marginal value of money goes up as its holders have less and therefore tend to urge redistribution in a variety of ways.

[62] A "sliding scale," such as the one Justice Marshall proposed would, of course, do this at least as well. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 98-99 (1973) (Marshall, J., dissenting); Richardson v. Belcher, 404 U.S. 78, 90 (1971) (Marshall, J., dissenting); Dandridge v. Williams, 397 U.S. 471, 519-21 (1970) (Marshall, J., dissenting).

Tiers of scrutiny distribute control over goals among the courts and the agencies they supervise. The higher the level of scrutiny, the greater the judicial control. All levels of scrutiny imply a balance between the harm caused by the violation of some protected right or interest and the social purposes pursued over the damaged body of that right or interest. At the more consistent end we can discern a philosophy, a jurisprudence of ends and means.

It has long been noted that strict scrutiny flushes out bad motives.[63] If the reasons given for trampling constitutional rights provide poor justification, it is likely that the trampling was, in fact, based on bad motives. It is unclear why it is necessary to reconvert the discovery of good or bad results into the language of intentions. We might have stopped and said that the results did or did not justify the means, the loss of this or that constitutional liberty. But we reconvert our findings into the language of intentions in some areas of law as the result of the Court's decisions in such cases as *Washington v. Davis.*[64]

Reversing the same logic, strict scrutiny also flushes out judicial assumptions. As the courts allow important rights to be trampled for little gain, it discloses all too clearly a hierarchy of judicial purposes. We can determine, as above, whether the courts treat discrimination as an evil or a benefit, and whether they treat minorities as deserving equal treatment or needing to justify the treatment they receive. When the Court decided that a prosecutor was justified in dismissing Hispanic jurors because they were bilingual and would be able to understand the witness without the aid of the translator, we might conclude that the justification was trivial, even wrongheaded given our general ability to understand witnesses unaided, and conclude further that the Court had treated discrimination as even less important.[65] Or when the Court rejected the standard of "probable innocence" for ordering a hearing of a defendant awaiting execution, we can conclude that finality is more important to the Court than life.[66]

A. The Weights on the Scales in a Consequentialist Jurisprudence of Tiers

The crucial issues, therefore, are what weights are inserted in the methodology. On the Court there are two large competing approaches with many variations. One of the competing approaches is both consequentialist and utilitarian.[67] Consequentialism is, as its

---

[63] *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST 145-46 (1980); Gottlieb, *supra* note 10, at 105-07.

[64] 426 U.S. 229 (1976).

[65] Hernandez v. New York, 500 U.S. 352, 361 (1991).

[66] Herrera v. Collins, 506 U.S. 390, 400 (1993).

[67] *See* GOTTLIEB, *supra* note 26, at 87, 140, 160, 197.

name implies, about consequences. What is good or bad is evaluated by its consequences. With respect to equal protection in general, and race in particular, consequentialists can look toward eradication of differences (often called assimilation), toward pluralism, or toward separation. Each is a state of affairs toward which some people might work. They would then measure the quality of proposals according to how well it brought about the chosen goal.

Utilitarianism is a specific type of consequentialism. Utilitarians like those measures that result in the greatest human happiness and the least pain.[68] Those who believe that human happiness will be maximized by assimilation, pluralism, or tolerance can support varieties of the contact hypothesis.[69] The idea behind the contact hypothesis, which is "as American as apple pie," is that as people get to know each other they learn to respect, even like each other and eventually to support each other. That is not always true of course. Contact often breeds conflict. Social scientists have labored to find the circumstances in which contact brings concord and those in which it does not. But it is typical of Americans to believe that contact will, eventually, erode hostility and result in some blending of manners and ideas.[70] Utilitarians who support diversity in some form are therefore likely to support the contact hypothesis because they prefer the consequences it is believed to produce.

Those who are concerned with a different set of consequences, who are not utilitarian but who focus on the consequences for a specific group, or a stricter moralism more easily enforceable by homogeneous groups, may fear biological or cultural miscegenation. If those are their fears, they must fear contact because it would bring about what they fear. There is a strand of conservative thought that leans in that direction[71] and that has never accepted the demise of *Plessy v. Ferguson.*[72] Each of those consequentialist versions fills the scales with different values.

---

[68] *See id.* at 147-69.

[69] *See, e.g.*, GORDON ALLPORT, THE NATURE OF PREJUDICE 488-91 (1954); LAWRENCE CREMIN, TRANSFORMATION OF THE SCHOOL: PROGRESSIVISM IN AMERICAN EDUCATION, 1876-1957 10 (1964); PHYLLIS A. KATZ & DALMAS A. TAYLOR, ELIMINATING RACISM: PROFILES IN CONTROVERSY 360 (1988) (describing the contact hypothesis); HECTOR ST. JOHN DE CRÉVECOEUR, LETTERS FROM AN AMERICAN FARMER (E. P. Dutton, 1957) (1782); ISRAEL ZANGWILL, THE MELTING POT: DRAMA IN FOUR ACTS (Arno Press, 1975) (1932); Mark A. Chesler, *Contemporary Sociological Theories of Racism, in* TOWARDS THE ELIMINATION OF RACISM 36 (Phyllis A. Katz ed., 1976); Gary Gerstle, *Liberty, Coercion, and the Making of Americans*, 84 J. AMER. HIST. 524 (1997).

[70] I have described this at length in an article on *Brown v. Board of Education*, 347 U.S. 483 (1954), prepared for appearance in the Suffolk University Law Review.

[71] *See* GOTTLIEB, *supra* note 26, at 57-59, 75-76, 92-97.

[72] 163 U.S. 537 (1896).

B. *The Weights on the Scales in an Ontological and/or Non-Situational Jurisprudence of Tiers*

Ontology is literally a study of the nature of existence. It refers to what we think is natural. Ontological jurisprudence draws from ideas about what is natural, inherent or inalienable, whether rights or law or both. Such "natural" thinking can be consequentialist, but need not be. If one believes that the golden rule expresses natural law or right, it tends to be consequentialist. We would evaluate choices by the consequences they bring for others or for society. The emphasis is on substantive justice. In the scheme of John Rawls, differences in the circumstances people enjoy require justification.[73] This is inherently consequentialist. Results count and define the justice of the rules themselves.

Natural law or rights, however, can also be understood in a self-regarding way.[74] Self-regarding rules provide right-holders with options irrespective of the harm to others, i.e., regardless of the consequences. That is perhaps the common way of thinking about natural law or rights although it clearly does not need to be so. In this self-regarding, nonconsequentialist way of thinking about law, the "justice" of the consequences is defined by the rule. The consequences do not have a role to play in defining what should happen.

Procedural justice can mean the provision of a set of rules that bind all who are in similar circumstances, and can mean further that justice is thereupon satisfied, without more. This is also referred to as formalism or formal justice. Procedural justice flows more easily from the self-regarding fork of natural law thinking. But which procedure counts?[75] The immediate decision? A decision about allocations? A decision about the rules of the game? If substance counted, then the crucial procedure would be the allocation procedure or the decision about the rules of the game. But if substance does not count, there may be no standard on which to base the choice of allocation or rules, in which case any rule is as good as another and "the cookies crumble" as they will. It is frequently said that it is often better that one have rules than that the rules be good ones.[76] That is the essence of procedural justice, and it is clear, for example, in the writing of Justice Scalia. Indeed the title of one of his articles makes the point unmistakably—*The Rule of Law as a Law of Rules.*[77]

If social shares are themselves natural, if they are preordained, proper, earned, or protected, then there is no justification for provid-

---

[73] JOHN RAWLS, A THEORY OF JUSTICE 103 (1971).

[74] *See* Ian Shapiro, *Notes Toward a Conditional Theory of Rights and Obligations in Property, in* STEPHEN E. GOTTLIEB, JURISPRUDENCE: CASES AND MATERIALS 379 (1993).

[75] *See* Margaret Jane Radin, *Reconsidering the Rule of Law,* 69 B.U. L. REV. 781, 787, 792 (1989); Joseph Raz, *The Relevance of Coherence,* 72 B.U. L. REV. 273, 301-02 (1992).

[76] *See, e.g.,* Labine v. Vincent, 401 U.S. 532, 537 (1971).

[77] 56 U. CHI. L. REV. 1175 (1989).

The practitioners of formalism argue, however, against the inclusion of consequences in any form.[81] For them, any inclusion of consequences results in a "living" Constitution that reflects the judges' preferences rather than the founders' work.[82] And in a perverse intrusion of consequentialism into their own theory, they argue that consequential rules fail to bind the Justices themselves as well as formal ones. Thus in Scalia's understanding, rules are more important than good rules because the search for good ones unleashes the judges and Justices.[83]

IV. TIERS OF SCRUTINY ON THE REHNQUIST COURT

Tiers of scrutiny have perverse results on the Rehnquist Court for several reasons. First, philosophically the Rehnquist Court proceeds from nonconsequentialist *a priori* values. The *a priori* values pursued by the Rehnquist Court leave little room for equality except as a procedural value. The conservative majority argues that equality is formal, not substantive.[84] With respect to affirmative action, for example, the conservative majority believes there is and should be no "difference between a 'No Trespassing' sign and a welcome mat."[85] There is no difference between benign and malignant distinctions. The difference is only in the beholder.

Second, the Court has never moved beyond an *ad hoc* specification of the elements of the compelling interest test. For that test to constrain decision making, it is necessary to specify what will engage each of the levels of scrutiny, what will count as an interest of sufficient degree, what the scope of those interests will be, and how they shall be weighed. Absent these types of specificity, the tiers are simply an invitation to roam at will among the maxims of constitutional law. Many jurists and scholars have delved into specification of the rights that might invoke the tiers of scrutiny.[86] But the Rehnquist Court has rejected that scholarship,[87] has continued to invoke varieties of elevated

---

[81] *See, e.g.*, William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976).

[82] *See id.* (noting the interpretive aspects of formalistic theory).

[83] *See* Scalia, *supra* note 77, at 1175.

[84] *See, e.g.*, Shaw v. Hunt, 517 U.S. 899, 904-05 (1996) (stating the colorblindness principle); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 520-21 (1989) (Scalia, J., concurring) (same); *cf.* Bush v. Vera, 517 U.S. 952, 1071-72 (1996) (Souter, J., dissenting) (arguing against the colorblindness principle).

[85] *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 245 (1995) (Stevens, J., dissenting), *cert. granted sub nom.* Adarand v. Mineta, 121 S. Ct. 1401 (2001), *cert. dismissed as improvidently granted*, 122 S. Ct. 511 (2001); *cf. Vera*, 517 U.S. at 1071-72 (Souter, J., dissenting).

[86] *See, e.g.*, United States v. Carolene Prods. Corp., 304 U.S. 144, 152 n.4 (1938); *see generally* ELY, *supra* note 63.

[87] *See, e.g., Croson*, 488 U.S. at 494-96 (holding that the standard of review under the Equal Protection Clause does not depend on the race of those classified).

ing anything else. If that were true, protection against discrimination would be favoritism. Justice Scalia took this position in his dissent in *Romer v. Evans*, arguing that everyone is subject to the prejudices of others, and that protection from such prejudices is not equality but favoritism.[78] Thus formalism has consequences even as it argues against taking consequences into account. Under a formal definition of equal protection, it does not matter what happens or to whom it happens, and no account of substantive justice can be allowed to influence the definition of equality. Thus, "invidiousness" should be irrelevant to the choice of definition. Not only "affirmative action" but anti-discrimination measures are affected by the distinction between formal and substantive justice because rules that do not mention race become sanctified as "race-neutral," and explanations of actions that do not mention race are taken to mean that there were no bad intentions, even though the rules and the explanations have, or obscure, large impacts. On purely formal, procedural grounds, there is no reason to prefer a different definition of discrimination. Indeed there is not a "better" one. As Justice Thomas argued in *Adarand Constructors, Inc. v. Pena*, it all boils down to whose ox is gored, and there is no standard by which to judge that.[79]

C. What Role Do Tiers Play in Nonconsequentialist Theory?

Tiers do not fit nonconsequentialist theory well. There are two reasons. First, nonconsequentialist theory is definitional and deductive. There is not supposed to be anything to balance. Second, *a priori* values are not subject to criticism.

There can be space in definitions for consequences. Consequences come in the form of analogies, and in the form of parades of horribles. In other words, psychologically, consequences influence definitions. But they remain theoretically concealed and hard to argue because they are not supposed to be there. Those who espouse nonconsequentialism may yet incorporate consequences in their thinking on occasion—even frequently.[80] It is not hard to demonstrate the formalists' inability or unwillingness to exclude consequences in practice.

---

[78] 517 U.S. 620, 641, 645 (1996) (Scalia, J., dissenting).

[79] Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 241 n.* (1995) (Thomas, J., concurring) (internal citations omitted), *cert. granted sub nom.* Adarand v. Mineta, 121 S. Ct. 1401 (2001), *cert. dismissed as improvidently granted*, 122 S. Ct. 511 (2001) ("It should be obvious that every racial classification helps, in a narrow sense, some races and hurts others. As to the races benefited, the classification could surely be called 'benign.' Accordingly, whether a law relying upon racial taxonomy is 'benign' or 'malign,' either turns on 'whose ox is gored.'").

[80] *See* Glenn A. Phelps and John B. Gates, *The Myth of Jurisprudence: Interpretive Theory in the Constitutional Opinions of Justices Rehnquist and Brennan*, 31 SANTA CLARA L. REV. 567 (1991); Glenn A. Phelps and Timothy A. Martinez, *Brennan v. Rehnquist: The Politics of Constitutional Jurisprudence*, 22 GONZ. L. REV. 307 (1987).

scrutiny without a discernable plan,[88] and has regularly rejected claims of right that would invoke heightened scrutiny despite strong arguments to the contrary in fact and in prior law.[89] Some scholarship has gone into the identification and source of interests as well as the possibility of a link to rights.[90] But the Court has continued to discuss interests based on intuitions[91] no more clear than Justice Stewart's "I know it when I see it" procedure.[92] And some scholarship has also gone into the issue of the scope of values treated as compel-

---

[88] In *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), the Court declined to use the compelling interest test, refusing to treat homosexuals as a discrete and insular minority or as otherwise requiring judicial protection, although in *Romer v. Evans*, 517 U.S. 620 (1996), it seemed to take the reverse stand. In *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000), the Court evaluated congressional power over age discrimination by using the tiers of scrutiny and refused to find age discrimination sufficiently harmful to justify national legislation.

[89] In *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999), the Court declined to find that non-citizens had an interest in equal protection of the law, though the Court had protected aliens from deprivations of equal protection in previous cases. *See, e.g.*, Nyquist v. Mauclet, 432 U.S. 1 (1977) (holding New York law denying financial aid for education to resident aliens not seeking naturalization violated the Equal Protection Clause); Hampton v. Mow Sun Wong, 426 U.S. 88 (1976) (holding the Civil Service Commission's law excluding non-United States' citizens and non-natives of American Samoa from employment in most civil service positions violated Equal Protection Clause); Truax v. Raich, 239 U.S. 33 (1915) (holding Arizona law requiring that eighty percent of an employer's workforce be United States' citizens violated Equal Protection Clause). In *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000), the Court continued to wear blindfolds about incumbency advantages that it first put on in *Buckley v. Valeo*, 424 U.S. 1 (1976), and so failed to credit the importance of the claim being raised or the need to evaluate it under elevated scrutiny. In *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Court discounted the record of religious discrimination. And in *United States v. Morrison*, 529 U.S. 598 (2000), the Court discounted the record of state failure to handle violence against women.

[90] *See* PUBLIC VALUES IN CONSTITUTIONAL LAW, *supra* note 51; Symposium, *When Is a Line as Long as a Rock Is Heavy? Reconciling Public Values and Individual Rights in Constitutional Adjudication*, 45 HASTINGS L.J. 707-1120 (1994); *see also* Richard H. Fallon, Jr., *Individual Rights and the Powers of Government*, 27 GA. L. REV. 343 (1993); Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential but Unanalyzed Term in Constitutional Adjudication*, 68 B.U. L. REV. 917 (1988).

[91] *See, e.g.*, Hill v. Colorado, 530 U.S. 703 (2000) (judgment about the size of appropriate bubble zone around abortion clinics based on the significance of confrontational and harassing conduct); Troxel v. Granville, 530 U.S. 57 (2000) (basing determination of the constitutionality of a visitation order partly on judgment about the constitutional status of the best interests of the children); Saenz v. Roe, 526 U.S. 489 (1999) (basing constitutionality of state law partly on the constitutional status of state reasons for imposing residential criteria for welfare benefits); Vacco v. Quill, 521 U.S. 793 (1997) (basing holding on the state's public interest in outlawing physician-assisted suicides); Washington v. Glucksberg, 521 U.S. 702 (1997) (basing determination of the constitutionality of laws prohibiting physician-assisted suicides on the importance of the states' interests in preventing such suicides). In the Voting Rights Act cases, the Court has been unwilling to decide whether compliance with the Voting Rights Act qualifies as a compelling government interest, a conclusion which is particularly remarkable because the Act prohibits the "denial or abridgment" of the right to vote, a provision which would track the requirements of the Fourteenth Amendment except for the Court's insistence on distinguishing between intent and reality. *See* 42 U.S.C. § 1973 (2001); Hunt v. Cromartie, 526 U.S. 541 (1999); Abrams v. Johnson, 521 U.S. 74 (1997); Shaw v. Hunt, 517 U.S. 899 (1996); Bush v. Vera, 517 U.S. 952 (1996).

[92] Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

ling,[93] but that too depends on the Court's willingness to specify the process more completely.

Third, tiers of scrutiny are completely undermined by reversion to an undefined version of intentions analysis that is equivalent to minimal scrutiny or the rational basis test.[94] The application of rules that provide no mention of race suffice to convince this Court that the crucial boundary of bad intentions has not been crossed. Thus, it was able to find that hiring different racial and ethnic populations in different locations for work at an Alaskan cannery, though resulting in a segregated workforce, was not discriminatory because the rules made no mention of race or ethnicity.[95] The Court was able to find that it was not racial discrimination to dismiss two Hispanic jurors because it could be explained, however trivially, in terms that did not mention race or nationality, as excluding bilingual jurors who would not rely on the official translator but instead would rely directly on the witnesses' testimony.[96] Formally neutral rules give this Court the ability to ignore substantive inequality. Its blindness to consequences is repeated in such areas as the First Amendment's religion clauses, where the evenhanded enforcement of rules with very uneven effects on people of different faiths has seemed entirely appropriate, with little need for justification.[97]

In these ways, the Rehnquist Court has dismantled any notion of substantive equality, rejected affirmative action categorically, and dismissed charges of discrimination. Conversely, tiers of scrutiny are very helpful to this Court in striking down any attempt to ameliorate the condition of racial minorities. The Court requires strict scrutiny of any effort to redress racial discrimination under the Voting Rights Act. The result has been that multiracial districts have been voided as racial segregation and as unconstitutional gerrymanders even though voiding them left racial minorities with less than a proportional share of electoral power.[98] The Court also requires strict scrutiny of efforts to redress racial discrimination through set-aside programs. In effect, the Court defines colorblindness, in goal and in remedy, as the preeminent value, and notices the breach only on behalf of white complainants, and therefore substantive justice fails the comparison. Tiers of scrutiny work in combination with a formal or procedural jurisprudence to deny the power of substantive justice.

---

[93] *See* Roger Craig Green, *Interest Definition in Equal Protection: A Study of Judicial Technique*, 108 YALE L.J. 439 (1998).

[94] *See, e.g., Cromartie*, 526 U.S. at 541; *Abrams*, 521 U.S. at 74; *Shaw*, 517 U.S. at 899; *Vera*, 517 U.S. at 952.

[95] Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989).

[96] Hernandez v. New York, 500 U.S. 352 (1991).

[97] *See generally* Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115 (1992).

[98] *See* Reno v. Bossier Parish Sch. Bd., 528 U.S. 320 (2000); *Vera*, 517 U.S. at 952; *Shaw*, 517 U.S. at 899; Miller v. Johnson, 515 U.S. 900 (1995); Shaw v. Reno, 509 U.S. 630 (1993).

V. CAN TIERS BE TIGHTENED?

Roger Craig Green has proposed an ingenious improvement in the precision of tiers of scrutiny.[99] By linking the levels of generality of government interests to the relatedness and importance prongs of the levels of scrutiny, and by insisting that the courts look for interests at those points of intersection, he proposes to develop a less malleable approach to the treatment of public interests. And by formalizing concepts of required interests and forbidden interests, which are implicit in the law, he proposes to make equal protection jurisprudence much richer and more reliable than it now is.

This Court, however, has not acted in the ways that it has because of the ambiguity of these concepts; instead, it has rejected them. Within any doctrinal and philosophical tradition, it is surely possible to describe likely and unlikely implications—in other words, to be able to predict with reasonable assurance how most cases will turn out. But the philosophical tradition of the Rehnquist Court is a direct repudiation of the philosophical traditions of its predecessors. Indeed, some of what drives Green's analysis is his own evaluation of critical values like impartiality in elections—values that the Rehnquist Court consistently rejects.[100] Green's proposal is a good workout for a Court committed to the values it has inherited. For the Rehnquist Court, it is either an irrelevance or a tool to make very different decisions from those Green envisions.

VI. *BUSH V. GORE*

The Court's morally bankrupt approach to equal protection as a formal, empty doctrine could not have been demonstrated better than in *Bush v. Gore*.[101] The Court noted that there were indeed equal protection problems among the voters in Florida.[102] Some voters might have had their votes counted if their chads were merely dimpled, others if they hung by two corners, still others if they hung only by one. That picture is a simplification since it was not clear that the single Florida judge whose job it was to oversee the ballots would have left it at that, or if the Florida Supreme Court would have either.[103]

---

[99] *See* Green, *supra* note 93, at 454-59.

[100] *Id.* at 464.

[101] 531 U.S. 98 (2000).

[102] *Id.* at 105-11.

[103] *See* Gore v. Harris, 772 So. 2d 1243, 1262 (Fla. 2000) (ordering the Florida circuit court to commence the tabulation of voter ballots immediately and to order statewide relief simultaneously); Order on Remand at 3, Gore v. Harris, No. 00-2808 (Fla. Cir. Ct. Dec. 9, 2000) (prescribing procedures for the counting of untabulated presidential ballots in Miami-Dade County and "in all other counties that have not conducted a manual recount or tabulations of the non-votes or undervotes"). *See also* Gore v. Harris, 773 So. 2d 524, 534 n.23 (Fla. 2000) (Pariente, J., con-

But the United States Supreme Court passed over those details and noted that a problem of equal protection had developed.[104]

In other voting cases before the Rehnquist Court, the Court has protected only the rights of over-represented white voters[105] and of political parties.[106] The Court did not break precedent here. Noting the denial of equal protection if the voting continued, the Court denied those voters whose ballots for president had not been counted by the machines any votes at all[107] as if that solved the problem. The Court did not solve the equal protection problem. Instead, it created other problems of equal protection. First, there is the difference between those voters who had their votes counted by machine and those who did not.[108] Some assert that the problem was in the voters' misbehavior,[109] but that, of course, is precisely the factual matter the resolution of which the Court prevented. Second, there was the difference among the uncounted voters themselves, since the difference between those voters whose votes should have been counted and those whose votes should not was also obscured by this method. Third, it resolved these problems of equal protection by the same method it commonly uses for complaints lodged by blacks—it denied relief.[110] And that denial makes the finding of inequality hypocritical,

---

curring) ("I remain confident that if the recount had continued in a timely manner, any obvious disparity in counting votes would have been reviewed by Judge Terry Lewis whose initial order on December 8, 2000, demonstrated an orderly and objective approach to the recount procedures.").

[104] *Bush*, 531 U.S. at 103.

[105] *See, e.g.*, Bush v. Vera, 517 U.S. 952, 1007, 1040-41 (1996) (Stevens, J., dissenting) (providing the statistical information regarding Texas' redistricting plan demonstrating that blacks and Hispanics comprised a third of the state population, that there had been five Hispanic and black representatives out of twenty-seven under the prior districting plan, to which the state added three "minority-majority" districts in the proposed thirty district plan); Miller v. Johnson, 515 U.S. 900, 906-07 (1995) (describing that 1990 Census indicated a black population of twenty-seven percent but striking down a districting plan that provided black majorities in two out of eleven districts or approximately fourteen percent).

[106] *See, e.g.*, Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm'n, 518 U.S. 604, 608 (1996) (explaining that the First Amendment prohibits limits on the amount of "an expenditure that the political party has made independently without coordination with any candidate").

[107] *Bush*, 531 U.S. at 108 (noting that a manual recount would count the votes of citizens whose votes for one candidate were not registered, yet a recount would still exclude the unreadable ballots of citizens who had voted for two candidates); *see also id.* at 147 (Breyer, J., dissenting) (noting that the halt of manual recount "ensur[es] that the uncounted legal votes will not be counted under any standard . . . harm[ing] the very fairness interests the Court is attempting to protect").

[108] *Id.* at 127 (Stevens, J., dissenting) (noting that the majority ignored an unknown number of voters whose ballots revealed their intent but were rejected by machines); *id.* at 147 (Breyer, J., dissenting).

[109] *See* Michael Griffin, *Don't Expect Sweeping Election Reform as Lawmakers Prepared for Battle*, ORLANDO SENTINEL, February 26, 2001, at A1 (noting Florida House Speaker Tom Feeney's opinion that Florida's election woes rested more with voters who made mistakes than mechanical breakdowns).

[110] *Bush*, 531 U.S. at 110 (reversing the order of the Supreme Court of Florida that the recount proceed).

for if there was a denial of equal protection, then there was a predicate for relief.

But this Court treats votes with as little reverence as it treats blacks; perhaps it is even less reverent when the votes are cast by blacks, though it may not have mattered in this event. Put another way, the Court's action shows that the values of equality and electoral rights have little value on this Court's scales.

CONCLUSION: CAN THIS COURT BE TAKEN SERIOUSLY?

Bush v. Gore makes clear the Court's lack of interest in the substantive values that are supposed to be measured by the tiers of scrutiny. Even taking the Court on its own rhetorical terms produces little of value. Procedural justice is hard to evaluate but by its consequences. The result is that this Court's procedural values are hollow with respect to race.

Tiers of scrutiny are a vessel into which the Justices pour their values. It is not a system that produces logically necessary results. The problem, however, is not with the theory; it is with the people and their refusal to share, accept, or enforce the values that the nation has expressed in its Constitution and laws on these issues.