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Supreme Court and Equality Legislative Classifications Desegregation and Reverse Discrimination

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THE SUPREME COURT AND EQUALITY: LEGISLATIVE CLASSIFICATIONS, DESEGREGATION, AND REVERSE DISCRIMINATION*

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Of the three great recurring themes in Western legal and political philosophy—liberty, justice, equality—the equality concept has always been the most complex and the least productive of cogent comment. Men are obviously unequal in talent and character, conditions and opportunities are infinitely varied, and all societies seem naturally to develop into a structure of position and preferment. The assembling of adequate governmental power to institute and maintain a regime of complete egalitarianism would pose a threat to liberty. Such considerations prompted Justice Holmes' characterization of equality as "an ignoble aspiration" and the idealization of envy. Ignoble though it may be in some of its manifestations, most would agree that the passion for equality is one of the driving forces of our times. Liberty and equality are functionally related, in that a certain modicum of equality is a pre-condition of a free society. Yet liberty and equality are quite different concepts. Equality is the more elusive value, with a varied background in natural law, Christian theology, and democratic theory. The American tradition of equality rests on notions of the equality of all men before the law. In addition, the American equality ethic, since the Jacksonian era, has included a notion that government ought to protect the disadvantaged, curb special privileges, and check the overly successful competitor so as to prevent monopoly.

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I

EQUAL PROTECTION CLAUSE: BIRTH AND BARREN YOUTH

The American idea of equality was first codified—though not clarified—through adoption of the fourteenth amendment, with its "equal protection of the laws" clause.[1] The ultimate question posed by the equal protection clause is whether there is a constitutional mandate to actively promote egalitarianism. The answer to that question has been a long time in coming, mainly because of a lack of interest in equal protection analysis prior to 1960.[2]

The birth of the clause was not an immaculate conception. The Reconstruction Congress sat as a constitutional convention to formally establish the new status of blacks as free persons, citizens, and equal partners in the nation's endeavors.[3] But it is apparent that some members of Congress did not know what they were talking about, and that, in the end, many did not know what they were voting for.[4] For example, on such an obvious question as nondiscriminatory access to public services and benefits, the members sensed no inconsistency between the new constitutional amendments and the continued operation of a segregated school system in the District of Columbia.[5] Nor did they make any clear

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[1] *See* Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873). In this period the equal protection clause was construed to be "so clearly" a provision for the black race that a "strong case" was required for its application to any other.

[2] For a discussion of development in the law of equal protection before the 1960's, see R. HARRIS, THE QUEST FOR EQUALITY (1960) (554 decisions reviewed). Harris found that 426, or 76.9% of the opinions, dealt with legislation affecting economic interests (255 with regulation, 171 with taxation). *Id.* at 59. Only 78, or 14.2%, dealt with racial discrimination (state laws allegedly imposing it or congressional laws to eliminate it). *Id.* In many of the economic interest cases, the equal protection issue was subsidiary to due process, and the bulk of the cases did "little more than display the Court's patience in dealing with trivia." *Id.* at 60. In those economic interest cases involving classification of property for state tax purposes, equal protection was a more separable issue, but often here too "the majestic grandeur of judicial review enshroud[ed] the insignificant." *Id.*

[3] *See generally* R. HARRIS, *supra* note 2, at 24-56; J. MATHEWS, LEGISLATIVE AND JUDICIAL HISTORY OF THE FIFTEENTH AMENDMENT (1971) (originally published in 1909); J. TENBROEK, THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT (1951); Graham, *The Early Antislavery Backgrounds of the Fourteenth Amendment*, 1950 WIS. L. REV. 479, 610; TENBROEK, *Thirteenth Amendment to the Constitution of the United States—Consummation to Abolition and Key to the Fourteenth Amendment*, 39 CALIF. L. REV. 171 (1951).

[4] For a detailed collation of the relevant material in the Congressional Globe and committee reports, see VIRGINIA COMMISSION ON CONSTITUTIONAL GOVERNMENT, THE RECONSTRUCTION AMENDMENTS' DEBATES (A. Avins ed.) (1967) [hereinafter cited as AVINS]. *See also* H. FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT (1908); B. KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION (1914).

[5] *See* R. HARRIS, *supra* note 2, at 56; Kelly, *The Congressional Controversy over School Segregation, 1867-1875*, 64 AM. HIST. REV. 537 (1959).

legislative history[6] concerning the degree of state involvement required—if any—before the equal protection clause would reach particular acts of private discrimination.

While the Department of Justice took a broad view in its initial enforcement of the civil rights laws enacted to implement the amendment,[7] a more narrow interpretation of the amendment prevailed in the Supreme Court. In its 1880 decision in *Strauder v. West Virginia*,[8] the Court was steadfast in prohibiting exclusion of blacks from jury selection. But three years later it could find no basis in the fourteenth amendment for a congressional statute seeking to ban racially discriminatory practices in restaurants, theaters, or other places of "public accommodation."[9] And the firm stand in *Strauder* against racial discrimination was significantly undercut in 1896, when the Court upheld state-imposed racial segregation in transportation.[10] On other fronts, the Supreme Court did surprisingly little with the equal protection clause. For example, in the area of sex discrimination, the Court indicated almost a "josephic" aversion to women[11] in its early cases, rejecting challenges to discrimination in respect to law practice,[12] suffrage,[13] and tending bar.[14]

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[6] *See* Frank & Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 COLUM. L. REV. 131 (1950). Frank and Munro attempted to distill the meaning of the equal protection clause of the fourteenth amendment by combining the understandings at passage by Congress in 1866, at ratification in 1868, and at the end of the Reconstruction decade when the Civil Rights Act of 1875 was passed. However, they succeeded only in underscoring the confusion among the fourteenth amendment's architects as to the meaning of equal protection. Although there was general agreement that "all men without regard to race or color" should have the same rights with respect to property, legal procedure, entry into business, and certain other interests, there was "substantial divergence" over whether this also required an end to segregation in the schools. For other interpretations of the "original meaning" of the fourteenth amendment (more noted for their volume than agreement), see Reynolds v. Sims, 377 U.S. 533, 590-608 (1964) (dissenting opinion, Harlan, J.). *See also* AVINS, *supra* note 4, at 168 (listing more than 20 "original understanding" articles by Avins); Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949); Van Alstyne, *The Fourteenth Amendment, The "Right" to Vote, and the Understanding of the Thirty-Ninth Congress*, 1965 SUP. CT. REV. 33.

[7] H. CUMMINGS & C. MCFARLAND, FEDERAL JUSTICE 230-48 (1937).

[8] 100 U.S. 303 (1880).

[9] *See* Civil Rights Cases, 109 U.S. 3 (1883). It was not until 1964, after the passage of the Civil Rights Act of 1964, 28 U.S.C. § 1447, 42 U.S.C. §§ 1971, 1971a-1975d, 2000a to 2000h-6 (1970), that a national public accommodation law was upheld by the courts. *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

[10] *See* Plessy v. Ferguson, 163 U.S. 537 (1896).

[11] R. HARRIS, *supra* note 2, at 73.

[12] Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1872).

[13] Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1875).

[14] Goesaert v. Cleary, 335 U.S. 464 (1948), *disapproved in* Craig v. Boren, 97 S. Ct. 451, 463 n.23 (1976).

The Court was likewise reluctant to use the equal protection clause as a general curb on state legislative power. Theoretically, the equal protection clause could have been invoked whenever a legislative classification did not precisely fit the purposes of the statute.[15] But the Court, perhaps recognizing the spasmodic nature of all large legislative assemblies and the inherent imperfection in their work products,[16] was disposed to invalidate inexactly phrased legislation on equal protection grounds only if no conceivable set of circumstances could be imagined to justify the legislation.[17] Exceptions to this minimum rationality approach were rare.[18] Indeed, the courts turned not to the equal protection clause, but to the due process clause of the fourteenth amendment, to nourish and protect various liberties deemed "fundamental."[19]

Until the post-World War II era, then, the equal protection clause functioned as "the usual last resort of constitutional arguments."[20] By 1950, however, concern about America's racial problems had begun to crystallize.[21] Civil Rights groups conducted extensive litigation[22] (most notably, *Brown v. Board of Education* in 1954),[23] aimed at "solving" America's race problem through broad application of the fourteenth amendment, particularly the equal

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[15] Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 347-48 (1949).

[16] *See* Posner, *The De Funis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1, 26-31 (because the political process is based on compromise and accommodation of private interests, it is a mistake to demand that the resulting legislation be rationally related to some stated social purpose). The political science literature on the "irrational," *i.e.*, illogical, nature of the legislative process is voluminous. *See generally* D. TRUMAN, THE GOVERNMENTAL PROCESS (1951); J. TURNER, PARTY AND CONSTITUENCY: PRESSURES ON CONGRESS (1952); J. WAHLKE, H. EULAU, W. BUCHANAN & L. FERGUSON, THE LEGISLATIVE SYSTEM: EXPLORATIONS IN LEGISLATIVE BEHAVIOR (1962).

[17] *See* Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911).

[18] *See* R. HARRIS, *supra* note 2, ch. 3.

[19] After Lochner v. New York, 198 U.S. 45 (1905), the Court for decades engaged in "Lochnerizing" against social legislation, and since Adamson v. California, 332 U.S. 46 (1947), the Court has "incorporated" most of the fundamental aspects of the Bill of Rights into the due process clause of the fourteenth amendment. On the former development, see Henkin, *"Selective Incorporation" in the Fourteenth Amendment*, 73 YALE L.J. 74 (1963); Strong, *The Economic Philosophy of Lochner: Emergency, Embrasure, and Emasculation*, 15 ARIZ. L. REV. 419 (1973). *See generally* Dixon, *The "New" Substantive Due Process and the Democratic Ethic: A Prolegomenon*, 1976 B.Y.U. L. REV. 43.

[20] Buck v. Bell, 274 U.S. 200, 208 (1927) (Holmes, J.).

[21] The gravity of the issues had been certified by our traditional device for highlighting problems—a Presidential study. *See* REPORT OF THE PRESIDENT'S COMMITTEE ON CIVIL RIGHTS, TO SECURE THESE RIGHTS (1947).

[22] *See* Shelley v. Kraemer, 334 U.S. 1 (1948) (restrictive covenant); Sipuel v. Board of Regents, 332 U.S. 631 (1948) (segregation in graduate education); Smith v. Allwright, 321 U.S. 649 (1944) (white primary).

[23] 347 U.S. 483 (1954).

protection clause. It was a period of ferment and hope, continuing into the early 1960's at least, and a spirit of optimism pervaded the literature of the times.[24] By the mid-sixties, however, it was becoming apparent that all was not well with the desegregation decision of 1954. There had been Little Rock, the golf course confrontation of Governor Faubus and President Eisenhower, the Southern Manifesto, massive resistance in Virginia, and precious little forward movement from the Supreme Court.[25]

In the late sixties, the Supreme Court's new-found doctrinal creativity,[26] spreading also into fields not strictly race-related, produced a new two-tiered equal protection theory, with "strict scrutiny" or "substantive equal protection"[27] being applied to legislative classifications affecting "suspect classes" or "fundamental rights." This new test was used to strike down legislative classifications whenever favored groups or rights were threatened. A still newer version allows the Court to nullify classifications which are not reasonably precise in matching necessary means to legitimate ends.[28] Both of these equal protection doctrines can yield at least as much judicial power as the old substantive due process, and therefore merit careful analysis.

To survey the current scene is not to be reassured. Despite vast forward movement, both doctrinally and empirically,[29] we seem to have barely kept pace with the growth of equality-related problems and expectations. To be sure, the power of the federal government and the courts to influence race relations has been greatly enhanced.[30] Yet, the easy targets are gone. The egregious, highly

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[24] *See* R. HARRIS, *supra* note 2. For the success story in transportation, see Dixon, *Civil Rights in Air Transportation and Government Initiative*, 49 VA. L. REV. 205 (1963); Dixon, *Civil Rights in Transportation and the ICC*, 31 GEO. WASH. L. REV. 198 (1962).

[25] *See* Griffin v. County Sch. Bd., 377 U.S. 218 (1964) (voided public school closing while white children had public funds to attend private schools); Watson v. Memphis, 373 U.S. 526 (1963) (delay in recreation desegregation criticized); Goss v. Board of Educ., 373 U.S. 683 (1963) (minority-to-majority transfer plan voided). Indeed, the modern era of major integration orders as a temporary remedy to achieve the goal of a "unitary, nonracial system," dates only from Green v. County Sch. Bd., 391 U.S. 430 (1968).

[26] The Reapportionment Revolution, also based on the equal protection clause, came concurrently. Although the reapportionment issue involves doctrinal creativity, it does not fit the equal protection clause generically and has been the cause of much conceptual confusion.

[27] *See* notes 42-67 and accompanying text *infra*.

[28] *See* notes 155-204 and accompanying text *infra*.

[29] *See* U.S. DEP'T OF COMMERCE, THE SOCIAL AND ECONOMIC STATUS OF NEGROES IN THE UNITED STATES (1970); WASHINGTON CENTER FOR METROPOLITAN STUDIES, METROPOLITAN BULLETIN: AGENDA FOR THE 70's (Aug. 1972) (reporting sharp rise in economic power of black families in the District of Columbia). *See also* S. MASTERS, BLACK-WHITE INCOME DIFFERENTIALS (1975).

[30] There is currently a four-faceted solution to the power problem: (*1*) expansion of

visible acts of segregation and discrimination have been replaced by more subtle problems of race relations. We now face questions that it would have been unthinkable to raise a few decades ago. Does the equal protection clause of the fourteenth amendment prohibit government from offering any benefits where access to those benefits may vary with the financial circumstance of the recipient?[31] Or, does the equal protection clause require adoption of a principle of ethnic proportionality for significant parts of our social and economic system? The picture has changed rapidly, and we have moved from battles to promote seemingly clear causes supported by a broad moral consensus of the community, to battles over what the cause should be. The following discussion focuses on two equal protection issues likely to be at the forefront of future litigation: namely, the use of the equal protection clause to nullify legislation on a fairly broad scale, and the continuing development of equal protection theory in the volatile areas of desegregation and "reverse" discrimination.

II

Equal Protection and Legislative Choices

In its more extreme manifestations, the "new substantive equal protection" doctrine threatens to make the concept of legislation itself unconstitutional. The underlying problem in using the equal protection clause as an instrument for legislative review is that virtually all legislation classifies. One of the first rules a child encounters is that he should start kindergarten at age five and first grade at age six.[32] There are rules governing the age at which a budding politician may bud,[33] and when even healthy people must retire.[34] Must each of the classifications that follow us through

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the "state action" concept to bring "private" activities within the control of the fourteenth amendment; (2) expansion of federal power under the commerce clause to reach much interstate business; (3) the development of a unique "remedial" theory of federal power; and (4) the revival and expansion of the thirteenth amendment, at least with respect to blacks.

[31] An exhaustive treatment of this question would involve discussion of the thirteenth amendment and the Court's recent reliance upon it in the area of racial discrimination in employment and education. This Article focuses on the equal protection clause of the fourteenth amendment.

[32] Hammond v. Marx, 406 F. Supp. 853 (N.D. Me. 1975) (discussed at notes 138-42 and accompanying text *infra*).

[33] Wurtzel v. Falcey, 69 N.J. 401, 354 A.2d 617 (1976) (discussed at note 141 *infra*).

[34] Massachusetts Bd. of Retirement v. Murgia, 376 F. Supp. 753 (D. Mass. 1974), *rev'd*, 96 S. Ct. 2562 (1976) (discussed at notes 147-50 and accompanying text *infra*).

life—whether based on age or other special status[35]—be precisely tailored to accomplish the legislative purpose behind it, so that it sweeps in only those who should be covered, no more and no less? To be sure, one of our basic equality values is that equals should be treated alike, and there is a large body of literature on the more refined version of that concept known as distributive justice.[36] But legislatures are very human and very imperfect. The equal protection clause, if applied with any stringency at all, opens the door to an endless sequence of challenges to governmental actions which do not draw classifications that exactly fit legislative purposes (assuming that there even *is* a clear policy purpose). Inexact tailoring produces either the vice of under-inclusion, as when we confine anti-discrimination legislation to sellers of multiple-unit housing,[37] or over-inclusion, as when we used Japanese ancestry as a basis for incarcerating a large number of American citizens during World War II.[38]

Although sometimes insisting on consistency and clarity in the legislative product, the Court, taking to heart Emerson's admonition that consistency is the hobgoblin of petty minds, has followed no straight line in enforcing the equal protection clause. The older "minimum rationality" test, still employed by the Court in some cases,[39] involves a "quick peek" approach. As eloquently formu-

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[35] Other classifications include differential tax rates keyed to income level and eased by ownership of depreciable assets; length of work period needed to qualify for unemployment compensation, retirement awards, or disability awards; difference in penal confinement periods on the basis of offense classification; exemptions from various business or labor relations regulations depending on size and nature of the enterprise; and so on through an almost infinite list.

[36] *See generally* G. LENSKI, POWER AND PRIVILEGE: A THEORY OF SOCIAL STRATIFICATION (1966); J. RAWLS, A THEORY OF JUSTICE (1971); N. RESCHER, DISTRIBUTIVE JUSTICE (1966); W. RUNCIMAN, RELATIVE DEPRIVATION AND SOCIAL JUSTICE (1966); Murphy, *Distributive Justice, Modern Significance*, 17 AM. J. JURIS. 153 (1972); Reisman, *Notes on Meritocracy*, 96 DAEDALUS 897 (1967).

[37] *See* Lee v. O'Hara, 20 Cal. Rptr. 617, 370 P.2d 321 (Cal. App. 1962); Colorado Anti-Discrim. Comm'n v. Case, 151 Colo. 235, 380 P.2d 34 (1962); Massachusetts Comm'n Against Discrim. v. Colangelo, 344 Mass. 387, 182 N.E.2d 595 (1962); Levitt & Sons, Inc., v. Division Against Discrim. in State Dep't of Educ., 31 N.J. 514, 158 A.2d 177 (N.J. Super. 1960); O'Meara v. Washington State Bd. Against Discrim., 58 Wash. 793, 365 P.2d 1 (1961).

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

[39] In City of New Orleans v. Dukes, 96 S. Ct. 2513 (1976), the Supreme Court again employed the "mere rationality" test to uphold a city ordinance which excluded all hot dog vendors from the French Quarter of New Orleans except those who had worked there for eight years or more. The Court specifically overruled Morey v. Doud, 354 U.S. 457 (1957), the only case in the last half century that invalidated a wholly economic regulation solely on equal protection grounds, as a "needlessly intrusive judicial infringement on the State's legislative powers." *Id.* at 2518. *See also* Massachusetts Bd. of Retirement v. Murgia, 96 S.

lated in *Lindsley v. Natural Carbonic Gas Co.*,[40] the test requires the Court to uphold a classification whenever it is possible to imagine conditions under which that classification would be reasonable. In the 1960's, the Warren Court developed the idea of substantive equal protection as a basis for close judicial review of legislation, particularly in such areas as voting rights, minority opportunity, and welfare regulation. Under this "strict scrutiny" test, the Court rejects the tolerant quick peek of the minimum rationality approach, and becomes more inclined to a conclusive frown. More recently, the Court has sometimes taken a middle ground requiring that the classification have a "strong rational basis." This approach, under which the Court applies something of an "unfriendly quizzical look" to the challenged legislation, leads the Court into the morass of ends-means review.[41] Still another variant of modern equal protection analysis is a general disdain for legislation creating "irrebuttable presumptions." A common facet of all of the newer versions of equal protection—strict scrutiny, irrebuttable presumption, and strong rational basis—is a distaste for legislative prohibitions or disabilities which are phrased in broad terms. Such distaste is, in effect, an aversion for the creaking legislative process itself; for central to the legislative process are the "unprincipled" practice of compromise and adjustment, and the elevation of general rules over individualized determinations.

A. *Strict Scrutiny*

The strict scrutiny doctrine,[42] which now may be on the

Ct. 2562 (1976) (mere rationality test used to validate mandatory retirement for state policemen); McDonald v. Board of Election Comm'rs, 394 U.S. 802 (1969) (rationality test used to uphold denial of absentee ballots to local jail inmates awaiting trial); McGowan v. Maryland, 366 U.S. 420 (1961) (general reasonableness standard used to validate classifications in Sunday Closing Laws); notes 155-204 and accompanying text *infra*.

[40] 220 U.S. 61 (1911).

[41] Gunther has referred to this development as the old equal protection with a "new bite." *See* Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 20 (1972).

[42] "Strict scrutiny," commonly identified as a late Warren Era construction, has roots in three earlier developments. Race needed no Warren Court probing to become a "suspect category." Per se invalidity of racial classifications was the message of Strauder v. West Virginia, 100 U.S. 303 (1879), and after the separate-but-equal period of Plessy v. Ferguson, 163 U.S. 537 (1896), per se invalidation was the message of Brown v. Board of Educ., 347 U.S. 483 (1954). The constitutional suspectness of racial classifications has recently been brought into question, however, by the preferential admissions cases. *See* notes 279-343 and accompanying text *infra*.

Apart from race, two earlier strands merit mention. One derives from Skinner v. Oklahoma, 316 U.S. 535 (1942), almost a "sport" in statistical terms in its own time. It was a forerunner of the idea that when a fundamental value is at stake (avoidance of being

wane,[43] has nevertheless been an especially powerful engine of judicial invalidation of legislation. The doctrine applies to any legislative classification affecting enjoyment of a fundamental right, such as travel, or to a classification suspect per se, such as one based on race or alienage. A good example of strict scrutiny in action is *Shapiro v. Thompson*,[44] a case concerning the once-common requirement of one-year residency in a state as a precondition for welfare eligibility. After identifying interstate migration as a fundamental right, the Court subjected to strict scrutiny—and rejected—the state's purported justifications for the residency requirement as a legitimate approach toward planning the welfare budget, avoiding double payment, encouraging work by new arrivals, and discouraging immigration solely to obtain welfare benefits. Likewise, in *Williams v. Rhodes*, the Court strictly scrutinized the preferential treatment given to established major parties over newly formed parties in access to Ohio's presidential election ballot.[45] Over three dissents and a concurrence rejecting the equal protection basis for the ruling,[46] the Court nullified the Ohio rules on the grounds that they needlessly impaired the fundamental

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sterilized as a recidivist), the classifications used to determine who is to be tagged and who is to escape must exactly identify the characteristics which support the end to be achieved.

The other strand comes from the line of cases "equalizing" the position of funded and unfunded criminals with respect to availability of such benefits as counsel and trial transcripts necessary to perfect an appeal. *See* Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956). But in truth, as Justice Harlan so perceptively observed in his still-unanswered dissent, these are basically "fair trial" cases. Indeed, the Court has refused to carry to their logical conclusion the open-ended equality simplisms of Justice Black in *Griffin v. Illinois* (joined by Chief Justice Warren and Justices Douglas and Clark). *See* Ross v. Moffit, 417 U.S. 600 (1974) (no right to free counsel for discretionary state appeals and applications for review in Supreme Court); Fuller v. Oregon, 417 U.S. 40 (1974) (allowing recoupment of legal expenses furnished by state to subsequently funded indigent).

[43] Certainly Justice Powell's opinion for the Court in San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973), seems to signal a spirit of moving deliberately, empirically, and incrementally, rather than by creative leaps, in judicial review of government programs.

[44] 394 U.S. 618 (1969).

[45] Williams v. Rhodes, 393 U.S. 23 (1968).

[46] The lineup of the dissenters in Williams v. Rhodes, 393 U.S. 23 (1968), and in Shapiro v. Thompson, 394 U.S. 618 (1969), is interesting. To the prescient it would have suggested then that the "strict scrutiny" test would itself receive careful scrutiny when the trigger was not a suspect category, or when the trigger was an appeal to a fundamental right *other than* voter access to the ballot box (not at issue in *Williams*). Chief Justice Warren and Justices Stewart and White dissented in *Williams*, and Justice Harlan placed his concurrence solely on first amendment grounds. In *Shapiro* the Chief Justice again dissented, along with Justices Black and Harlan. But in the same year, in Kramer v. Union Free Sch. Dist., 395 U.S. 621 (1969), concerning disqualification of nonparents and nonproperty owners from school district elections, the Chief Justice wrote an uncompromising "strict scrutiny" opinion and nullified the limitations.

rights of free speech and voting.[47]

Put pithily, the strict scrutiny doctrine is this: We, the Justices of the Supreme Court, feel that some rights are so fundamental, and some classifications so suspect, that any legislation which uses a suspect category or which operates to deny a fundamental right to some and not to others will be nullified *unless* the government sustains the burden of showing a compelling state interest in the classification imposed. The second half of the formula, shifting the burden of proof to the state, is as important as the first.[48] There are few classifications which can be said to be truly vital—certainly not a one-year residency requirement for welfare eligibility[49] or suffrage.[50] Nor is a compelling interest served by a requirement that one possess property or be a parent as a precondition to voting in a school election.[51] Classifications such as these have been found unconstitutional under the strict scrutiny test.

The Court recently did uphold a one-year residency requirement for divorce in *Sosna v. Iowa*.[52] Customarily, however, the states have not fared well in sustaining the burden of showing a compelling state interest.[53] Thus, the Court's power to assert that

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[47] The principal beneficiary of the ruling was Governor Wallace of Alabama, whose American Independent Party had sought a place on the Ohio ballot in the 1968 Presidential election. 393 U.S. at 26. Another beneficiary of the ruling was the Socialist Labor Party, which had brought a suit that was a companion case to *Williams*. *Id.*

[48] There is an intellectual affinity between the fundamental rights branch of equal protection "strict scrutiny" and the sense of fundamentality which has produced the "preferred freedoms" gloss on the first amendment, with a corresponding shift of a special burden of justification to the state. As I said on another occasion:

> It may well be that such subtle shifts in burdens of proof and presumptions in constitutional cases are a most important aspect of the substantive due process spirit, even if not at first perceived as such. Little noticed by laymen, because seemingly mere arcane technicalities, such shifts materially affect outcomes. In this way the bench asserts, sub silentio but powerfully, its own perception of what is . . . "fundamental" and thus necessarily placed on a pedestal.

Dixon, *supra* note 19, at 61-62 (footnotes omitted).

[49] *See* Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974); Shapiro v. Thompson, 394 U.S. 618 (1969).

[50] *See* Dunn v. Blumstein, 405 U.S. 330 (1972).

[51] *See* Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621 (1969).

[52] 419 U.S. 393 (1975). The Court found that the plaintiff would suffer only delay, not deprivation, and that the state had such legitimate interests as ensuring protection of spouses and children, avoiding becoming a divorce mill, and avoidance of intermeddling in matters with primary roots still in another state. Not convinced that *Shapiro v. Thompson* could be so easily distinguished, one commentator on *Sosna* asked whether "the Burger Court is preparing to reconsider the source of the right to travel." Comment, *A Strict Scrutiny of the Right to Travel*, 22 U.C.L.A. L. REV. 1129, 1159 (1975).

[53] Chief Justice Burger, dissenting in Dunn v. Blumstein, 405 U.S. 330, 363-64 (1972), stated: "Some lines must be drawn. To challenge such lines by the 'compelling state interest' standard is to condemn them all. So far as I am aware, no state law has ever satisfied this

an interest affected by a classification is fundamental, or that the policy is keyed to a suspect classification, has normally been tantamount to a power to place certain matters beyond the effective grasp of the legislature. A racial classification imposing a detriment on the group affected has been upheld only once in our history; in *Korematsu v. United States*,[54] the Court upheld the internment of Japanese-Americans during World War II.

The list of "suspect classifications" includes race, and (oddly enough) alienage for purposes of welfare eligibility[55] or access to occupations.[56] Sex and illegitimacy are not avowedly suspect classifications, although several challenges to classification on these two bases have been successful under a nominally less strict standard of equal protection review.[57] Professor Barrett concludes that the Court has begun to treat sex as a suspect classification, at least where females are disadvantaged (hence, a primary effect of the equal rights amendment, if adopted, may be to help males).[58] The Court has invalidated legislation terminating a father's support duty at eighteen for female but at twenty-one for male children,[59] legislation creating a preference for males as administrators of decedents' estates,[60] and legislation preventing servicewomen from claiming their spouses as dependents on the same liberal basis al-

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seemingly insurmountable standard, and I doubt one ever will . . . ." *But see* American Party of Texas v. White, 415 U.S. 767 (1974); Storer v. Brown, 415 U.S. 724 (1974); Jenness v. Fortson, 403 U.S. 431 (1971) (cases sustaining relatively minor inhibitions such as petition requirements). *See also* Richardson v. Ramirez, 418 U.S. 24 (1974) (sustaining California's disenfranchisement of ex-felons because of § 2 of the fourteenth amendment concerning "participation in rebellion or other crime").

[54] 323 U.S. 214 (1944).

[55] In regard to the suspect classification concept, once we move beyond the "suspectness" of race as a classifying device, there are no adequate ground rules for determining additional ones. A test of invidiousness keyed to use of an immutable, involuntary characteristic could be too broad (*e.g.*, age); a test keyed to a history of community discrimination could be too narrow (*e.g.*, denying protection to men). *See* Barrett, *Judicial Supervision of Legislative Classifications—A More Modest Role for Equal Protection?*, 1976 B.Y.U. L. REV. 89.

[56] *See In re* Griffiths, 413 U.S. 717 (1973); Sugarman v. Dougall, 413 U.S. 634 (1973); Graham v. Richardson, 403 U.S. 365 (1971).

Invalidation of alienage as a classification device under an equal protection theory coincides with an earlier consistent American tradition of perceiving legal rights and duties in terms of "persons" rather than "citizens." *See* Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873). *See also* A. BICKEL, THE MORALITY OF CONSENT 33 (1975); Bickel, *Citizenship in the American Constitution*, 15 ARIZ. L. REV. 369 (1973).

[57] Stanton v. Stanton, 421 U.S. 7 (1975); Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971).

[58] Barrett, *supra* note 55, at 90-91. *See also* Ginsburg, *Gender and the Constitution*, 44 U. CIN. L. REV. 1 (1975).

[59] Stanton v. Stanton, 421 U.S. 7 (1975).

[60] Reed v. Reed, 404 U.S. 71 (1971).

lowed for male servicemen.[61] In two instances, however, the Court has upheld legislation discriminating in favor of women and against men: a law granting a tax exemption for widows but not widowers,[62] and a military policy applying less stringently to female personnel in linking mandatory discharge to nonpromotion (*i.e.*, the up-or-out policy).[63] Similarly, the Court has invalidated classifications based on illegitimacy six times, and validated only one such classification in recent years.[64] The Court has never treated wealth per se as a suspect classification.[65]

The list of fundamental rights now includes virtually all aspects of voting and access to the ballot,[66] and certain aspects of access to the judicial process, such as free transcripts and filing fees for impecunious defendants[67] in criminal cases.

B. *Limiting the Scope of the Doctrine: The Case of School Financing*

When an attempt was made to use the new equal protection to restructure radically the traditional system of financing public education, the Supreme Court finally drew the line in *San Antonio Independent School District v. Rodriguez*.[68] The challenged financing system, based on local school district property taxation, necessarily produced significant interdistrict disparities in per pupil expenditure, due to local differences in taxable wealth. Conceptually, the

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[61] Frontiero v. Richardson, 411 U.S. 677 (1973).

[62] Kahn v. Shevin, 416 U.S. 351 (1974). *See* Parson v. Grabert, 344 N.E.2d 317 (Ind. Ct. App. 1976).

[63] Schlesinger v. Ballard, 419 U.S. 498 (1975). *But see* Califano v. Goldfarb, 45 U.S.L.W. 4237 (U.S. Mar. 2, 1977) (holding unconstitutional a Social Security Act provision making qualification for survivors' benefits more difficult for widowers than for widows).

[64] An intestate succession law denying illegitimates the same inheritance rights as legitimates was upheld in Labine v. Vincent, 401 U.S. 532 (1971). The decisions invalidating restrictions based on illegitimacy were: Jimenez v. Weinberger, 417 U.S. 628 (1974) (Social Security disability benefits); New Jersey Welfare Rights Org. v. Cahill, 411 U.S. 619 (1973) (state welfare); Gomez v. Perez, 409 U.S. 535 (1973) (duty of paternal support); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972) (Workmen's Compensation claim for death of natural father); Levy v. Louisiana, 391 U.S. 68 (1968) (recovery for wrongful death of natural mother); Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73 (1968) (recovery for wrongful death of illegitimate child). Voiding the resriction in *Labine v. Vincent* could have had the effect of diluting the share of legitimate children, a factor not present in the other cases, except possibly *Gomez v. Perez*.

[65] When wealth affects the availabilty of other fundamental rights, the classification becomes suspect. *See, e.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (poll tax affecting rights of indigents to vote held unconstitutional); Douglas v. California, 372 U.S. 353 (1963) (denial of appointed counsel to indigents on appeal held unconstitutional). *But cf.* United States v. MacCollom, 96 S. Ct. 2086 (1976) (holding indigent prisoner not entitled to treat transcript as matter of right in pursuing habeas corpus relief).

[66] Bullock v. Carter, 405 U.S. 134 (1972); Williams v. Rhodes, 393 U.S. 23 (1968).

[67] Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956).

[68] 411 U.S. 1, *reh. denied*, 411 U.S. 959 (1973).

litigation was an attack on "intrastate federalism." Logically it would not be confinable to education, because the existence of local governments as a third tier of regulation and finance leads to wide intrastate variations in provision of other important public services such as police and fire protection, water supply, and sewer service. A new dimension thus entered in this kind of suit. Nominally seeking to vindicate personal rights against government, insofar as statewide equality was sought, the suit really asked the Court to review and restructure the institution of local government itself.[69] Doctrinally, the *Rodriguez* case exemplifies the strict scrutiny facet of the developing equal protection clause. Jurisprudentially it is far more. It illustrates the insufficiency of "equal protection" as a decisional guide for institutional restructuring, and the elusive nature of the underlying equality values.

The *Rodriguez* litigation was an attempt to reverse an earlier defeat in federal courts for the principle of compensatory (or at least equal) educational expenditure.[70] Stunned by the apparent breadth of the defeat, various civil rights groups sought ways of presenting the equalization argument. They developed an appealing rhetoric and finally succeeded in California in *Serrano v. Priest*,[71] and in some subsequent cases in other states that eventually became known colloquially as the "*Serrano* cases."[72] The California Supreme Court said that the conventional local property tax basis for financing public education "invidiously discriminate[d] against the poor."[73] Apparently endorsing fully the plaintiffs' theory of the case, the court went on to say:

> To allot more educational dollars to the children of one district than to those of another merely because of the fortuitous pres-

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[69] Metropolitan desegregation suits seek effectively the same kind of restructuring. *See* Milliken v. Bradley, 418 U.S. 717 (1974), discussed at note 249 and accompanying text *infra*.

[70] Burson v. Wilkerson, 397 U.S. 44 (1970) (per curiam); McInnis v. Ogilvie, 394 U.S. 322 (1969) (per curiam). The complaint in *McInnis v. Ogilvie* was murky, but apparently encompassed both a "one-student one-dollar" analogue of the one-man one-vote idea and a concern for some compensatory inputs. *See* Schoettle, *The Equal Protection Clause in Public Education*, 71 COLUM. L. REV. 1355 (1971).

[71] 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

[72] *See* Van Dusartz v. Hatfield, 334 F. Supp. 870 (D. Minn. 1971); Milliken v. Green, 389 Mich. 1, 203 N.W.2d 457 (1972); Robinson v. Cahill, 118 N.J. Super. 223, 287 A.2d 187 (1972).

[73] Serrano v. Priest, 5 Cal. 3d 584, 589, 487 P.2d 1241, 1244, 96 Cal. Rptr. 601, 604 (1971).

The case was remanded for further proceedings because the court relied on facts judicially noticed or assumed true on demurrer and had tecbnically reversed only a dismissal granted under a general demurrer.

> ence of such property is to make the *quality of a child's education dependent upon the location of private commercial and industrial establishments*. Surely, this is to rely on the most irrelevant of factors as the basis for educational financing.[74]

Under the plaintiffs' theory, the system of local school finance—with some state supplementation—would have to be operated under a "fiscal neutrality" principle[75] employing a district power-equalization formula. Some local discretion over tax rates would remain, but the amount of revenue transferred to poorer districts would be determined by the state.[76]

The *Serrano* theory was subjected to significant criticism even before the Supreme Court rejected an analogous plea in *Rodriguez*. The power-equalization formula rests on equating wealth with the assessed valuation of real estate, presuming sub silentio that less assessed value exists in districts populated by parents with low income. Studies in Connecticut and Kansas, however, have rebutted this assumption.[77] Moreover, under the *Serrano* theory,

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[74] *Id.* at 601, 487 P.2d at 1252-53, 96 Cal. Rptr. at 612-13 (emphasis added, footnote omitted).

Jurisprudentially, *Serrano* was a mess (*see* notes 77-87 and accompanying text *infra*), and illustrates afresh the danger of advisory opinions, whether of the overt variety or in the form of pre-judging critical public policy issues in a one-sided fictional setting on demurrer. It was left to commentators to expose the mixture of high purpose and speciousness in the work which undergirded the case. *See* J. COONS, W. CLUNE, & S. SUGARMAN, PRIVATE WEALTH AND PUBLIC EDUCATION (1970) [hereinafter cited as COONS]; Clune, *The Supreme Court's Treatment of Wealth Discriminations Under the Fourteenth Amendment*, 1975 SUP. CT. REV. 289. [Hereinafter the phrase "*Serrano* theory" will refer both to the general work of Coons *et al.* and the judicial gloss in *Serrano* itself.]

Particularly in the equality field, where judicial review now acts not merely to negate governmental action, but to impose "affirmative-duties" and reshape complex programs, new judicial directions should not be based on special pleading concealed as scholarship, thin factual records, and abandonment of the presumption of constitutionality. Nor should the burden of justifying the whole existing order as necessary and part of a "rational plan" be switched to the state. Another important factor is the control plaintiffs normally exercise over the timing of litigation, including the opportunity for lengthy preparation, for marshalling specialized and often free talent in the law schools, and for developing novel but not implausible theories. The larger the issue, the more alert courts should be to the virtues of incremental change factually founded in our total experience, rather than creative doctrinal leaps.

[75] *See* COONS, *supra* note 74, at 2, 295-433.

[76] *See* Brief for The Urban Coalition, The National Committee for the Support of the Public Schools, as Amicus Curiae at 23-24, 35-41, Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971). *See also* COONS, *supra* note 74, at 201-42, 395-433.

[77] *See* Ridenour & Ridenour, *Serrano v. Priest: Wealth and Kansas School Finance*, 20 U. KAN. L. REV. 213, 225 (1972). Note, *A Statistical Analysis of the School Finance Decisions: On Winning Battles and Losing Wars*, 81 YALE L.J. 1303 (1972). To a significant extent, the urban poor live in districts with relatively high assessed values due to the presence of industrial and commercial property. A California legislative committee study projected that an equalization plan would transfer away from San Francisco approximately one-third of

there is actually a disincentive for rich districts to increase local taxes, since much of any additional revenue would be diverted to poorer districts. This disincentive could lead to a decline in local contribution to educational costs, thus increasing the demand on state reserves by poorer districts.[78]

The critical doctrinal foundations of the California Supreme Court's constitutional theory in *Serrano* were the characterizations of wealth as a suspect classification, and of public education as a fundamental right. This done, the wealth and expenditure disparities became presumptively unconstitutional unless the state could show a compelling need for continuing the traditional school financing system. The *Serrano* case offers an especially good illustration of the somewhat specious nature of the "strict scrutiny" test. Strict scrutiny provides a vehicle for shaking up public policy and imposing affirmative duties on government, under the guise of constitutional law, without requiring the Court to decide or even discuss the basic substantive issue, *i.e.*, the meaning of equality in allocation of resources. Nominally, the government is merely told that it cannot continue to operate the program at issue in the customary manner. Nominally, it is not told to "equalize," a step that the lower federal courts were loath to order in two pre-*Serrano* cases.[79] But the matter is not that simple. If the state is not to abandon the challenged program—and usually abandonment is unthinkable—it must proceed affirmatively to define equality

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its per-pupil funds available for unrestricted use. Carrington, *Financing the American Dream: Equality and School Taxes*, 72 COLUM. L. REV. 1226, 1236 (1973).

In light of such factual difficulties, one may wonder whether the *Serrano* theory would have been so appealing to the California Supreme Court had it not, unlike the intermediate appellate court (10 Cal. App. 3d 1110, 1117-18, 89 Cal. Rptr. 345, 350-51, (Ct. App. 1970)), taken the state's demurrer as an admission of the plaintiffs' "material facts." This generally acceptable technique of civil procedure may be a highly questionable way to try a constitutional challenge to complex state programs.

[78] Carrington, *On Egalitarian Overzeal: A Polemic Against the Local School Property Tax Cases*, 1972 U. ILL. L.F. 232, 242-43.

[79] The point was well put by one of the *Serrano* theory strategists:

> While logically, it is true, equality and inequality are mutually exclusive and exhaust the universe, it nevertheless makes a great deal of practical difference whether we ask, on the one hand, whether particular treatment is unequal in a particular respect, or whether, on the other hand, we ask whether particular treatment is equal in all other respects. We may be able to decide what is unequal—an inquiry which can easily be narrowed and pinpointed—without having the haziest notion as to what is equal. To determine what is equal requires omniscience with respect to the infinite aspects of any particular distribution of benefit or burden, plus the ability to measure or weigh each aspect in comparison to the others—an impossible task, certainly for the judiciary.

Shanks, *Educational Financing and Equal Protection: Will the California Supreme Court's Breakthrough Become the Law of the Land?*, 1 J.L. & EDUC. 73, 86 n.34 (1972).

under the watchful eye of the court. A court can thus nullify "on the cheap" as it were, and then participate in defining substantive equality rights by the backdoor route of remedy. The focus subtly shifts to the effectiveness of the remedy in introducing change, and away from the unresolved and perhaps unresolvable question of the ultimate dimension of the underlying substantive right.

Although not fully articulated in these terms, the Supreme Court's rejection of the *Serrano* theory in *Rodriguez* may have been induced, at least in part, by a realization that use of strict scrutiny here could embroil the courts in matters of public administration. Writing for the majority, Justice Powell could find neither an identifiable "suspect" class nor a "fundamental interest" in public education per se. Plaintiffs had asserted a theory of wealth—*i.e.*, differential school district taxable wealth—as a suspect category. To the Court, this amounted to saying that the disadvantaged class encompassed "every child in every district except the district that ha[d] the most assessable wealth and spen[t] the most on education."[80] None of the "traditional indicia of suspectness" were found in such a "large, diverse, and amorphous class."[81]

In respect to the fundamental interest line of analysis, the Court did bow to the language of *Brown v. Board of Education*[82] by referring to education as "perhaps the most important function of state and local government."[83] But this characterization was viewed as a socio-political assessment, not a statement of constitutional right:

> It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. Thus the key to discovering whether education is "fundamental" is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution.[84]

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[80] 411 U.S. at 28. As the Court noted, the plaintiffs in *Serrano* had in fact proclaimed that the disadvantaged class encompassed every child in every district except the district with the most assessable wealth. *Id.* at 28 n.65.

[81] *Id.* at 28.

[82] 347 U.S. 483 (1954).

[83] San Antonio Ind. Sch. Dist. v. Rodriguez, 411 U.S. 1, 29 (1973).

[84] *Id.* at 33-34. The *Rodriguez* plaintiffs also tried to develop a derivative theory of fundamental interests, analogizing education to free speech and voting rights—rights that cannot be enjoyed without a decent education. This nexus theory, however, has no logical

Justice Powell also pointed to the "unprecedented upheaval" in public education that would flow from acceptance of the plaintiffs' fiscal power-equalization theory, the unpredictable consequences of such a "massive change in the financing and control of public education,"[85] and the factual uncertainty as to whether the poorest families actually would benefit. The Court asserted, however, that such "practical considerations" play no role in constitutional adjudication except as a prudential basis for judicial self-restraint.[86] That is a bit like saying that brakes have no function in driving other than to retard forward progress. Such considerations are exactly the kind that the Court should evaluate before creating new constitutional law—particularly when creating new affirmative duties rather than merely negating state policy.[87]

The dissenting opinions in *Rodriguez* helped to highlight the "unprecedented upheaval" that acceptance of the plaintiffs' theory would have entailed. Justice White, joined by Justices Brennan and Douglas, tucked away in a footnote his novel major premise that the equal protection clause supports the "goal of providing local government with realistic choices as to how much money should be expended on education."[88] He noted that the *only* revenue-raising mechanism authorized for school districts is the property tax, and that because of interdistrict variance in the value of taxable property, equivalent tax effort will not produce *equivalent revenue results*. But is it the limitation of school districts to a single revenue-raising instrument that makes the Texas system one resting on a "classification" lacking a "rational relationship to a permissible object?"[89] This seems unlikely, since an authorized school district income tax would still produce nonequivalent revenue results if interdistrict personal income patterns varied widely. Alternatively, were the dis-

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limits. Food, shelter, and a good home life could all become derivative fundamental interests. *Id.* at 33-37.

[85] *Id.* at 56.

[86] *Id.* at 58.

[87] Courts typically have had insufficient evidence to make realistic judgments about the practical consequences of their decisions. This deficiency might be corrected if courts were presented with "Brandeis briefs" detailing probable consequences of court decisions. In traditional due process litigation, the function of the "Brandeis brief" was to show the reasonableness of pursuing the new policy already politically chosen. By contrast, substantive equal protection litigation is frequently directed toward restructuring a program which in practical terms cannot be abandoned (*e.g.*, public schools, apportionment of legislatures, operation of state prisons and mental hospitals). The "Brandeis brief" I suggest would show reasons why a court should not impose new affirmative duties on government, or at least not impose them in the vague, litigation-spawning way often requested by plaintiffs.

[88] 411 U.S. at 68 n.6.

[89] *Id.* at 67.

senters really extracting from the equal protection clause a requirement of substantially equal results, *i.e.*, a system guaranteeing "each district an equal per-pupil revenue from the state school-financing system"?[90] This was flatly denied by Justice White. And yet, in effect, this is what the district court apparently decreed when it said that "the *quality* of public education"—not, it may be noted, merely the equal availability of taxable wealth—"may not be a function of wealth, other than the wealth of the state as a whole."[91] Justice Marshall's separate dissent explicitly focused on what the state provided its children, not the effect of spending on educational achievement.[92] To achieve equality in expenditure, he suggested several remedial options[93] to eliminate differential expenditure as a factor contributing to "inequality . . . of educational opportunity."[94]

Very basic questions in social theory are raised by *Rodriguez*. Even though there may be major disagreement about assuring equal distribution of goods throughout society, there has been a fairly broad consensus in support of equality of opportunity. There also is general consensus on the wisdom and morality of disallowing consideration of class differences, personal characteristics, and indeed any indicia other than "merit" in distributing societal benefits and burdens. But how equal must opportunity be in order to ensure that merit is the sole deciding factor? This question lies at the core of the *Rodriguez* litigation. Although there are obvious limits on the extent to which government can guarantee common starting points for all children, should there at least be relatively common and equal base lines in the quality of elementary and secondary education? In view of the practical importance of education in American life today, does not equal protection at least require that the quality of compulsory public education not be materially affected by differential financial support, attributable to the accidental factors of parentage and parental residence? Perhaps we should have a system resting on a concept of equal distribution of educational offerings.[95] But is it the function of the judiciary to

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[90] *Id.* at 68.

[91] Rodriguez v. San Antonio Ind. Sch. Dist., 337 F. Supp. 280, 284 (W.D. Tex. 1971) (per curiam) (emphasis added).

[92] 411 U.S. at 83-84.

[93] *Id.* at 130-31 n.98.

[94] *Id.* at 90.

[95] On an asserted right to be subsidized in a different context, see Citizens for Underground Equality v. City of Seattle, 6 Wash. App. 338, 492 P.2d 1071 (1972), where the court rejected the argument that special assessment financing was unconstitutional because

impose such a system by distorting the equal protection clause and entwining the judiciary in an ongoing managerial process, any more than it was properly the function of an earlier Court to impose laissez-faire capitalism on the states by distorting the due process clause?

Consider the power the judiciary would have wielded had the dissenters in *Rodriguez* prevailed. A decision that interdistrict wealth differentials could not be reflected in school expenditures (and the matter logically could not have been confined to school expenditures)[96] would be tantamount to saying that local government as we have known it is unconstitutional.[97] Logically, would interstate disparities also suffer the same fate?[98] Could federalism itself be suspect because it collides with a fundamental right to public education (perhaps shifted from the fourteenth to the fifth amendment) on a relatively equal funding basis?[99] Could

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poorer neighborhoods were unable to participate in the program (which involved putting overhead utility wires underground).

[96] Surely such peripheral matters as transportation to school, general library resources in the community, and even sports facilities can also be educationally-related benefits affected by differential local wealth, and thus differentially affecting total educational opportunity. Nor should it be relevant that libraries and sport facilities normally are provided by the municipality, not the school district, for recognition of that distinction would permit gerrymandering-by-function to override an alleged constitutional right.

[97] On the question of equal-protection-based suits to improve municipal services other than education, see Beal v. Lindsay, 468 F.2d 287 (2d Cir. 1972); Hawkins v. Town of Shaw, 461 F.2d 1171 (5th Cir. 1972); Selmont Improvement Ass'n v. Dallas County Comm'n, 339 F. Supp. 477 (S.D. Ala. 1972). The suits focused on a restricted local inequity and did not attempt to achieve statewide equality of service.

Plaintiffs substantially prevailed in *Hawkins* and *Selmont Improvement* in the context of black versus white neighborhoods in the South. But in *Beal*, Judge Friendly noted proof that the rundown condition of a park in a black and Puerto Rican area of the Bronx was due to vandalism, despite more than equal input by the City, and concluded that "attainment of equal results" in such a situation was not constitutionally mandated. 468 F.2d at 290. *See also* Fresler & May, *The Municipal Service Equalization Suit: A Cause of Action in Quest of a Forum*, in PUBLIC NEEDS AND PRIVATE BEHAVIOR IN METROPOLITAN AREAS 157 (J. Jackson ed. 1975); Bond, *Toward Equal Delivery of Municipal Services in the Central Cities*, 4 FORDHAM URB. L.J. 263 (1976); Lineberry, *Mandating Urban Equality: The Distribution of Municipal Public Services*, 53 TEX. L. REV. 26 (1974).

[98] "If the doctrine in *Serrano* is pursued to its logical conclusion, there should be only one government that levies taxes and distributes their proceeds among the multitudinous claimants for public funds: the national government." Freeman, in THE 1972 FOUR-DAY UNIVERSITY OF BOARDSMANSHIP PROCEEDINGS, NATIONAL SCHOOL BOARDS ASSOCIATION, AMERICAN ENTERPRISE INSTITUTE REPRINT NO. 7, at 55 (1972).

[99] This approaches reductio ad absurdum. To be sure, the process of constitutionalizing various congressional impositions of new duties on the states has significantly expanded the national authority under the Constitution. *See* Oregon v. Mitchell, 400 U.S. 112 (1970); Katzenbach v. Morgan, 384 U.S. 641 (1966); South Carolina v. Katzenbach, 383 U.S. 301 (1966); Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603 (1975). However, in a major recent federalism decision the Court nullified that

the process of intervention with private choices even end at this point? Suppose the state did intervene massively at one end of the resources-versus-needs equation, and rearranged *resources* so that there was equality in educational offering.[100] Could the state then ignore the other end—the input of *needs*—leaving those needs uncontrolled and dominated perhaps by socially detrimental private choices, each made in isolation?[101] India's serious exploration of the idea of mandatory birth control[102] relates in a very basic way

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portion of the Fair Standards Amendments of 1974, 29 U.S.C. § 203(d)-(x) (Supp. V 1975) (amending 29 U.S.C. § 203(d)-(x) (1970)), extending the wages, hours, and overtime requirements of the Fair Labor Standards Act to all nonsupervisory state and local employees. National League of Cities v. Usery, 96 S. Ct. 2465 (1976). In Rizzo v. Goode, 423 U.S. 362 (1976), Justice Rehnquist, again writing for the Court, continued to emphasize the principles of federalism by refusing equitable relief to Philadelphia plaintiffs alleging a general pattern of police misconduct. The Court held that such relief would represent an unwarranted invasion by the federal judiciary into the discretionary authority granted to the police by state and local law. *See also* Brown v. EPA, 521 F.2d 827 (9th Cir. 1975), *cert. granted*, 426 U.S. 904 (1976) (Clean Air Act Amendments cases). These cases, now awaiting Supreme Court action, concern congressional power to require states not merely to refrain from certain practices, but to affirmatively exercise their police powers in prescribed ways. However, the limitations and duties imposed, or sought to be imposed, in these cases are the products of congressional *action*, and do not involve a major national reallocation of limited resources.

With respect to "nationalizing *Serrano*," what remedy would there be for congressional *inaction*? Would an attempted suit against Congress or an attempt to withhold taxes on grounds of disagreement with national policy be dismissed promptly under the somewhat battered "political question" doctrine? *See* United States v. Nixon, 418 U.S. 683 (1974); Powell v. McCormack, 395 U.S. 486 (1969); Baker v. Carr, 369 U.S. 186 (1962). The essence of the doctrine in *United States v. Nixon*—namely, the availability of judicially discoverable and manageable standards—seems to be what Justice Powell had in the back of his mind when he spoke in *Rodriguez* of "the wisdom of the traditional limitations on this Court's function." San Antonio Ind. Sch. Dist. v. Rodriguez, 411 U.S. 1, 58 (1973).

[100] Justice Marshall in *Rodriguez* expressly separated the question of "what the children are able to do with what they receive." *Id.* at 84 (dissenting opinion, Marshall, J.).

[101] A hypothetical may help sharpen the question. Assume that wealth, however defined, is relatively equal in two districts, but that one district has two children per family and the other district uniformly has five children per family. Resources are therefore spread more thinly in the latter district, on a per child basis. Would it be appropriate, by judicially-imposed constitutional mandate, to force the district with the lower birth rate to subsidize the education of the larger families in the district with the higher birth rate? If this were done, would pressure develop for more intervention by "family planners" in the lives of the families in the high birth rate district?

[102] The government of India announced recently that residents of federally-administered New Delhi could face loss of jobs and public assistance if they exceed two children per family. The Indian states have been encouraged to experiment with similar regulations. N.Y. Times, Feb. 26, 1976, at 1, col. 3; *id.* Mar. 9, 1976, at 33, col. 2.

Recently Justice Powell hypothesized in his concurring opinion in Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 651-52 (1974), that on the basis of Dandridge v. Williams, 397 U.S. 471 (1970), it would be constitutional to "seek to discourage excessive population growth by limiting tax deductions for dependents." In Dandridge v. Williams, 397 U.S. 471 (1970), the Court upheld a maximum welfare grant regulation which had the effect of

to the concept of effective equality of opportunity, lest it become merely an equality in respect to shrinking opportunities in an overcrowded field.

C. *Irrebuttable Presumptions*

Another major variant in current equal protection analysis, although nominally sounding in due process, is the so-called "irrebuttable presumption" doctrine. This doctrine can, like "strict scrutiny," cause sudden death for the legislative classification to which it is applied. Unlike the strict scrutiny test, however, the irrebuttable presumption doctrine can be applied whether or not the case involves fundamental rights or suspect classifications. Although rooted in earlier cases,[103] the doctrine did not become a major decisional device until 1973 and 1974.[104] Its nature and also its difficulties are well-exemplified by *Vlandis v. Kline*.[105]

In *Vlandis* the Court nullified a Connecticut rule limiting eligibility for the low in-state tuition schedule at state colleges to those students who could show a meaningful pre-admission nexus with the state. The formula, concededly somewhat inartistic, denied the lower rates to married students whose legal address at the time of application was outside the state, and to unmarried students whose legal address was outside the state during any part of the year preceding the application date. For both categories, ineligibility continued as long as the individuals were students. Because the formula was phrased simply in terms of residence (*i.e.*, legal domicile), the Court brushed aside the argument that it was merely designed to recognize and reward the investments in higher educa-

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reducing the per capita henefits to children in the largest families (eight or more). Strict scrutiny was not applied and under the lower standard of equal protection scrutiny, the policy was deemed rational. Although he dissented from the ruling, Justice Marshall did note that "the effect of the maximum grant regulation upon the right of procreation is marginal and indirect at best, totally unlike the compulsory sterilization law that was at issue in *Skinner*." *Id.* at 521 n.14.

[103] *See* Stanley v. Illinois, 405 U.S. 645 (1972); Bell v. Burson, 402 U.S. 535 (1971); Carrington v. Rash, 380 U.S. 89 (1965).

Long before the rise of modern equal protection concerns, the Court invalidated as denying fair opportunity to rebut certain tax laws providing that gifts made within a specified time prior to death were presumptively made in contemplation of death. Heiner v. Donnan, 285 U.S. 312 (1932); Hoeper v. Tax Comm'n, 284 U.S. 206 (1931); Schlesinger v. Wisconsin, 270 U.S. 230 (1926). Justice Rehnquist, dissenting in Vlandis v. Kline, 412 U.S. 441, 467-68 (1973), characterized these decisions as the product of "a day when the principles of substantive due process had reached their zenith in this Court."

[104] *See* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); United States Dep't of Agric. v. Murry, 413 U.S. 508 (1973).

[105] 412 U.S. 441 (1973).

tion made over the years by established Connecticut residents. The way was then open to apply the irrebuttable presumption label and nullify the formula. As the Court noted, it was "not necessarily or universally true in fact" that recently arrived students had no bona fide intent to transfer their domicile to Connecticut.[106]

The decisional technique here contains the following elements: (*1*) ascertaining the purpose to be achieved by statutory classification; (*2*) ascertaining the group which must be dealt with to achieve that purpose; and (*3*) determining whether there is an exact "fit" between this theoretical group and the group actually identified by the statutory classification.[107] If there is not an exact fit—if, as in *Vlandis*, the presumption of lack of domiciliary intent is overinclusive—then the classification is nullified. The irrebutable presumption doctrine nominally sounds in due process insofar as it focuses on the need for a hearing in which an individual can show that he does not come within the apparent purpose of the statute,[108] even though he is "caught" by being a member of the excluded class. But because the doctrine focuses essentially on the *classification*, the inexact fit between the basic fact (*e.g.*, in *Vlandis* pre-admission nonresidency) and the presumed fact (continued lack of domiciliary intent while a student), it has been viewed by virtually all commentators as more closely akin to equal protection's strict scrutiny standard.[109] True due process analysis requires the presence of a life, liberty, or property interest as a precondition of entitlement to a hearing.[110] Under the irrebuttable presumption approach, however, the Court seems to elevate a simple principle of the law of evidence, concerning the correspondence of proved

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[106] *Id.* at 452.

[107] In the language of presumptions, the identifiable group encompassed by the statutory classification is the "basic fact." That this group coincides with the theoretical group which the legislation is designed to reach is the "presumed fact."

[108] Defining "purpose" is not easy in any legislative process. Justice Rehnquist, dissenting in United States Dep't of Agric. v. Murry, 413 U.S. 508, 522 (1973), referred to the Court's opinion in that case as resting on what the majority "conceive[d] to be the legislative aim." *See generally* Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95.

[109] *See* Bezanson, *Some Thoughts on the Emerging Irrebuttable Presumption Doctrine*, 7 IND. L. REV. 644 (1974); Note, *The Irrebuttable Presumption Doctrine in the Supreme Court*, 87 HARV. L. REV. 1534 (1974); Note, *The Conclusive Presumption Doctrine: Equal Process or Due Protection?*, 72 MICH. L. REV. 800 (1974); Note, *Irrebuttable Presumptions: An Illusory Analysis*, 27 STAN. L. REV. 449 (1975). *See also* Comment, *Constitutional Law: Court Substitutes Conclusive Presumption Approach for Equal Protection Analysis*, 58 MINN. L. REV. 965 (1974). The first four of these sources also subject the doctrine to an incisive critique and essentially reject it.

[110] On the requisites of "entitlement," see Arnett v. Kennedy, 416 U.S. 134 (1974) (plurality opinion); Board of Regents v. Roth, 408 U.S. 564 (1972); Perry v. Sindermann, 408 U.S. 593 (1972). *See also* Note, 72 MICH. L. REV., *supra* note 109, at 816-21.

facts and presumed facts,[111] to the level of a constitutional principle justifying invalidation of substantive legislative policies. The Court does this without confronting the merits of the legislative policy, the reasonableness of the statute's classification, or the feasibility of alternative means.[112] The irrebuttable presumption doctrine almost makes a mockery of the familiar "ends-means" analysis, which is a part of both due process and equal protection, by requiring perfect means.

Under careful analysis,[113] however, are the results in the irrebuttable presumption cases, as distinguished from the doctrine itself, defensible? Did the Court employ this new decisional principle in the early 1970's as a practical device to reach desired outcomes in particular cases? Many of the results reached under the strict scrutiny doctrine in the late 1960's could have been achieved more honestly under the old, much-criticized, substantive due process doctrine.[114] But the price of reverting to substantive due process would have been revelation of the true breadth of

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[111] *See* Justice Rehnquist's remonstrance in United States Dep't of Agric. v. Murry, 413 U.S. 508, 524 (1973): "Thus, we deal not with the law of evidence, but with the extent to which the Fifth Amendment permits this Court to invalidate such a determination by Congress."

[112] The belief of some Justices during this period that prophylactic rules were unnecessary and that administrative procedures could solve all problems is disturbing, and decidedly nonempirical. *See* United States Dep't of Agric. v. Murry, 413 U.S. 508, 518-19 (1973) (concurring opinion, Marshall, J.) (suggesting that Congress could easily provide an administrative mechanism to guarantee elimination of abuse from the program, and that "reasonable rules" could be devised to simplify tbe hearing process). This assurance has a hollow ring in light of recent reports of welfare fraud amounting to millions of dollars, and the relative failure of corrective measures. *See, e.g.*, N.Y. Times, Apr. 11, 1975, at 38, col. 5; *id.*, Jan. 13, 1975, at 47, col. 4.

Even in areas illuminated by past litigation, such as the legal residence concept, the cases demonstrate the difficulty of achieving easy and accurate determinations. *See* Texas v. Florida, 306 U.S. 398 (1939); *In re* Dorrance's Estate, 115 N.J. Eq. 268, 170 A. 601 (Prerog. Ct.), *modified*, 116 N.J. Eq. 204, 172 A. 503 (Prerog. Ct. 1934), *aff'd sub nom.* Dorrance v. Thayer-Martin, 13 N.J. Misc. 168, 176 A. 902 (Sup. Ct. 1935) (per curiam), *aff'd*, 116 N.J.L. 362, 184 A. 743 (per curiam), *cert. denied*, 298 U.S. 678 (1936); Matter of Newcomb, 192 N.Y. 238, 84 N.E. 950 (1908); *In re* Dorrance's Estate, 309 Pa. 151, 163 A. 303, *cert. denied*, 287 U.S. 660 (1932), *cert. denied*, 288 U.S. 617 (1933); Hammerstein v. Hammerstein, 269 S.W.2d 591 (Tex. Civ. App. 1954).

In the case of college students, for example, the ease of "establishing" a new domicile by acquiring driver's licenses and voting registration is so great that it would not be worthwhile for the state to try to contest. *See* Vlandis v. Kline, 412 U.S. 441, 464-65 (1973) (dissenting opinion, Rehnquist, J.).

[113] Such careful analysis is found in some of the dissents—especially those of Justice Rehnquist.

[114] *See* Karst, *Invidious Discrimination: Justice Douglas and the Return of the "Natural-Law-Due-Process Formula,"* 16 U.C.L.A. L. REV. 716 (1969).

judicial discretion being exercised, thus raising old shibboleths about the Court as a super-legislature.[115] Moreover, the new equal protection itself came under heavy attack from inside the Court as overly simplistic. Once a classification was found to be "suspect" per se or to trench on a "fundamental interest," the state's burden to show a "compelling interest" became so heavy that invalidation was almost automatic.[116] The list of "suspect" classes[117] and "fundamental" rights[118] soon stopped growing, not only because of the Burger Court's ethic of judicial restraint, but also because the Warren Court exhausted the supply of easy cases.

The irrebuttable presumption doctrine has thus provided the Court, although generally without the support of Chief Justice Burger and Justice Rehnquist, with a way to invalidate, on a nominally objective basis, those extremes in classification that offend the Court's sense of justice. The doctrine's virtue is also its vice, because its objective basis (*i.e.*, lack of a close fit between the defined target and the real target) could justify nullification of thousands of statutes. To a large degree, all legislation is classification,[119] just as all districting is gerrymandering.[120] There is always inexactness of fit, and the only relevant question is how much inexactness is *constitutionally* tolerable, leaving major corrections to the political process.

If the Supreme Court's irrebuttable presumption decisions are re-rationalized on their facts, a somewhat more appealing picture emerges. Most of the cases involved interests that were special, if not actually fundamental. The challenged classifications were questionable even under an ends-means analysis of medium severity

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[115] The outcries would have been especially anguished from Justice Black, who was even willing to rewrite history to avoid basing decisions on the "evanescent standards" of due process and its natural law infusion. *See* Rochin v. California, 342 U.S. 165, 177 (1952) (concurring opinion, Black, J.); Kelly, *Clio and The Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 120-21, 132-36; Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights?—The Judicial Interpretation*, 2 STAN. L. REV. 140, 166-67 (1949).

For a more recent example, see the comments of Justice Marshall concurring in Vlandis v. Kline, 412 U.S. 441, 455 (1973), in which Justice Rehnquist, dissenting, openly charged the majority with reaching an essentially unrationalized substantive due process result by using the irrebuttable presumption label.

[116] See the despairing comment of Chief Justice Burger, dissenting in Dunn v. Blumstein, 405 U.S. 330, 363-64 (1972).

[117] *See* text accompanying notes 55-65 *supra*.

[118] *See* text accompanying notes 66-67 *supra*.

[119] On the potential reach of a simplistic irrebuttable presumption doctrine, see Note, 72 MICH. L. REV., *supra* note 109, at 830-34.

[120] R. DIXON, DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS 459-63 (1968).

(*i.e.*, the "strong rational basis" test[121]). *Carrington v. Rash*,[122] ostensibly decided under the irrebuttable presumption doctrine, involved the interest of a serviceman in being able to vote in a state where he was stationed; and voting is an interest actually deemed fundamental.[123] *Stanley v. Illinois*,[124] in which the Court struck down a statutory presumption that putative fathers were unfit parents, involved both an "almost fundamental" interest (parental interest in child-rearing) and a near-suspect classification (illegitimacy). In *United States Department of Agriculture v. Murry*,[125] the Court nullified a federal regulation that denied food stamps to any household containing a person claimed as a tax dependent by his parents. Although the Court based its decision on a finding of an irrebuttable presumption, the regulation was also susceptible to attack under the doctrine of *Goldberg v. Kelly*,[126] since it could have had the effect of denying food stamps to those in genuine need. *Bell v. Burson*,[127] insofar as it is an irrebuttable presumption case at all, is easily explicable as a case in which the Court insisted on a certain level of adjudicative fairness because the state was proceeding against a person on the basis of his personal conduct[128] (in contrast to legislating a general prophylactic rule on a class basis). All of the foregoing cases thus touched on interests of special sensitivity, and could probably have been decided the same way without invocation of the irrebutable presumption doctrine.

Cleveland Board of Education v. LaFleur,[129] a very different case, is especially intriguing. *LaFleur* and its companion case involved rules imposing mandatory leave for public school teachers in midpregnancy. From one standpoint, this was an intrusion upon a

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[121] *See* notes 155-204 and accompanying text *infra*. There is no agreed label for the test and each writer devises his own—all perhaps more quotable than informational. *See* text accompanying note 41 *supra*.

[122] 380 U.S. 89 (1965).

[123] *See* Dunn v. Blumstein, 405 U.S. 330 (1972); Williams v. Rhodes, 393 U.S. 23 (1968); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

[124] 405 U.S. 645 (1972).

[125] 413 U.S. 508 (1973).

[126] 397 U.S. 254 (1970). There is a significant doctrinal difference. In *Murry*, any adverse impact was general and rested equally on all those within the legislatively defined class. In *Goldberg*, the ineligibility turned on the recipient's conduct; *i.e.*, on circumstances unique to the recipient himself. In administrative law terms, *Murry* dealt with rulemaking, while *Goldberg* dealt with adjudication.

[127] 402 U.S. 535 (1971).

[128] In *Bell*, the problem involved the state's administration of its policy concerning uninsured motorists involved in accidents; concededly, a matter of significant state concern. The challenged practice was that an uninsured motorist involved in an accident faced loss of his license prior to any determination of fault in the accident.

[129] 414 U.S. 632 (1974).

personal liberty associated with family life, although John Stuart Mill might rejoin by observing that the real issue was the "other-regarding" act of holding onto a classroom job.[130] The underlying legislative purpose for the rules was quite obscure, and probably did not coincide with any of the purposes that the state lamely tried to use for justification. For example, the asserted interest in continuity of instruction is actually disserved by removing a healthy teacher from the classroom where birth is not anticipated until more than a month after the end of the semester. Moreover, any correlation between physical unfitness and pregnancy would be higher in early pregnancy than in mid-pregnancy. If the real basis for mandatory pregnancy leave is deference to "outmoded taboos"[131] against appearing in public while pregnant, then the rule is founded on a rapidly disappearing and nonrationalized custom. In such a context the irrebuttable presumption doctrine may act as a "legal euthanasia" device. Judicial invalidation of the rule is painless to the legislature—which thereby avoids the trauma of voting to repeal—and harmless to the judicial system, because the invalidation assertedly rests on the lack of a factual nexus rather than on a value judgment.[132]

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[130] It is well to return to Mill's distinction, even if oversimplified, between self-regarding acts (*e.g.*, consensual sexual conduct, for which near-absolute liberty can be justified), and other-regarding acts, which involve community relations and third-party impacts (*e.g.*, having a child, or asking the community to adjust to one's personal disability). *See* J. MILL, ON LIBERTY 21-22 (London 1859): "[T]he sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. . . . Over himself, over his own body and mind, the individual is sovereign." Whether Mill would agree with the examples given above is unknown; they are examples of realistic hard choices testing his principles.

[131] Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 641 n.9 (1974) (Stewart, J.). With respect to Justice Stewart's concept of "outmoded taboos," it may be noted that there was a noticeable regional variation in the lower court decisions on mandatory pregnancy leaves at the time the Court decided *LaFleur*. Mandatory leaves had been voided in the Sixth Circuit (Ohio) in LaFleur v. Cleveland Bd. of Educ., 465 F.2d 1184 (6th Cir. 1972), in the Second Circuit (Connecticut) in Green v. Waterford Bd. of Educ., 473 F.2d 629 (2d Cir. 1973), and in the Tenth Circuit (Oklahoma) in Buckley v. Coyle Pub. School Sys., 476 F.2d 92 (10th Cir. 1973). They had been sustained in the Fourth Circuit (Virginia) in Cohen v. Chesterfield County Sch. Bd., 474 F.2d 395 (4th Cir. 1973) (the companion case to *LaFleur* in the Supreme Court), and in the Fifth Circuit (Texas) in Schattman v. Texas Employment Comm'n, 459 F.2d 32 (5th Cir. 1972), *cert. denied*, 409 U.S. 1107 (1973).

[132] Lawrence Tribe rests his lonely defense of the irrebuttable presumption doctrine on the ground that it is a way of neatly attacking rules in a period of "moral flux." But this is to take an exotic instance—for *LaFleur* is the only one of the irrebuttable presumption cases so explicable—and use it to justify a general doctrine potentially destructive of the democratic process. *See* Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269, 311 (1975). For a different calculation of risk in open-ended judicial participation in the revision and, necessarily, legalization of moral consciousness, see W. ELLIOT, THE RISE OF GUARDIAN DEMOCRACY (1974).

The re-rationalization process falters, however, when *Vlandis* is reached. That decision still seems highly questionable. If public education does not give rise to a fundamental interest triggering strict scrutiny,[133] then certainly graduate education is not imbued with interests of special sensitivity.[134] It is not prima facie unreasonable to make various entitlements turn on an enduring relation to the state. The Court has validated a durational residence requirement as a precondition to obtaining a divorce,[135] as well as a Minnesota one-year durational residence requirement for special in-state tuition rates.[136]

The focus in all constitutional litigation really should be on substance rather than form,[137] and the matter really comes down to a question of permissible margin of error. This point is illustrated in a lower court case concerning the age requirement for first grade admission. In 1975, the federal district court in Maine rejected a challenge to the familiar "age-six" eligibility rules for first grade.[138] Obviously, it is "not necessarily or universally true in

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In a situation similar to *LaFleur*, the Court nullified a Utah statute that made women ineligible for employment compensation benefits for a period extending from 12 weeks before the expected birth to six weeks after childbirth. Turner v. Department of Employment Sec., 423 U.S. 44 (1975).

[133] *See* San Antonio Ind. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33-37 (1973).

[134] In Vlandis v. Kline, 412 U.S. 441, 463 (1973), Justice Douglas and the Chief Justice joined Justice Rehnquist in dissent. Justice Douglas's role in the irrebuttable presumption cases was puzzling. He wrote the opinion of the Court in one of the Food Stamp cases, United States Dep't of Agric. v. Murry, 413 U.S. 508 (1973). But in another Food Stamp case, Department of Agric. v. Moreno, 413 U.S. 528 (1973), where the majority, eschewing irrebuttable presumption analysis, found instead a lack of minimum rationality in a rule barring food stamps for households containing unrelated individuals, Justice Douglas agreed with the dissenters (Justice Rehnquist and the Chief Justice) that this minimum test had been met. He concurred with the majority, however, on the distinctive ground of preserving a first amendment right of freedom of association. *Id.* at 542-45.

[135] Sosna v. Iowa, 419 U.S. 393 (1975).

[136] Starns v. Malkerson, 326 F. Supp. 234 (D. Minn. 1970), *aff'd mem.*, 401 U.S. 985 (1971). The *Starns* ruling was endorsed in Vlandis v. Kline, 412 U.S. 441, 452 (1973).

[137] The point is perceptively put by one commentator as follows:

> Rather than asking whether the legislature has established an irrebuttable presumption, the Court should inquire whether the legislature may constitutionally do what it has in fact effected through the provision, independent of any explicit or implicit presumption contained therein. In effect, the judicial role should be to decide whether particular consequences may constitutionally turn on a particular fact situation, not whether evidence must be allowed to defeat the validity of that particular fact situation as a classifying criterion. The question is substantive rather than procedural.

Note, *Irrebuttable Presumptions: An Illusory Analysis*, 27 STAN. L. REV. 449, 464 (1975) (footnotes omitted).

[138] Hammond v. Marx, 406 F. Supp. 853 (D. Me. 1975).

fact"[139] that all children under six lack school readiness.[140] Under a simplistic irrebuttable presumption analysis, the classification would be vulnerable. The state was fortunate, however, in having available an empirical study of school readiness. From this the court could conclude that, although errors would occur, the "age-six" classification was a reasonably accurate substitute for detailed individual testing—a costly, time-consuming process that would involve its own uncertainties.[141] In effect the court utilized a medium level rationality test, aided by the Supreme Court's earlier rejection of the proposition that education is a fundamental interest. Under strict scrutiny review a state would have difficulty proving that individualized determinations were impossible.[142]

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[139] The quoted phrase matches the Court's language in Vlandis v. Kline, 412 U.S. 441, 452 (1973).

[140] It might also be asserted that not all children six or over are ready for school, and that allowing the "unready" to attend diminishes the effectiveness of education for those who are ready. If it ever were established that there is a constitutional duty to offer some training to the retarded, the underlying constitutional principle would be that there is a right to that level of education from which one may maximally benefit, and hence a right to special education for gifted students. *See* Cuyahoga County Ass'n for Retarded Children & Adults v. Essex, 411 F. Supp. 46 (N.D. Ohio 1976) (no invidious discrimination found in limiting education for the mentally handicapped by available funding, and excluding children who were not acceptably toilet-trained). *Cf.* Ackerman v. Rubin, 35 Misc. 2d 707, 231 N.Y.S.2d 112 (Sup. Ct.), *aff'd mem.*, 17 App. Div. 2d 796, 232 N.Y.S.2d 872 (1st Dep't 1962) (no arbitrariness in denying grade acceleration to ten year-old because of insufficient age).

[141] Hammond v. Marx, 406 F. Supp. 853, 856-57 (D. Me. 1975). See also the rejection of a challenge to minimum age requirements for service in the state legislature in Wurtzel v. Falcey, 69 N.J. 401, 354 A.2d 617 (1976) (per curiam). The Court said that strict scrutiny was not triggered because there is no fundamental right to run for office, nor is age a suspect classification. It did not discuss the irrebuttable presumption doctrine; *i.e.*, the possible argument that the age picked created an irrebuttable presumption of immaturity below the designated age.

[142] A more questionable ruling, although understandable because the facts evoke sympathy, is the recent lower court decision voiding on irrebuttable presumption grounds a school board's policy of barring blind teachers from teaching English to sighted children. Gurmankin v. Costanzo, 411 F. Supp. 982 (E.D. Pa. 1976). It may not be "universally true" that blindness prevents a teacher from effectively instructing sighted children in English (setting aside any question of disciplinary problems). But, unlike the "first grade case" (Hammond v. Marx, 406 F. Supp. 853 (D. Me. 1975)), the court in *Gurmankin* cited no evidence on the degree of correspondence between blindness and lowered teaching performance in a sighted classroom, or concerning the relevance of varied levels of student ability. The court cited both the case nullifying mandatory pregnancy leaves (*LaFleur*) and the case upholding the nine-month marriage rule for widows' eligibility for Social Security benefits (Weinberger v. Salfi, 422 U.S. 749 (1975)), and found the blind teacher's case to be closer to the former than the latter. 411 F. Supp. at 989-92.

One can hypothesize two further suits that suggest the difficulties attending vigorous judicial review of personnel classifications in the field of education. First, suppose both blind and sighted teachers teach in a sighted school, and parents of children assigned to a blind English teacher sue, claiming that their children are denied equal protection in com-

In 1975 the Supreme Court apparently perceived that it had unbottled a djinn with the powerful but unrationalized irrebuttable presumption doctrine. In *Weinberger v. Salfi*,[143] the Court rejected an attack on a rule that made a widow who had married less than nine months before her husband's death ineligible for Social Security benefits—a sort of durational wifehood rule. Conceding that the nine-month classification would not infallibly distinguish investor widows from loving spouses, the Court nevertheless upheld the classification as a reasonable prophylactic rule:

> [T]he question raised is not whether a statutory provision precisely filters out those, and only those, who are in the factual position which generated the congressional concern reflected in the statute. Such a rule would ban all prophylactic provisions . . . . The question is whether Congress, its concern having been reasonably aroused by the possibility of an abuse which it legitimately desired to avoid, could rationally have concluded both that a particular limitation or qualification would protect against its occurrence, and that the expense and other difficulties of individual determinations justified the inherent imprecision of a prophylactic rule.[144]

Justice Rehnquist reasoned that it was possible to uphold the classification in *Salfi* without disturbing the prior rulings in such cases as *Stanley v. Illinois* and *LaFleur*, because "a noncontractual claim to receive funds from the public treasury enjoys no constitutionally protected status."[145] In this statement there is a profound shift from the previous simplistic approach. The inquiry is to focus not just on inexactness of fit between the basic fact and the presumed fact, but on whether a status related to a constitutional guarantee is affected. This kind of inquiry would tame the irrebuttable presumption doctrine and bring it within the conventional range of statutory review where the central task is delineation of substantive constitutional rights.

Salfi involved another limiting circumstance (although only

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parison with other children assigned to sighted teachers. Second, suppose only blind teachers are assigned to teach blind children, and the blind children's parents sue, claiming denial of equal protection in comparison with children assigned to a sighted teacher. Do these cases raise questions suitable for handling under either the irrebuttable presumption doctrine or strict scrutiny? Or do they instead raise highly complicated issues of educational policy and finance, such that any judicial action would amount to a policy dialogne rather than reasoned adjudication? *See generally* Grey, *Do We Have An Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975), and references therein to the writings of Professors Bork, Ely, Epstein, Linde, and Winter, criticizing judicial adventuring.

[143] 422 U.S. 749 (1975).

[144] *Id.* at 777.

[145] *Id.* at 772.

mentioned in passing by the Court): namely, impracticality of personalized hearings. In the cases where the Court has invalidated state policy on irrebuttable presumption grounds, the majority Justices have either stated or assumed that individualized determinations were feasible, and would be offered if the state felt the policy was worth the expense and effort of hearings (*e.g.*, in respect to need in *Murry* or physical fitness in *LaFleur*). But in the *Salfi* situation, involving the intimacies of marital relations, the majority expressed doubt that hearings could "filter out" all error, "since neither marital intent, life expectancy, nor knowledge of terminal illness" is "reliably determinable."[146]

In *Massachusetts Board of Retirement v. Murgia*,[147] a 1976 case, the Supreme Court rejected a challenge to a law that required state police officers to retire at the relatively young age of fifty. The district court had voided the classification, noting that the state already required regular medical examinations of police officers as a matter of course, thus allowing for individualized retirement decisions:

> On this record we find that mandatory retirement at age 50, where individualized medical screening is not only available but already required, is no more rational, and no more related to a protectable state interest, than the mandatory suspension or discharge of school teachers upon reaching their fourth or fifth month of pregnancy.[148]

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[146] *Id.* at 782-83.

[147] 96 S. Ct. 2562 (1976) (per curiam), *rev'g* 376 F. Supp. 753 (D. Mass. 1974).

In a footnote, the district court had queried whether a law mandating retirement at age 70 would present a different case. 376 F. Supp. at 756 n.9. The court may have assumed that at 70 there would be a closer "fit" between the basic fact of age and the presumed fact of inability to work. But the trouble with irrebuttable presumption analysis, or indeed any level of equal protection analysis above minimal rationality, is that it fails to tell us how close the "fit" must be. Some inexactness will always be present. Nor is the problem solved by Justice Marshall's preference for a flexible intermediate level of scrutiny keyed to such imponderables as "the importance of the governmental benefits denied, the character of the class, and the asserted state interests." 96 S. Ct. at 2571 (dissenting opinion). At this point the "new" equal protection simply becomes substantive due process. *See also* Usery v. Turner Elkhorn Mining Co., 96 S. Ct. 2882 (1976) (sustaining various irrebuttable and rebuttable presumptions in complicated Black Lung Benefits Act (30 U.S.C. §§ 901, 902, 921-924, 931-934, 936-940, 951 (Supp. V 1975))). The presumptions operate in favor of the private claimant, so the case is not analogous to the typical recent irrebuttable presumption cases. But the presumptions in the Act also run against the coal mine operators, who are expected to assume the cost of the program on transfer from the federal government. The absence of an adverse impact on a personalized interest may explain the Court's leniency here, in contrast to its increasing distaste, since Weinberger v. Salfi, 422 U.S. 749 (1975), for irrebuttable presumption analysis.

[148] Murgia v. Massachusetts Bd. of Retirement, 376 F. Supp. 753, 756 (D. Mass. 1974), *rev'd*, 96 S. Ct. 2562 (1976) (per curiam).

This reasoning ignores the obvious point that more than medical data is relevant to performance evaluation.

The *Murgia* case demonstrates that challenges to arbitrary age classifications or cutoff dates so common in legislation can be grounded either in irrebuttable presumption or equal protection doctrine. The district court in *Murgia* felt that the arbitrary age cutoff did not have even a rational basis, but it also cited the *LaFleur* case with its irrebuttable presumption principle.[149] The Supreme Court's per curiam opinion reversing the district court ignored the irrebuttable presumption doctrine and found rationality because physical ability "generally" declines with age.[150]

The "equality" interest at stake in the irrebuttable presumption cases is the philosophic principle of distributive justice, *i.e.*, that persons in similar situations should be treated similarly. Justice Marshall provided the most explicit statement of this principle in his *Murry* concurrence, although he confused the doctrine by likening it to the "fairness" principle of the due process clause.[151] Nevertheless, treating like alike is a widely accepted philosophical goal.[152] It is also an important aspect of equal treatment under the law when the state proceeds against an individual, *qua individual*, as in *Bell v. Burson*.[153] Yet, the feasibility of rigidly implementing the principle of treating similars similarly is questionable under the American (or any democratic) system, which is more suited to

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[149] 376 F. Supp. at 756.

[150] 96 S. Ct. at 2567-68. Interestingly, however, the Court indicated that such an arbitrary classification might not be minimally rational if the plaintiff could show that the law "has the effect of excluding from service so few officers who are in fact unqualified as to render age 50 a criterion wholly unrelated to the objective of the statute." 96 S. Ct. at 2568.

The Court avoided decision in another interesting irrebuttable presumption case, Andrews v. Drew Mun. Separate Sch. Dist., 507 F.2d 611 (5th Cir. 1975), by dismissing the writ of certiorari as improvidently granted. 425 U.S. 559 (1976). The rule at issue barred parents of illegitimate children from employment as public school teachers' aides, and had been voided by the lower courts on irrebuttable presumption grounds. 507 F.2d at 614-15. In a third case, Lavine v. Milne, 424 U.S. 577 (1976), the Court upheld a presumption under New York law that, "in the absence of evidence to the contrary," a welfare applicant who voluntarily terminates employment 75 days or less before his application does so in order to obtain welfare, and thereby becomes subject to a 75-day waiting period. 424 U.S. at 579-80.

Because the district court in *Murgia* used the presumption doctrine only as an alternative basis for decision, and since the Supreme Court failed even to mention it in its *Murgia* opinion, the irrebuttable presumption doctrine may be dead without a decent burial.

[151] "One aspect of fundamental fairness, guaranteed by the Due Process Clause of the Fifth Amendment, is that individuals similarly situated must receive the same treatment by the Government." 413 U.S. at 517 (concurring opinion, Marshall, J.).

[152] *See* commentators cited in note 36 *supra*.

[153] 402 U.S. 535 (1971).

operating by general rules emanating from a legislature than by the ad hoc, individualized discretion of a chancellor.[154]

D. *Reversion from "Strict Scrutiny" to "Strong Rational Basis"*

The "strong rational basis" test, a middle level review between minimum rationality and strict scrutiny, is not the product of a single Supreme Court opinion, and its contours are not entirely clear. In a series of cases since 1971, the Court has turned its back on the spirit of *Lindsley v. Natural Carbonic Gas Co.*,[155] and has often refused to uphold statutes merely because reasons could be conceived to justify the classifications made.[156] The Court is now more inclined to ascertain the actual purpose of the legislation, and to measure the classification against that purpose.

The beginnings of the strong rational basis test appeared in some of the sex and illegitimacy cases discussed earlier.[157] In those cases, the Court applied a stringent level of review which, although short of strict scrutiny, normally resulted in invalidation of the challenged provision.[158] In *Reed v. Reed*,[159] after a bow to the old equal protection, the Court invalidated a provision that gave a preference to men over women in appointments as administrators of decedents' estates. The asserted purpose of the preference—to conserve court time by limiting the number of potential appointees—was rejected by Chief Justice Burger, for a unanimous Court, who stated that a state may not classify "on the basis of criteria wholly unrelated" to the statute's "objective."[160] *Weber v.*

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[154] A persistent problem of the modern welfare state, which a vigorous use of the irrebuttable presumption doctrine can only aggravate, is the difficulty of conducting individualized determinations on a large scale. This problem is under-assessed by those not attuned to the difficulties of "mass justice" in administrative law. There is an unavoidable tendency to transform personalized grievance procedures into thousands of formal hearings—a powerful thrust toward over-legalization supported equally by "welfare rights" groups and the American Bar Association. *See generally* R. DIXON, SOCIAL SECURITY DISABILITY AND MASS JUSTICE: A PROBLEM IN WELFARE ADJUDICATION (1973); Mashaw, *The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness, and Timeliness in the Adjudication of Social Welfare Claims*, 59 CORNELL L. REV. 772 (1974). *See also* D. BAUM, THE WELFARE FAMILY AND MASS ADMINISTRATIVE JUSTICE (1974); Dixon, *The Welfare State and Mass Justice: A Warning From the Social Security Disability Program*, 1972 DUKE L.J. 681.

[155] *See* notes 40-41 and accompanying text *supra*.

[156] *See* Schlesinger v. Ballard, 419 U.S. 498, 508 (1975) (Stewart, J.); *id.* at 520 (dissenting opinion, Brennan, J.).

[157] *See* notes 55-65 and accompanying text *supra*.

[158] *See* Gunther, *supra* note 41, at 15.

[159] 404 U.S. 71 (1971).

[160] *Id.* at 76.

Aetna Casualty & Surety Co.[161] invalidated the provisions of a workmen's compensation statute under which unacknowledged illegitimate minors received nothing if there were enough legitimate children to exhaust the maximum benefits. Writing for the Court, Justice Powell did not choose between minimal rationality and strict scrutiny, but seemed to reach for a new general rule which would at least be more stringent than the old equal protection.[162]

Reed and *Weber*, however, could be read as strict scrutiny decisions in disguise, with the Court treating the classifications involved as "suspect" without actually saying so. A more general illustration of a middle level, ends-means focused review, can be found in *Eisenstadt v. Baird*.[163] If the old Court had a "josephic aversion to women,"[164] the new equal protection Court contains members, and an occasional majority, with an aversion to legislative imperfection. The Court in *Eisenstadt*, without applying strict scrutiny, utilized a vigorous ends-means review to nullify a Massachusetts law forbidding dissemination of birth control materials except by licensed pharmacists or physicians. Certainly there were solid reasons for questioning that kind of legislation, not the least being concern about population control. But the Court did not cite the desirability of birth control to justify its decision in *Eisenstadt*, nor did it draw on the "privacy" rationale of *Griswold v. Connecticut*,[165] which nullified Connecticut's prohibition against the use of contraceptives.[166] Instead, the majority insistently pursued legislative history, the structure of the statute itself, apparent purposes of the legislation, inexactness of means, and technical over- and under-inclusion, in finding the legislative product wanting in rationality. Under the statutory scheme, single persons, unlike married persons, could not legally be given contraceptives, even on prescription, for the purpose of preventing pregnancy.[167] On grounds of over- and under-inclusion, the Court concluded that the married-unmarried distinction could not be sustained under any of three possible purposes: deterring fornication, promoting health,[168] or prohibiting contra-

[161] 406 U.S. 164 (1972).

[162] *Id.* at 172-75.

[163] 405 U.S. 438 (1972).

[164] *See* note 11 and accompanying text *supra*.

[165] 381 U.S. 479 (1965).

[166] The true issue in *Griswold* and in *Eisenstadt*, although not so handled by the Court, may have been a first amendment right of access to birth control information. *See* Dixon, *The Griswold Penumbra: Constitutional Charter For an Expanded Law of Privacy?*, 64 MICH. L. REV. 197, 213-17 (1965); Emerson, *Nine Justices in Search of a Doctrine*, 64 MICH. L. REV. 221 (1965).

[167] Anyone could have obtained contraceptives to prevent *disease*. 405 U.S. at 442.

[168] The purpose of deterring fornication fails because married persons with the aid of

ception.[169]

Other cases followed,[170] and by 1975 an overt ends-means scrutiny test had taken more definite shape in such cases as *Schlesinger v. Ballard*[171] and *Weinberger v. Weisenfeld*.[172] In a 1976 case, *Craig v. Boren*,[173] the Court adopted the same analysis to strike down a statutory scheme that discriminated against males. In *Weisenfeld*, Justice Brennan spoke for a unanimous Court in striking down a provision of the Social Security Act which provided survivor's benefits for widows but not for widowers. The Government sought to justify the distinction on the ground that widows as a group would find it harder than widowers to obtain work and family income. The Court rejected this rationale, finding that the actual statutory purpose was to benefit children by making it easier for the surviving parent to remain in the home—a benefit not uniquely related to the sex of the surviving parent.[174] *Weisenfeld*, in short, was a "no rationality" case.

A few weeks earlier the Court had decided *Ballard*, a more difficult case illustrating the strains of middle level ends-means scrutiny. The majority upheld Navy rules providing for mandatory discharge after failure to achieve promotion, despite the fact that the rules gave male officers a shorter period to make promotion than female officers. Justice Stewart, for the Court, rationalized the difference in terms of the more limited opportunity for promotion

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contraceptives could engage in illicit relations with unmarrieds; the purpose of promoting health fails because the unmarried need safeguards as well as the married. *Id.* at 447-52.

[169] On the last point, Brennan said that even if *Griswold* were construed not to bar prohibition of distributing contraceptives, a prohibition confined to unmarrieds would fail for under-inclusion: "In each case the evil, as perceived by the State, would be identical, and the underinclusion would be invidious." *Id.* at 454.

[170] *See* cases discussed in Gunther, *supra* note 41, at 10-20. *See also* Department of Agric. v. Moreno, 413 U.S. 528 (1973). The "strong rational basis" test has some affinity with the "sliding scale" test articulated by Justice Marshall in his dissenting opinions in Dandridge v. Williams, 397 U.S. 471 (1970), and San Antonio Ind. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973). However, whereas the "strong rational basis" test points toward an ends-means analysis, Marshall's "sliding scale" approach is directed more towards a weighing of the interests in the case. In the end both approaches resemble substantive due process under a new label.

[171] 419 U.S. 498 (1975).

[172] 420 U.S. 636 (1975).

[173] 97 S. Ct. 451 (1976).

[174] Justice Rehnquist, concurring in the result, said that the limitation at issue did "not rationally serve *any* valid legislative purpose, including that for which [it] was obviously designed." 420 U.S. at 655 (emphasis added). This suggests a willingness to continue the "hypothesizing" approach of Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911). In *Weisenfeld*, however, there was a simple surviving parent-child care issue, the "sole question" being "whether a child of a deceased contributing worker should have the opportunity to receive the full-time attention of the only parent remaining." 420 U.S. at 655.

available to women. Justice Brennan, joined by Justices Douglas and Marshall, saw an unjustified gender-based classification. The striking thing about the case is the detailed inquiry both wings of the Court made into the legislative history and historical development of the promotion systems as indicia of congressional purpose. But whereas the majority Justices found "complete rationality,"[175] the dissenters accused them of sustaining the statute under "a supposition about the legislature's purpose in enacting it when the asserted justification [could] be shown conclusively *not* to have underlain the classification in any way."[176] Although the merits of the intra-Court debate in *Ballard* are not of concern here, one may well ask whether invalidation of legislation on constitutional grounds should turn on an inquiry into legislative purpose, when the Court itself can split six to three as to the nature of the purpose.

In *Craig*, the Court struck down an Oklahoma statutory scheme that prohibited the sale of 3.2% beer to all males under the age of twenty-one and all females under the age of eighteen.[177] The state—armed with statistical evidence that substantially more 18-20 year-old males were arrested for driving while drunk or under the influence than were females in the same age group—argued that the gender-based classification was substantially related to the legitimate state objective of promoting public health and traffic safety. The Court, however, subjecting the statistical data to a careful review, noted that the statute prohibited only the sale and not the drinking of 3.2% beer, and concluded that the ends-means relationship was far too tenuous to meet the *Reed* "substantial relationship" test.[178]

In a flurry of concurring and dissenting opinion, the Justices indicated their own uncertainty about the equal protection standards to be applied in specific cases. Justice Brennan, writing for the majority, embraced an ends-means, strong rational basis standard, at least for gender-based classifications.[179] But in the various

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[175] 419 U.S. 498, 509 (1975).

[176] *Id.* at 520 (emphasis in original).

[177] 97 S. Ct. 451 (1976).

[178] *Id.* at 458-60.

[179] Justice Brennan never explicitly discussed the level of equal protection review he was applying to the challenged classification scheme. He indicated, however, that *Reed* was controlling, and that the gender-based classification had to be substantially related to the attainment of important governmental interests. *Id.* at 457-60. This is the language of a strong rational basis test (middle-level review) falling between strict scrutiny and minimum rationality. To the extent that the Court may already treat sex as a suspect classification where females are disadvantaged (*see* note 58 and accompanying text *supra*), *Craig* represents an extension of such treatment to gender-based classifications that disadvantage males.

concurring and dissenting opinions, support was expressed for one-level,[180] two-level,[181] and three-level[182] approaches to equal protection review.

From the standpoint of constitutional history, the development of equal protection review into a "three-tier plus" system makes life more interesting for the judiciary, but adds nothing to the certainty of the law. It may be explicable, however, in terms of internal strains in the Court on questions of social, political, and moral values.[183] After the rejection of substantive due process, the Court cast about for a substitute. For a time, strict scrutiny proved fully adequate. It was even better than due process, since it sounded in a value nobody could fault—equality—and was almost automatic in application. The earlier minimum rationality approach was continued for a variety of cases, *e.g.*, where the problem of adjusting resources to needs was great,[184] where the classification was so intrinsically arbitrary that the Court hesitated to interfere with the legislative choice,[185] or where the plaintiff's claim did not seem to implicate any enduring values.[186] The flaw in this two-tier system

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[180] Justice Stevens maintained that the Court has really been applying only one level of equal protection analysis—requiring every state to govern impartially—and that all the decided cases could be explained within that analysis. The Oklahoma statute, according to Stevens, failed to meet the impartiality requirement, and was therefore unconstitutional. 97 S. Ct. at 464-65 (concurring opinion).

[181] Chief Justice Burger (dissenting), Justice Rehnquist (dissenting), and Justice Stewart (concurring), although reaching different results, all applied the minimum rationality test of the two-tier analysis. *Id.* at 466-73.

Justice Rehnquist, in perhaps the most carefully reasoned opinion, maintained that application of the two-level analysis in equal protection cases had caused sufficient problems to render undesirable an even more daring three-level review. *Id.* at 467-69. Under the two-level analysis, which he has taken some pains to clarify over the past several years, Rehnquist would apply strict scrutiny only when a class discriminated against had been historically subjected to a pattern of discrimination (*e.g.*, female sex), or when a fundamental interest (*e.g.*, individual interest in privacy) had been infringed. In all other cases—as in *Craig*—a minimum rationality test would be applied. *Id.*

[182] Justice Powell, concurring, called on the Court to forthrightly acknowledge that it had employed a middle-level review of gender-based classifications. *Id.* at 463-64.

[183] That law, particularly constitutional law, is not an objective science is no secret. *See* J. LASH, FROM THE DIARIES OF FELIX FRANKFURTER (1975). *Compare* W. MENDELSON, JUSTICES BLACK AND FRANKFURTER: CONFLICT IN THE COURT (1961), *with* Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673 (1963). *See also* Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957); Wright, *The Role of the Supreme Court in a Democratic Society—Judicial Activism or Restraint?*, 54 CORNELL L. REV. 1 (1968).

[184] Dandridge v. Williams, 397 U.S. 471 (1970).

[185] Massachusetts Bd. of Retirement v. Murgia, 96 S. Ct. 2562 (1976).

[186] *See* Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (zoning for single-family dwellings sustained; "family" defined to exclude unrelated groups of three or more); Johnson v. Robison, 415 U.S. 361 (1974) ("active duty" requirement for veterans' benefits sustained, thus excluding conscientious objectors who had performed alternative civilian ser-

was that once the close similarity between strict scrutiny and substantive due process was perceived, the former became suspect and had to be saved for the truly extraordinary case. Likewise the irrebuttable presumption doctrine, which can accomplish some of the same activist purposes as strict scrutiny, has become something of an over-kill concept. From this perspective, middle level or strong rational basis review can be viewed as a flexible mediating principle, permitting judicial participation without dominance in the shaping of public policy.

More important than the details of the strong rational basis line of cases[187] is the overall spirit of judicial review which they seem to embody. According to Gerald Gunther,[188] the essence of the strong rational basis test as a model for equal protection review in the future can be phrased as follows: "[L]egislative means [*i.e.*, the classifications used] must substantially further legislative ends."[189] The Court will "concern itself solely with means, not with ends."[190] By contrast, under the Warren Court's strict scrutiny test the Court asked whether the "legislative ends were 'compelling' and repeatedly found legislative purposes inadequate to justify impingements on fundamental interests."[191] Under the middle-tier review of *Reed* and *Eisenstadt*, and the more recent confirmations of the trend in *Ballard* and *Weisenfeld*, the "yardstick for the acceptability of the means would be the purposes chosen by the legislatures, not 'constitutional' interests drawn from the value perceptions of the Justices."[192]

The strong rational basis test is somewhat inconsistent with the realities of lawmaking.[193] Legislation is the product of a political

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vice); Marshall v. United States, 414 U.S. 417 (1974) (exclusion from drug rehabilitation programs of felons with two or more previous convictions sustained).

[187] In view of the Court's reluctance in Massachusetts Bd. of Retirement v. Murgia, 96 S. Ct. 2562 (1976)—not a sex-related case—to apply an ends-means analysis, the strong rational basis test may turn out to be merely a gloss on the "two-tier" system for sex-related classifications.

[188] *See* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 662 & n.12 (9th ed. 1975); Gunther, *supra* note 41. *See generally Forum: Equal Protection and the Burger Court*, 2 HASTINGS CONST. L.Q. 645 (1975); Wilkinson, *The Supreme Court, The Equal Protection Clause, and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945 (1975).

[189] Gunther, *supra* note 41, at 20.

[190] *Id.* at 21.

[191] *Id.*

[192] *Id.*

[193] For another recent criticism of the constitutional legitimacy of "ends-means" review, whether smuggled into equal protection and reaching "classification" cases, or honestly grounded on substantive due process and reaching all cases, see Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976). *See also* P. BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING—CASES AND MATERIALS (1975); Ely, *Legislative and Administrative Motivation*

process of compromise and adjustment.[194] Much statutory language is designed not to clearly express an agreed upon "legislative end," but to accommodate the conflicting interests of persons who wish to place the area in question under some governmental control. A constitutional mandate, however, that legislative means must substantially promote legislative ends—even if expressed as a "minimum rationality test"—could force the nullification of many enactments. It also could lead to tedious and uncertain inquiries into confused legislative histories.[195] Legislative purpose is primarily relevant as an aid to *statutory construction*. The *constitutionality* of legislation should not turn on the clarity of its purposes, or the pleasing symmetry with which the means are tailored to further the specified purposes. The constitutional focus should instead be on the overall impact of the program on identifiable rights. Otherwise, we shall have returned to *Lochner v. New York*,[196] without the honesty of *Lochner*.

Although recognizing its affinity with the substantive due process approach of *Lochner* and of *Nebbia v. New York*,[197] Gunther sees this new style of review as merely placing "a greater burden on the state to come forth with explanations about the contributions of its means to its ends."[198] He asserts that "[m]eans scrutiny . . . can improve the quality of the political process—without second-guessing the substantive validity of its results—by encouraging a fuller airing in the political arena of the grounds for legislative action."[199] At this point Gunther's equal protection analysis intersects with the suggestion of Professor Tribe, placed nominally under the due process clause and called "structural due process."[200]

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in Constitutional Law, 79 YALE L.J. 1205 (1970).

[194] *See* sources cited at note 16 *supra*.

[195] As Justice Rehnquist explained, dissenting in another apparent strong rational basis decision: "[C]ourtrooms should [not] become forums for a second round of legislative hearings whenever a legislative determination is later challenged." Jimenez v. Weinberger, 417 U.S. 628, 641 (1974).

[196] 198 U.S. 45 (1905). *See* note 87 *supra*.

[197] 291 U.S. 502 (1934). Gunther recognizes that his suggested means-focused model of equal protection review, which calls for careful scrutiny of legislative classifications, parallels both in purpose and in verbiage the formula of latter-day substantive due process review as articulated in *Nebbia*. As phrased in *Nebbia*, the test was whether "the means selected . . . have a real and substantial relation to the object sought to be attained." *Id.* at 525. The only function of the equal protection clause in this perspective is to provide a more acceptable basis for reinstating this level of judicial review, because the correct label of substantive due process has been so thoroughly discredited that it evokes an instinctive negative response. *See* Gunther, *supra* note 41, at 41-43.

[198] Gunther, *supra* note 41, at 44.

[199] *Id.*

[200] Tribe, *supra* note 132.

Tribe also has a concern for inadequacies in the political process, particularly during "periods of moral flux."[201] He proposes a judicial power to invalidate laws enacted on the basis of outmoded, simple stereotypes that make defective the "process of policy-formation."[202] To him, the abortion decision, *Roe v. Wade*,[203] "makes the most sense if it is read as standing for the proposition that the process of governmental determination of the legality of early abortions had become so entangled with religion that the state was disabled from legislating in the area."[204]

It is apparent that an ends-means scrutiny, engrafted on equal protection via the "strong rational basis" test, has a thrust similar to the irrebuttable presumption doctrine previously discussed. Both press toward governmental action by judicially-controlled individualized hearings rather than by legislatively-enacted generalized rules. The so-called "structural due process" analysis provides a somewhat uncertain alternative rationale for this questionable functional result of the "new" equal protection.

E. *The Limits of New Equal Protection*

Many of the developments under the "new" equal protection are both unsettling to established practice and troubling for constitutional theory. Whether approached in due process or equal protection terms, the function of judicial review is not to make the legislative process *constitutional*. It is that already, no matter how fitful legislative policy-making might be. Nor is it the function of the courts to "improve" the legislative product or make it more rational. The proper function of judicial review in respect to the legislative process is to prevent it from making unjustified inroads on identifiable constitutional rights. A rigorous "ends-means" review is analogous to the open-ended "arbitrary and capricious" or "substantial evidence" standard customary in scrutinizing administrative action.[205] We will erode the foundations of the separation of powers and the proper limits of "constitutional review" if we let the habits of review appropriate for administrative action extend to legislative action too.

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[201] *Id.* at 319.

[202] *Id.* at 290-93.

[203] 410 U.S. 113 (1973).

[204] Tribe, *supra* note 132, at 290-91.

[205] It is known among the legal congnoscenti that a court can do just about as it pleases under such vague standards. *See, e.g.*, K. DAVIS, 4 ADMINISTRATIVE LAW TREATISE § 29.01, .02, .11 (1958). On the distinction between "constitutional review" and lesser forms of review, see Strong, *Judicial Review: A Tri-Dimensional Concept of Administrative-Constitutional Law* (pt. 2), 69 W. VA. L. REV. 249 (1967).

More significantly, we should be wary of using equal protection as a hatchet in areas where generic equality is not present. The equal protection clause has normally been seen as a check on the most egregious forms of invidious discrimination. Indeed, that was its exclusive original purpose, and should be its limiting principle even when it is expanded beyond racial matters.[206] It is important to bear in mind the distinction between legislatively-created characteristics established for regulatory purposes, and unchangeable natural characteristics to which benefits or disabilities may be attached. The equal protection clause was never intended to be an instrument for general review of legislation under a rigid requirement that similarly situated persons be treated similarly.

III

EQUAL PROTECTION OF THE LAWS AND CURRENT RACIAL ISSUES

I have reserved until last the issues of school desegregation, benign racial quotas, and reverse discrimination. Approaching the "equality" topic in this way adds perspective, and helps to delineate the breadth and uncertainty of the equal protection clause. The clause itself expresses so little, yet incorporates such large hopes and aspirations. Its meaning is even less illumined by our common-law heritage than the concept of due process.[207]

The equal protection clause may operate to give the Court unprincipled discretion,[208] when combined with a "right of travel"

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[206] *Cf.* Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 81 (1873) (holding that the equal protection clause was clearly designed for a racial emergency, and that a strong case would be needed for its application in any other context). The early post-Civil War Court was willing to transcend race and reach economic regulation, but it was unable to find that any equality values were implicated by the latter.

The modern era of equal protection for nonracial issues began with Griffin v. Illinois, 351 U.S. 12 (1956), where the Court required the state to provide free trial transcripts to indigent criminals where necessary for an appeal. But even there, was an *equality* value actually involved or was it a *due process* value going to basic fairness in administration of criminal justice? Justice Harlan, dissenting in *Griffin*, saw it as the latter. *Id.* at 35-36. The majority saw it as the former, thus creating a constitutional right with no limiting principle and logically extending free counsel to indigents even for discretionary appeals and post-conviction relief. Subsequently, the majority did limit the right of free counsel to the first appeal-as-of-right stage, although without a satisfying rationale. Douglas v. California, 372 U.S. 353 (1963). Justice Harlan on one occasion did muster a majority for his preferred due process rationale. Boddie v. Connecticut, 401 U.S 371 (1971).

[207] *See* E. CORWIN, LIBERTY AGAINST GOVERNMENT 90-91, 114-15 (1948).

[208] It also may operate to give the Court an uninformed power to play god with the politics of the people, as it did in the latter phases of the reapportionment revolution. As a federal district court in Texas explained in 1972: "In ten years of wandering about this

concept as in *Shapiro v. Thompson*.[209] There, by voiding all welfare residence requirements, the Court effectively increased the welfare burden of those states favored by migrants. There was not, and could not be, any corresponding judicial guarantee of federal financial assistance.[210] From the perspective of federalism, the Court had power to complicate the problem, not to solve it. The Court should be loath to use constitutional clauses that speak in terms of individual rights to effect major institutional changes in government,[211] as, for example, it was loath to order equalization of school expenditures in *Rodriguez*.[212]

What then of race? Do we find here at least an area in which the equal protection clause is plainly applicable within well-defined limits? Have we found the "burning bush" of clear principle so that all that is left is a bit of tidying up? Not only is the answer "no," but we are mired in a major moral crisis as well as constitutional confusion. As the late Professor Bickel saw it in his last book, *The Morality of Consent*:

> The lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society. Now this is to be unlearned and we are told that this is not a matter of fundamental principle but only a matter of whose ox is gored. Those for whom racial equality was demanded are to be more equal than others. Having found sup-

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political thicket, we have not yet found the burning bush of final explanation." Graves v. Barnes, 343 F. Supp. 704, 708 (W.D. Tex. 1972), *aff'd sub nom.* Archer v. Smith, 409 U.S. 808 (1972), *modified sub nom.* White v. Regester, 412 U.S. 755 (1973), *vacated as moot*, 422 U.S. 935 (1975).

This era was perhaps ended with Justice White's opinion for the Court in Gaffney v. Cummings, 412 U.S. 735 (1973), establishing a prima facie rule of constitutionality if population deviations among districts are minimal, and recognizing that all legislative districting *is* political.

[209] 394 U.S. 618 (1969).

[210] When a Supreme Court decision forces the restructuring of government rather than the satisfaction of particular personal claims, it may be possible for the government body affected to engage in *counter-restructuring*, to the overall detriment of the groups involved. Under a ruling such as *Shapiro*, it is possible for government to adjust to the new burden by reducing the benefits for all claimants. *See generally* Canby, *The Burger Court and the Validity of Classifications in Social Legislation: Currents of Federalism*, 1975 ARIZ. ST. L.J. 1.

[211] More helpful would be a concept of minimum levels of service or opportunity, but as one writer has demonstrated, it is impossible to derive such a concept logically from the equal protection clause. Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969). Fine gradations keyed to reasonableness, and to the adequacy of means to ends, sound in due process if at all.

[212] 411 U.S. 1 (1973).

> port in the Constitution for equality, they now claim support for inequality under the same Constitution. Yet a racial quota derogates the human dignity and individuality of all to whom it is applied; it is invidious in principle as well as in practice. Moreover, it can as easily be turned against those it purports to help. The history of the racial quota is a history of subjugation, not beneficence. Its evil lies not in its name but in its effect; a quota is a divider of society, a creator of castes, and it is all the worse for its racial base, especially in a society desperately striving for an equality that will make race irrelevant.[213]

In an effort to draw together a number of disparate strands on the current scene, I would like to suggest a tactical view of race, the Supreme Court, and integration. My starting point is *Brown v. Board of Education*,[214] both a promise and a paradox in respect to equality in America. It is a promise to blacks not so much of a place in the sun, but of a chance for a daiquiri in the shade with the rest of us. It is a paradox because not even in political philosophy, let alone constitutional law, has the tension been resolved between the goals of equality of opportunity and equality of results.[215] The Court could have been content in *Brown* to jettison the "separate but equal" doctrine of *Plessy v. Ferguson*[216] by going back to the earlier doctrine of *Strauder v. West Virginia*,[217] *i.e.*, that state benefits and procedures may not be conditioned on race. We might then have been able to approach the more subtle equality issues incrementally rather than apocalyptically.

A. *Desegregation*

Brown, of course, nullified compulsory racial segregation in public education. But Chief Justice Warren's short opinion for a unanimous Court, even if written mainly for rhetorical effect to muster support for desegregation, could be read to promise much more. Education is "the most important function of state and local governments,"[218] said Warren, and in modern society "it is doubt-

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[213] A. BICKEL, *supra* note 56, at 133. Identical language appears in the Brief of the Anti-Defamation League of B'nai B'rith as Amicus Curiae 36, De Funis v. Odegaard, 416 U.S. 312 (1974). Professor Bickel authored that brief in association with Professor Philip B. Kurland, Larry M. Lavinsky, and Arnold Forster.

[214] 347 U.S. 483 (1954).

[215] Parody sometimes illuminates conceptual difficulties better than the disputations of philosophers. On equality of results, see the essay *Harrison Bergeron* in K. VONNEGUT, WELCOME TO THE MONKEY HOUSE 7 (1950). On the distributive justice facet of equality theory, see Michelman, *supra* note 211.

[216] 163 U.S. 537 (1896).

[217] 100 U.S. 303 (1880).

[218] 347 U.S. at 493.

ful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."[219] Noting then-current "psychological knowledge," the Chief Justice concluded that "[s]eparate educational facilities are inherently unequal."[220]

The purported psychological basis for such a concept of inherent inequality would appear to be present whether racial separation is the aftermath of prior de jure segregation, or the product of current residential patterns. Is a Northern state therefore culpable if, using the words of *Brown*, it "has undertaken to provide" the "opportunity of an education," but has not made it "available to all on equal terms" because it has done nothing to correct the segregation resulting from residential patterns? Obviously much of the *Brown* opinion rests on an ethic of minority assimilation, with the public school as the generative force.[221] The "melting pot" ideal has long been one of America's cherished traditions, and, despite some cynical attacks on it, has generally served us well.[222] The tragedy of the black ghetto child today is that he is bused to improve readiness to compete with no assurance that readiness will occur,[223] and under conditions that may initially heighten barriers to assimilation. For though education is compul-

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[219] *Id.*

[220] *Id.* at 494-95.

[221] A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 121-23 (1970).

[222] Although the melting pot has never been perfect, a great many groups have been successfully assimilated. Orientals, for example, although early victims of discrimination, were eventually integrated into the mainstream, with little adverse effect on their educational development.

[223] Assessment of educational gains or losses among black and white students affected by large-scale desegregation orders is beyond the scope of this Article. Findings conflict and research methodology is disputed. Gains seem to be most likely in areas where the following special conditions exist: little interracial hostility among students; specially trained staff who understand and accept minority students; majority middle-upper class students in each classroom; desegregation at both school and classroom levels; absence of inflexible tracking; no interracial conflict in community over desegregation; and possibly the involvement of younger children. Weinberg, *The Relationship Between School Desegregation and Academic Achievement: A Review of the Research*, 39 LAW & CONTEMP. PROB. 241, 269 (1975). A community with these attributes may not need desegregation, and may be ready for a relaxed free-choice student assignment system, except for the problem of finding middle-upper class majorities in each classroom. If that appears to be the key variable, *i.e.*, interclass mixture rather than interrace mixture, one must then ask how our earlier immigrant lower class schools differed, and how they apparently accomplished their mission. There may be old lessons to be relearned. To make interclass mixture the chosen instrument today is to embrace a long-term egalitarian policy of Maoist proportions. And that policy is not even remotely extractable from *Brown* or any subsequent Supreme Court decision. *See* Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

sory, the melting pot has always been voluntary. That voluntariness was undergirded by a constitutional ruling of the Supreme Court in the 1920's, nullifying an attempt to discourage parochial schools by requiring public school attendance during part of the child's educational development.[224]

Much of our present doctrinal confusion, therefore, stems from *Brown*. The case arose in the context of compelled official segregation, but the rehetoric of the opinion seems to reach all segregation in the educational experience. The melting pot spirit, which was especially appealing to Chief Justice Warren and Justice Frankfurter, pervades the opinion. But there is serious question as to whether a concept like the melting pot can retain its viability once made compulsory. More to the point, is there any logical stopping point short of a form of Chinese Cultural Revolution when it is made compulsory? These unanswered questions emanating from *Brown* are not only with us, they haunt us.

1. *The Private School Option*

The private school has long been considered an enduring force on the American scene, drawing strength from both freedom and privacy values. As long as the private schools met the minimum quality standards for compulsory education, the law had no concern with their racial or religious composition. After *Brown*, the private school[225] option became a major vehicle for avoiding the melting pot in various parts of the country, and for defeating the *integrative effect* of judicial desegregation orders. In 1976, however, a divided Court ruled in *Runyon v. McCrary*[226] that a nonsectarian private elementary school could not refuse to admit a black pupil. The decision was nominally[227] based on the Civil Rights Act

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[224] Pierce v. Society of Sisters, 268 U.S. 510 (1925).

[225] It could be argued that the special "segregation academies" which arose in response to *Brown* were not, like the conventional "private schools," analogous to private clubs, but were more like places of public accommodation, open to all except blacks. Functionally the argument has appeal. Practically it would call for some close line-drawing because many pre-*Brown* private schools were not exclusive. And to extend the public accommodation theory of Katzenbach v. McClung, 379 U.S. 294 (1964), to the "seg academies" would have required a bit more stretching of the commerce clause.

[226] 96 S. Ct. 2586 (1976), *aff'g* 515 F.2d 1082 (4th Cir. 1975). Four Justices sharply criticized the majority's legal theory. *See* note 231 *infra*.

For a narrowly distinguished contrary ruling, see Riley v. Adirondack S. Sch. for Girls, 368 F. Supp. 392 (M.D. Fla. 1973), *decision on appeal deferred*, 522 F.2d 622 (5th Cir. 1975), in which the court left undisturbed an all-white private school because an objective test was given to all applicants, and factors other than race were considered in the admissions process.

[227] Operationally the real issue in *McCrary*, although not overtly so treated by the

of 1866,[228] which had been enacted pursuant to the enabling clause of the thirteenth amendment with the aim of protecting the right of freed blacks to make contracts and deal in property.[229] Since *Jones v. Alfred H. Mayer Co.*[230] in 1968, the Court has been engaged in rewriting this statute, and thus the thirteenth amendment as well, in order to support broader application of its provisions. This process was continued in *McCrary*.

The thrust of Justice Stewart's opinion for the Court in *McCrary* is the same as in his opinion in *Jones*: namely, that the thirteenth amendment conferred on Congress not merely a power to eradicate involuntary servitude, but also a broad police power over black status and opportunity in general.[231] Thus, according to

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Court, may have been a need to protect the desegregation process against a drain of whites to private schools. Such an approach would have placed the ruling on grounds of remedy (*i.e.*, it would be a protective order) rather than right, analogous to the rationale of South Carolina v. Katzenbach, 383 U.S. 301 (1966), sustaining the "temporary" federal takeover of voter registration under the Voting Rights Act. However, proof of a significant adverse impact on desegregation orders might not be easy. The dissenting judges at the court of appeals noted that only 7.6% of secondary school students attended private schools, and only 13.4% of all students, nursery through college, attended private schools. McCrary v. Runyon, 515 F.2d 1082, 1096 (4th Cir. 1975), *aff'd*, 96 S. Ct. 2586 (1976). Furthermore, the Supreme Court in *McCrary* ruled only that private schools cannot reject blacks solely on the basis of race, not that the schools must cease operation. In any event, it is doubtful that a sufficient number of blacks can afford to enroll in private schools to cause a significant flow of white students back to the public schools.

[228] 42 U.S.C. § 1981 (1970).

[229] The statute provides that "[a]ll persons" shall have the same right "to make and enforce contracts . . . as is enjoyed by white citizens." 42 U.S.C. § 1981 (1970) (derived from Civil Rights Act of 1866, 14 Stat. 27). The parallel provision, 42 U.S.C. § 1982 (1970), protects the right to deal in property. To be valid in the *McCrary* context, § 1981 must be linked to the thirteenth or fourteenth amendments. *See* Note, *Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments*, 74 COLUM. L. REV. 449 (1974); Note, *Desegregation of Private Schools: Section 1981 as an Alternative to State Action*, 62 GEO. L.J. 1363 (1974); Note, *Jones v. Alfred H. Mayer Co. Extended to Private Education: Gonzales v. Fairfax-Brewster School, Inc.*, 122 U. PA. L. REV. 471 (1973).

[230] 392 U.S. 409 (1968). The majority in *Jones* held that the thirteenth amendment's prohibition of involuntary servitude also reached "badges of slavery," and treated the refusal of a housing developer to sell a unit to a black as such a "badge." *Id.* at 439, 441-43. *See generally* Buchanan, *The Quest for Freedom: A Legal History of the Thirteenth Amendment* (pts. 1-9), 12 HOUS. L. REV. 1, 331, 357, 593, 610, 844, 871, 1070 (1974-75), and 13 HOUS. L. REV. 63 (1975); Casper, *Jones v. Mayer: Clio, Bemused and Confused Muse*, 1968 SUP. CT. REV. 89; Henkin, *The Supreme Court, 1967 Term—Foreword: On Drawing Lines*, 82 HARV. L. REV. 63, 82-87 (1968).

[231] 96 S. Ct. at 2598. Dissenting Justices White and Rehnquist (*id.* at 2604) and concurring Justices Powell (*id.* at 2601) and Stevens (*id.* at 2603) thought the whole line of supporting precedent was wrong, but the latter two felt bound by the error in *Jones*. Following precedent does support stability of law, but Justice Stevens' additional point, that the *Jones* error accorded with "the prevailing sense of justice today," (96 S. Ct. at 2604), is questionable, both as a principle of constitutional interpretation and as an accurate assessment of

Stewart, the "contract" and "property" terms in the ancient 1866 Act should be expansively construed to bar virtually all private discrimination, so that "a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man."[232] In *McCrary*,[233] however, there were important countervailing values to deal with: claims of freedom of association, parental rights, and the right of privacy. In Justice Stewart's brief discussion of these claims, the parental and privacy rights were essentially subsumed under the discussion of freedom of association. Justice Stewart "assumed" a first amendment parental right to send children to schools espousing the principle of racial segregation, but made the right an empty one by ruling that "the *practice* of excluding racial minorities from such institutions is [not] protected by the same principle."[234]

The private school at issue in *McCrary* was not a sectarian, parochial school. But the principle of parental freedom "to direct the upbringing and education of children under their control," including choice of a private school, which the Court upheld in 1925 in *Pierce v. Society of Sisters*,[235] is not restricted to choosing a parochial school. *Pierce* was a due process-liberty case, not a first amendment freedom of religion case. There is therefore an implicit tension between the ruling in *Pierce* and the new *McCrary* ruling, for the latter materially limits the principle of parental freedom.[236] It is a potential conflict between the liberty protected by the fourteenth amendment and the special—perhaps even sui

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the "current" sense of justice. It is unlikely that Congress would pass, or the President would sign, a measure to accomplish the result mandated by *McCrary*.

[232] 96 S. Ct. at 2598, *quoting* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 443 (1968).

[233] In another significant race discrimination case at the end of the 1975 Term, McDonald v. Santa Fe Trail Transp. Co., 96 S. Ct. 2574 (1976), the Court reversed two lower courts that had permitted the discharge of two white employees concurrent with the retention of a black employee equally involved in alleged thievery. The Court held such discrimination to be illegal under Title VII of the Civil Rights Act of 1964 (and also under the Civil Rights Act of 1866 (42 U.S.C. § 1981 (1970))).

[234] 96 S. Ct. at 2596 (emphasis in original).

[235] 268 U.S. 510, 534-35 (1925).

[236] In his Brief for the United States as Amicus Curiae in Runyon v. McCrary, 96 S. Ct. 2586 (1976), the Solicitor General sought to meet this point, stating that "[t]o the extent that freedom to associate is also an ingredient of the due process holdings of such cases as *Pierce v. Society of Sisters* . . . no such associational interest would be impaired by the application of Section 1981 here (*which would not prevent any individuals from associating in private schools*)." *Id.* at 31 n.30 (emphasis added). But the application would prevent association on certain bases desired by the associators. It is acceptable to say that for overriding reasons of national policy certain kinds of association, even if noncriminal, must be curbed. It is unacceptable to play with words and deny that a curb is a curb. The same criticism may be made of Justice Stewart's opinion for the Court in *McCrary*.

generis—black rights derived from the thirteenth amendment.[237]

2. *"White Flight," The City Boundary Issue*

An even greater obstacle to desegregation than the existence of private schools has been the phenomenon of massive "white flight." Although not solely a reaction to desegregation orders, the migration of whites to suburbia is producing heavily black central cities and heavily white suburbs.[238] Court-ordered remedies for official segregation were extended to Northern cities in the wake of *Keyes v. School District No. 1*[239] in 1973, but the option of escaping remedial orders (such as busing) by moving to the suburbs was kept open one year later in *Milliken v. Bradley*,[240] where the Court reversed a lower court ruling mandating metropolitan area busing in Detroit. After finding that official segregation had existed in the Detroit city public school system, the district court devised an areawide busing plan, encompassing Detroit and surrounding suburbs, because of an insufficiency of whites in the city proper.[241]

The Supreme Court's reversal was not on the ground that interdistrict compulsory integration orders were always forbidden,[242] but on the ground that they were permissible only if the taint of prior illegality affected the entire area, not merely one part of it. Some lower court decisions on interdistrict busing since *Milliken*, based on such proof, have ordered crossing of lines,[243]

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[237] The tensions between the judicially remade thirteenth amendment and various facets of the fourteenth amendment are provocatively discussed in Note, *The "New" Thirteenth Amendment: A Preliminary Analysis*, 82 HARV. L. REV. 1294, 1312-13 (1969).

[238] *See* W. TAYLOR, HANGING TOGETHER: EQUALITY IN AN URBAN NATION 169-72 (1971). Taylor cites data indicating that by 1985 three of every four blacks in metropolitan areas will live in the central city, and seven of every ten whites in the suburbs.

[239] 413 U.S. 189 (1973). *See* United States v. School Dist., 521 F.2d 530 (8th Cir. 1975) (Omaha); Hart v. Community Sch. Bd., 512 F.2d 37 (2d Cir. 1975) (New York City); Morgan v. Kerrigan, 509 F.2d 580 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975) (Boston); Oliver v. Michigan State Bd. of Educ., 508 F.2d 178 (6th Cir. 1974) (Kalamazoo); United States v. Board of Sch. Comm'rs, 503 F.2d 68 (7th Cir. 1974) (Indianapolis).

[240] 418 U.S. 717 (1974).

[241] *See id.* at 728-36.

[242] *Id.* at 744-45. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971). *Milliken* also involved a "little federalism" problem, which may help to explain the reversal. A plaintiff victory would have pointed toward state control of educational districting, just as plaintiff victory in *Rodriguez* would have forced state control of local educational expenditure. *See* text accompanying notes 69 & 96 *supra*. Taken together, *Rodriguez* and *Milliken* may evidence a Supreme Court distaste for use of the equal protection principle to force a restructuring of government—apart from the area of legislative apportionment.

[243] *See, e.g.*, United States v. Missouri, 515 F.2d 1365 (8th Cir.), *cert. denied*, 423 U.S. 951 (1975); Newburg Area Council v. Board of Educ., 510 F.2d 1358 (6th Cir.), *cert. denied*, 421 U.S. 931 (1975); Evans v. Buchanan, 393 F. Supp. 428 (D. Del.), *aff'd*, 423 U.S. 963 (1975), *implemented*, 416 F. Supp. 328 (D. Del. 1976). In Tasby v. Estes, 517 F.2d 92 (5th Cir.),

and, to date, the Supreme Court has indicated a distaste for further involvement in this highly charged issue by its summary actions denying review or affirming.[244]

Indeed, the 1976 decision in the Chicago Housing Authority case, *Hills v. Gautreaux*,[245] evidences a concern by the Court to preserve the autonomy of "innocent" local governments who have not themselves been party to constitutional violations by other governments. The suit was designed to promote location of federally-subsidized housing in the suburbs.[246] In upholding a court of appeals decision against the federal Department of Housing and Urban Development (HUD), the Supreme Court stressed the various actions that HUD could take on its own, and stated that the remedial decree would not force surburban governments to submit public housing proposals to HUD or displace their customary powers under existing law.[247]

3. *Problems of "Right" and "Remedy" Under Brown*

In *Swann v. Charlotte-Mecklenburg Board of Education*[248] in 1970, and again by inference in 1974 in *Milliken v. Bradley*,[249] the Supreme Court endorsed the basic theory that the Constitution does not compel or confer any substantive right to racial integration in public schools. Rather, despite some broader rhetoric in *Brown* as noted above,[250] the Constitution forbids official acts of racial segregation. Once official segregation has occurred, it is necessary as a matter of remedy to issue temporary "integration orders." Sup-

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cert. denied, 423 U.S. 939 (1975), the Court followed the principle but did not find the requisite proof.

[244] *See* cases cited in note 243 *supra*. On remand in Buchanan v. Evans, 423 U.S. 963 (1975), *aff'g* 393 F. Supp. 428 (D. Del. 1975), the district court subsequently directed the preparation of an interdistrict plan (Wilmington, Del., and suburbs), the city being 90% black or Chicano and the suburbs being 90% white. 416 F. Supp. 328 (D. Del. 1976). *See also* Sedler, *Metropolitan Desegregation in the Wake of Milliken—On Losing Big Battles and Winning Small Wars: The View Largely From Within*, 1975 WASH. U.L.Q. 535 (1975).

[245] 425 U.S. 284 (1976), *aff'g* Gautreaux v. Chicago Hous. Auth., 503 F.2d 930 (7th Cir. 1975).

[246] In one significant respect *Gautreaux* is quite different from the school desegregation cases in its impact on individuals. Public housing projects involve no compulsion affecting individuals as do integration orders in education.

[247] 425 U.S. at 300-06. *See* Kushner & Werner, *Metropolitan Desegregation After Milliken v. Bradley: The Case for Land Use Litigation Strategies*, 24 CATH. U.L. REV. 187 (1975); Rubinowitz & Dennis, *School Desegregation Versus Public Housing Desegregation: The Local District and the Metropolitan Housing District*, 10 URB. L. ANN. 145 (1975); Note, *Interdistrict Desegregation: The Remaining Options*, 28 STAN. L. REV. 521 (1976).

[248] 402 U.S. 1 (1971).

[249] 418 U.S. 717 (1974). *See Desegregating Urban School Systems After Milliken v. Bradley* (Symposium), 21 WAYNE L. REV. 751, 751-850 (1975).

[250] *See* notes 218-24 and accompanying text *supra*.

posedly, such orders are to be effective only long enough to eradicate the "vestiges"[251] of the state-imposed dual system and yield a unitary system, at which point the federal district court's monitoring function will cease.

The rhetoric of *Brown* and later cases has served to cloud the supposed distinction between right and remedy in desegregation. In cases where the prior existence of an officially segregated school system has been conceded, the Court has not minced words in ordering broad remedial actions. In *Green v. County School Board*,[252] the Court stated that there was an affirmative duty for school boards to take all necessary steps to achieve a "system in which racial discrimination would be eliminated root and branch."[253] In *Swann* the Court approved a detailed plan of altered attendance zones and busing to achieve a high degree of racial proportionality in the schools. In a companion case to *Swann*, the Court made the following statement, which was subsequently relied on in the Boston school desegregation case: "Having once found a violation, the district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation. . . . The measure of any desegregation plan is its effectiveness."[254] It would appear from such language that the question of how much of the racial separation in a particular case is attributable to policies of official separation, and how much to demographic patterns and residential preferences in the intervening years, is irrelevant to the Court. But if that be so, and if demographic patterns keep shifting so as to maintain substantial racial separation even in the face of the new policies of the sort approved in *Swann*, what meaning remains in the official theory that integration in the sense of compelled racial mixing is not a matter of right but of remedy? Does all this render meaningless the concurrent statement in *Swann* that there are limits to desegregation orders, and that the objective is simply to "dismantle dual school systems"?[255] Does the remedy, focusing on the demonstrated fact of racial separation and ignoring its cause, sub silentio reshape the remedy into a substantive right to integration?

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[251] Swann v. Charlotte-Mecklenburg, Bd. of Educ., 402 U.S. 1, 15 (1971). In Milliken v. Bradley, 418 U.S. 717, 738 (1974), the Court also reiterated the statement from *Swann* that courts may impose desegregation plans "only on the basis of a constitutional violation," and that the nature of the violation conditions the "scope of the remedy."

[252] 391 U.S. 430 (1968).

[253] *Id.* at 438.

[254] Davis v. Board of Sch. Comm'rs, 402 U.S. 33, 37 (1971).

[255] *Id.* at 22.

There are aspects of Justice Brennan's opinion for the Court in *Keyes v. School District No. 1*[256] which seem to suggest an affirmative answer, particularly in that part of the opinion dealing with the question of how a constitutional violation can be shown even where there has been no showing of de jure segregation. Justice Brennan noted a "profound reciprocal effect"[257] between a school board's policies in selecting school sites and the movement of families that determines the racial composition of neighborhoods. School board actions, plus this private response, may have the effect of "earmarking schools according to their racial composition."[258] Justice Brennan's approach in *Keyes* amounted to utilizing the remedy language of *Swann* to justify a finding of an initial constitutional violation in Denver. But "effect" goes both ways, and white flight may neutralize integrative site selection. Given this reality of the "reciprocal relationship," to base a finding of constitutional violation on such perpetual "earmarking" of schools is to trigger the process of "remedial" integration orders on far less than conventional de jure segregation. Indeed, it would seem to trigger sub silentio a prophylactic integration duty, even in the face of wholly private neighborhood obstacles, in order to avert any inference of "constitutional violation." In effect, this makes integration an end in itself.

The oddly bifurcated separate opinion by Justice Powell in *Keyes* carried forward the question of what is, or should be, the real meaning of *Brown*. At the outset of his opinion, Powell departed from *Brown*'s focus on ending *official* segregation and its after-effects, and seemed to endorse a policy of racial mixture as a constitutional right per se. He stated that "the evil of operating separate schools [was] no less in Denver than in Atlanta"[259] ("separate" apparently referring to the *fact* of racial separation, whether caused by private choice or by unconstitutional state action). On the crucial question of the nature of the constitutional violation that will trigger integration remedies, Powell suggested a less demanding test than the majority's requirement of showing "segregative intent"[260] behind the school board's policies. Whenever disproportionate racial ratios in schools could be shown, he would put the burden on school boards to show that they "nevertheless are operating a genuinely integrated school

[256] 413 U.S. 189 (1973).
[257] *Id.* at 202.
[258] *Id.*
[259] *Id.* at 219 (concurring and dissenting opinion).
[260] *Id.* at 206.

system."[261]

But when Justice Powell proceeded to discuss remedy, a strange thing happened. In contrast to the general pattern of desegregation litigation where concern for the remedy has enlarged the right, the Powell opinion limited the right by considerations drawn from analysis of remedy. Both the majority and Powell suggested that proof of existence of all-black or all-white schools would be strong evidence that the whole system was tainted, requiring an extensive desegregation order. But Powell turned the theory around and argued that one-race schools might be constitutional if the entire system was genuinely integrated. Reverting to his basic thought that the dominant cause of racial separation in schools was residential separation, he found that the remedy of mass busing exceeded the breadth necessary "to redress the constitutional evil."[262] It is clear that by "constitutional evil" he meant that part of racial separation in the schools actually attributable to wrongful school board action. This brought Powell, without explicit recognition of the point, back almost to the de jure approach of *Brown*, with remedial power keyed to eliminating the after-effects of proven state-imposed segregation.[263] In short, Powell would apparently require a finding of school board involvement in segregation before allowing court intervention. Where state-imposed segregation was found, an analysis of official cause and racial separation effect would determine the scope of the remedy. To the extent this is a fair characterization, Powell in *Keyes* was closer to Justice Rehnquist than to the majority opinion. Rehnquist stressed a cause and effect approach to defining the scope of the remedy, with the purpose of correcting situations where school board manipulative techniques forced minority students "to attend schools other than those that they would have attended had attendance zones been neutrally drawn."[264]

4. *What Is Desegregation?*

These critical ambiguities regarding the nature of the constitutional violation involved in school "segregation," and the proper

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[261] *Id.* at 224.

[262] *Id.* at 249.

[263] Powell added that we should be especially concerned about overbreadth in the remedial phase of desegregation because the "burden" of the governmental restructuring order is "borne by children and parents who did not participate in any constitutional violation." *Id.* at 249-50. In derogation of this principle, see the highly questionable extremism of the First Circuit in the Boston busing case, Morgan v. Kerrigan, 530 F.2d 401 (1st Cir. 1976), *cert. denied*, 97 S. Ct. 743 (1977).

[264] 413 U.S. at 254 (dissenting opinion).

scope and duration of remedy, surfaced again last term in *Pasadena Board of Education v. Spangler*,[265] a case that could mark a turning point in the evolution of desegregation theory under the equal protection clause. Nominally *Pasadena* only concerns duration of remedy, but impliedly it also raises the basic question of what constitutes the right.

Pasadena is the first instance in which the Court found, in effect, that the transition from an unlawfully segregated system to a unitary system had been completed, even in the face of continued racial separation due to shifting residential patterns. Pasadena became subject to a remedial integration order in 1970 and decided to comply rather than appeal. In 1974, because of changing residential patterns ("white flight"), the city sought modification of a requirement in the desegregation decree that there be no majority of minority students in any school. The case eventually reached the Supreme Court, which rejected with astonishment the statement of the federal district judge that, despite the school board's total compliance on student placement, his desegregation order " 'meant to me that at least during my lifetime there would be no majority of any minority in any school in Pasadena.' "[266] In an opinion by Justice Rehnquist, the Court reiterated its pronouncement from *Swann* that *Brown* does not require perpetual racial balance:

> It does not follow that communities served by [unitary] systems will remain demographically stable, for in a growing, mobile society, few will do so. Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system.[267]

Equally significant—and on this point Justices Marshall and

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[265] 96 S. Ct. 2697 (1976). The *Pasadena* ruling was reinforced two days later by the Court's denial of certiorari in a Sixth Circuit case, where the court of appeals had declared that the City of Chattanooga had complied with its remedial desegregation duties by implementing a court-approved racial mixing plan, even though immediate and substantial white flight prevented the plan from achieving the anticipated racial mix. Mapp v. Board of Educ., 527 F.2d 1388 (6th Cir.), *cert. denied*, 96 S. Ct. 3199 (1976).

See also Davis v. East Baton Rouge Parish Sch. Bd., 398 F. Supp. 1013 (M.D. La. 1975), in which, after 20 years of litigation, the district court declared that a unitary system had come into existence in East Baton Rouge, Louisiana, even though the then-current housing patterns produced 22 single-race schools (2 white, 20 black) out of 108.

[266] 96 S. Ct. at 2703. The Court also chided the Ninth Circuit for merely frowning at the district judge and not ordering correction of the error, so that the Board of Education could know the scope of its duties and avoid any contempt of court action. 96 S. Ct. at 2706.

[267] 96 S. Ct. at 2704, *quoting* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 31-32.

Brennan disagreed—the Court held that the board was entitled to a modifying order and perhaps termination of court jurisdiction over its demographic attendance patterns, even though the board had apparently not yet achieved total compliance with part of the desegregation plan concerning hiring and promotion of teachers and administrators. In short, a system can become "unitary" in some respects, and be discharged from court supervision over those aspects, even though some parts of the desegregation plan are still being implemented, provided the parts are separable and not causally connected. Specifically, in the context of *Pasadena*, attendance patterns were deemed separable from affirmative action duties in respect to staff.[268]

Because of its special setting, *Pasadena* does not resolve all questions concerning the scope and duration of desegregation remedies. If busing is the major desegregation tool in a given school system, must busing be maintained indefinitely, or need it be maintained only so long as it "works" to maintain the initial amount of racial mixing it produced? In Pasadena, the plan was initially successful in eliminating black-majority schools, but it failed after the first year because of demographic shifts beyond the city's control. Suppose that on remand of the *Pasadena* case, the district judge lifted his order entirely (as the Solicitor General in oral argument suggested might be appropriate).[269] Could the city then totally abandon the cross-town busing plan, or could it abandon the plan only to the extent that doing so would not *increase* the racial imbalance that natural forces of population mobility were causing anyway?

This question bridges right and remedy because it really demands a definition of "desegregation" in a particular, realistic setting. Ever since *Brown*, the tendency has been to stress that "it" must be done quickly and effectively, without defining the "it."[270]

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[268] A special feature of the *Pasadena* case was that the city could not have complied easily with the illegal prescription of the federal district court judge even if it had tried. "White flight," whether or not primarily attributable to the order itself, reduced the Anglo-Caucasian student population from 58.3% in the first year of the court's order (*i.e.*, 1970, when full compliance with the attendance part of the order was achieved), to 44% in the third year, yielding a black student population of 40%. Spangler v. Pasadena Bd. of Educ., 519 F.2d 430, 433 n.3, 435 (9th Cir. 1975). Hence, with respect to the black minority, there would have been only a 4% margin to work with in fine tuning the busing system; and when that margin vanished, compliance with the order would be a complete impossibility.

[269] 96 S. Ct. at 2707.

[270] I am reminded of an oral argument in Alexander v. Holmes County Bd. of Educ., 396 U.S. 19 (1969), when the first Nixon Administration was arguing through Jerris Leonard, Assistant Attorney General, Civil Rights Division, that additional time should be

Certainly, more than twenty years after *Brown*, an adequate definition should at least attempt to separate those aspects of ethnic proportionality in schools—or in other aspects of life—attributable to what Justice Powell has called "purely natural and neutral nonstate causes,"[271] from those aspects attributable to governmental manipulation. Although greeted with less than universal acclaim, and though not without some troublesome features, the busing bill proposed by President Ford in the summer of 1976 did saliently raise this question. The core of the proposal was to require federal courts in desegregation cases to determine the extent to which discriminatory governmental action had caused more racial imbalance than would have occurred anyway, and to limit remedial busing orders to correction of that portion of racial imbalance governmentally induced.[272]

There is more than a symbiotic relationship between the finding (and definition) of a constitutional violation, and the shaping of an affirmative action remedy. The scope and duration of judicial

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allowed to Mississippi and other Fifth Circuit states to implement large-scale desegregation plans. To Mr. Leonard's lame explanations, Justice Black, age 83, but practically bounding on the Bench like a frustrated 60-year-old, kept insisting—"Why can't you do 'it' now?" But it was obvious that Justice Black had not thought it through and had no notion of what "it" was or when "it" would or could be accomplished.

[271] Keyes v. School Dist. No. 1, 413 U.S. at 249 (concurring and dissenting opinion).

[272] S. 3618, 94th Cong., 2d Sess. (1976) (School Desegregation Standards and Assistance Act of 1976). The NAACP had sharply criticized the proposal, but William Raspberry, *Washington Post* columnist, had this to say in a column titled *Busing and the NAACP*:

> The principal residual from the massive effort [of the NAACP to achieve racial balance in all classrooms] is more likely to be racial bitterness and educational deterioration than racial understanding and educational enhancement. This is so because the emphasis on getting black children into the proper classrooms is based on the assumption that race relations and education will automatically improve once we [get] the children together. It's not automatic, and nobody seems to be working very hard on it.
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> . . . .
>
> I put the onus on the NAACP rather than the courts because the courts have no choice, once state-caused segregation is demonstrated, but to order desegregation. . . .
>
> But the NAACP has some choices. It could fight the unlawful official acts that, in its view, produce segregation at the time the acts are committed. It could involve itself directly in the search for ways to enhance the education of poor blacks—a major national problem and one that isn't significantly affected even by "successful" busing programs.

Washington Post, June 30, 1976, § A, at 19, col. 5.

See Rotunda, *Congressional Power to Restrict the Jurisdiction of the Lower Federal Courts and the Problem of School Busing*, 64 GEO. L.J. 839 (1976). Rotunda argues against congressional measures to limit busing on the ground that Congress cannot use a jurisdictional limitation to restrict a substantive right, but he overlooks the element of overbreadth in the mass busing remedy, and the obvious point that there is no constitutional right to remedial overbreadth.

jurisdiction over the school system is being determined. If the basis for judicial intervention is a finding of some *discriminatory action* attributable to government, then it follows that the remedy is limited to "correcting" the effects of that constitutional violation. But if judicial intervention is based solely on a statistical racial imbalance that creates a presumption[273] of discriminatory state action—even though the primary cause may be private action—then judicial power would seem to be limited only by the dynamics of demography and judicial self-restraint (which may be little limit at all). Further, if a reasonably precise de jure-de facto distinction is abandoned, we will have abandoned also the time limitation on all integrative remedies, implicit in *Brown*, and will have taken a long step toward the concept of an ethnically proportionalized educational system, readjusted every year to maintain numerical consistency in the face of contrary private choice.

Pasadena, with its focus on specific "correction" of specific governmental discrimination, seems to point in the direction of a limited judicial role, but a far better dialogue on the question is needed.[274] Until the Court clarifies the nature of the substantive

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[273] The presumption may be irrebuttable in practice, if not in law. Justice Powell noted the difficulty in ascertaining school board motivation regarding years of administrative decisions in a large and complex school system. Keyes v. School Dist. No. 1, 413 U.S. at 233-35 (concurring and dissenting opinion). *See also* Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CALIF. L. REV. 275 (1972). The traditional de jure-de facto distinction in school desegregation is expressly supported in dicta in Washington v. Davis, 426 U.S. 229 (1976).

[274] Continuing its trend toward limiting remedies for school segregation to the effects of the specific constitutional violations, the Supreme Court in Austin Indep. Sch. Dist. v. United States, 97 S. Ct. 517 (1976), remanded to the Fifth Circuit a sweeping remedial school busing plan for reconsideration in light of Washington v. Davis, 426 U.S. 229 (1976) (plaintiffs in civil rights cases must prove racially discriminatory purpose on part of officials and may not rely merely on a disproportionate racial impact). Noting that under the Fifth Circuit's proposal any school falling outside of the "naturally desegregated" range (between 50% and 90% Anglo) would be brought under the busing plan, Justice Powell concluded in a concurring opinion that "the plan is designed to achieve some predetermined racial and ethnic balance in the schools rather than to remedy the constitutional violations committed by the school authorities. As described by the Court of Appeals, the plan is impermissible under our holding [in] Pasadena City Board of Education v. Spangler . . . ." 97 S. Ct. at 518 n.3.

Although the Court once again failed to clearly define those official actions and inactions which amount to a constitutional violation and trigger equitable relief, Powell stated that school authorities could not be held responsible for racial and ethnic imbalances in public schools which resulted from residential patterns. He concluded that unless evidence in the record indicated that "absent those constitutional violations, the Austin school system would have been integrated to the extent contemplated by the plan, the remedy was overbroad. *Id.* at 519.

This decision is likely to require a reconsideration of broad court desegregation orders in effect in Wilmington, Delaware; Indianapolis, Indiana; Dayton, Ohio; and Louisville, Kentucky. *See* Memorandum for the United States as Amicus Curiae, Delaware State Bd.

right created by *Brown*, and the critical role of presumptions in findings of discriminatory state action, we seem destined to remain confused and divided—all the while slipping closer to the concept of racial ratios as a permanent policy. And we will leave it to some future generation to relearn the lesson that the ultimate goal is an "equality that will make race irrelevant."[275] The purposes and goals of "desegregation" are laudable. But continuing animosities generated by busing,[276] and a new wave of revisionist criticism in civil rights circles,[277] suggest that Supreme Court efforts to massively restructure the American educational system are both risky and unlikely to succeed.[278] This seems especially true where the Court's actions are based on little more than the constitutional uncertainties of the equal protection clause and the philosophical uncertainties of equality itself.

B. *Racial Preferences—"Reverse Discrimination"*

A somewhat different range of issues is presented when we turn from school desegregation to racial preference policies volun-

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of Educ. v. Evans, 97 S. Ct. 475 (1976) (dismissing appeal); Brief for the United States on Petition for a Writ of Cert. to the U.S. Ct. of Appeals for the 5th Cir., Austin Indep. Sch. Dist. v. United States, 97 S. Ct. 517 (1976) (granting certiorari, vacating, and remanding).

[275] A. BICKEL, *supra* note 56, at 133.

[276] The Boston desegregation case, Morgan v. Kerrigan, 530 F.2d 401 (1st Cir. 1976), *cert. denied*, 97 S. Ct. 743 (1977), has become a new Boston Marathon, and "[w]hites and blacks each patrol the perimeters of their own neighborhoods in radio cars." N.Y. Times, May 23, 1976, § 4, at 2, cols. 3-5. Between 1972 and 1976, under the district court's desegregation plan, white enrollment dropped from 58,800 to 35,200, while black enrollment remained at 31,000. N.Y. Times, June 28, 1976, at 61, col. 5.

[277] Despite broad application of the fourteenth amendment, it is becoming increasingly apparent that massive desegregation orders (as opposed to narrowly targeted desegregation orders keyed to clear cases of de jure segregation) are unworkable, both demographically and logistically, no matter how determined the school hroad, and how vigorous the judge. Writing in 1970, Alexander Bickel surveyed the problems and saw Brown v. Board of Education headed for "irrelevance." A. BICKEL, *supra* note 221, at 151 (1970). More recently Professor Derrick A. Bell, Jr., viewed *Brown* as obsolete, and wrote that the "time has come for civil rights lawyers to end their single-minded commitment to racial balance," which is increasingly unattainable and often "educationally impotent," and to work instead for "judicially enforceable educational improvements which all parents seek." Bell, *supra* note 223, at 516.

Professor James S. Coleman, co-author of the famous report, *Equality of Educational Opportunity* (U.S. Gov't Printing Office 1966), has more recently concluded that the "current means by which schools are being desegregated are intensifying the problems [of central city-suburb segregation] rather than reducing it." *See* J. Coleman, S. Kelly & J. Moore, Trends in School Segregation, 1968-73 (Urhan Institute Paper Aug. 15, 1975). *See also* C. JENCKS, INEQUALITY (1972); Levin, *Education, Life Chances, and the Courts: The Role of Social Science Evidence*, 39 LAW & CONTEMP. PROB. 217 (1975); Sowell, *Black Excellence: The Case of Dunbar High School*, 35 PUB. INTEREST 3 (1974).

[278] *See generally Symposium on The Courts, Social Science and School Desegregation*, 39 LAW & CONTEMP. PROB. 1, 217 (1975).

tarily adopted by government. Such policies have been developed for public and private employment and for admissions to state professional schools, in order to ensure an infusion of minority group members who might not be employed or admitted under conventional standards. Here, the problem is not one of judicial dictation of constitutional duties to the political branches. Rather, the political branches have presumably made a public policy choice favoring special preferences for minorities. The question is whether the judiciary should negate this policy choice on the ground that minority preference programs violate the equal protection clause.[279]

Benevolent quotas or reverse discrimination in professional school admissions and employment place important nondiscrimination and equality values in conflict. Although our goal should not be a racially proportionalized society, preferential admissions and employment policies are door-opening measures designed to ameliorate the disadvantages stemming from racial isolation, and to promote tolerance through mutuality of work and experience. The concept of subsidies is not new to this generation, and has not been confined to claims having a racial basis.[280]

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[279] This section deals with public policies of race preference, and judicial review thereof. Theoretically, wholly private law schools and medical schools are not affected by those constitutional restraints which may be imposed on public institutions that employ reverse discrimination policies. However, the truly private nature of reverse discrimination decisions in private schools may be questionable in light of the affirmative action duties which descend on them as a condition for retaining federal funding or charitable group tax privileges.

[280] A full treatment of racial preference issues would encompass a number of federal affirmative action policies. For example, every President since Franklin Roosevelt has exercised authority to require government contractors to implement equal employment programs. Exec. Order No. 8802, 3 C.F.R. 957 (Supp. 1938-43). President Kennedy enforced such orders in 1961, by requiring termination of contracts for those who did not comply. Exec. Order No. 10925, 3 C.F.R. 448 (Supp. 1959-63). The present order charges the Secretary of Labor with administration, and contractors must use affirmative action to ensure that equal employment opportunity is provided. Exec. Order No. 11246, 3 C.F.R. 339 (Supp. 1965). Authority for such orders has been sustained in a number of cases and opinions. *See* Contractors Ass'n of E. Pa. v. Secretary of Labor, 442 F.2d 159 (3d Cir. 1971); 42 OP. ATT'Y GEN. No. 21 (1961). For discussion of the contract compliance program, see U.S. COMM'N ON CIVIL RIGHTS, THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT—1974, VOL. V: TO ELIMINATE EMPLOYMENT DISCRIMINATION (1975).

Another example of a federal affirmative action program is the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1970) (Title VI), which forbids discrimination in programs receiving Federal assistance. The power to grant or withhold tax exemptions has also been used by the federal government to induce affirmative action. Green v. Connally, 330 F. Supp. 1150 (D.D.C. 1971), *aff'd sub nom.* Coit v. Green, 404 U.S. 997 (1971). *See* Proposed Rev. Proc., 50 Fed. Reg. 6991 (1975); Rev. Rul. 231, 1975-1 C.B. 158; Rev. Rul. 447, 1971-2 C.B. 330.

1. *Employment Cases*

The validity of federal programs that merely eliminate "built-in headwinds" to minority employment has been fairly well established.[281] Where programs operate to actually transfer scarce places from one group to another, however, far more difficult issues are presented. There is a significant difference between eliminating headwinds which have unfair detrimental effects, and creating tailwinds which cause unfair racial preferment. Nevertheless, the Supreme Court, in *Franks v. Bowman Transportation Co.*,[282] expansively construed Title VII of the Civil Rights Act of 1964[283] to authorize retroactive grants of competitive-type seniority, even though such an award can adversely affect innocent fellow employees not parties to the discrimination. The Court justified the ruling under the "make whole" objective of the Act.[284] To Justice Powell this was a discriminatory interpretation of the Act, because such awards "directly implicate the rights and expectations of perfectly innocent employees."[285] Chief Justice Burger described the result as " 'robbing Peter to pay Paul.' "[286] Significantly, neither the Chief Justice nor Justice Powell objected to the general principle of compensatory relief; rather they called for an equita-

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[281] Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971). *Griggs* involved an action brought under Title VII of the 1964 Civil Rights Act (42 U.S.C. §§ 2000e-1 to 2000e-17 (Supp. V 1975)). The Court held that once differential racial impact is shown, the challenged practice is prohibited unless the employer can prove that the practice has "a demonstrable relationship to successful performance of the jobs for which it [is] used." 401 U.S. at 431.

[282] 424 U.S. 747 (1976). The Fifth Circuit had held that retroactive seniority relief for non-employee plaintiffs was barred by the terms of the Act itself. 495 F.2d 398, 417-18 (5th Cir. 1974). *See also* Meadows v. Ford Motor Co., 510 F.2d 939, 949 (6th Cir. 1975), *cert. denied*, 96 S. Ct. 2215 (1976).

[283] 42 U.S.C. §§ 2000e-1 to 2000e-17 (Supp. V 1975).

[284] 424 U.S. at 763-69.

[285] *Id.* at 788 (concurring and dissenting opinion). Justice Rehnquist joined this opinion. Noting the view of some commentators that the "expectations" of incumbent workers might not be legitimate where they resulted from past discrimination against others, Justice Powell, in language reminiscent of his concern for the burden on innocent children in school desegregation (Keyes v. School Dist. No. 1, 413 U.S. at 249-50), had this response:

> Absent some showing of collusion, the incumbent employee was not a party to the discrimination by the employer. Acceptance of the job when offered hardly makes one an accessory to a discriminatory failure to hire someone else. Moreover, the incumbent's expectancy does not result from discrimination against others, but is based on his own efforts and satisfactory performance.

424 U.S. at 788-89 n.7.

[286] *Id.* at 781 (concurring and dissenting opinion). Three months later a federal district court upheld the reverse discrimination promotion of a woman over a man who was more qualified on the basis of a rating scale, but ruled that the man was entitled to money damages from the employer for lost pay and loss of position regarding further promotions. McAleer v. American Tel. & Tel., 416 F. Supp. 435 (D.D.C. 1976).

ble "balancing" process, case by case, in which the "claims of discrimination victims" would be weighed against the "economic penalties that would be imposed on innocent incumbent employees."[287]

When "affirmative action" programs extend beyond encouragement of nondiscriminatory hiring programs[288] among persons of presumptively equal capability,[289] and beyond nullification of nonvalidated entry tests,[290] and begin to produce actual discrimination against particular nonminority persons (as alleged in *Bowman*), a significant constitutional issue arises.[291] Yet the Supreme Court has handled Title VII cases solely in terms of statutory construction, without addressing the constitutional questions raised by racial preferences. This cannot last. Preferential hiring (or retention) on a nominally "temporary" remedial basis[292] is approaching the point where school desegregation has already arrived: the point where the breadth of a "remedy" untested by constitutional concepts subtly expands the substantive right.

Another alleged employment discrimination case in mid-1976, *Washington v. Davis*,[293] did result in a significant constitutional rul-

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[287] 424 U.S. at 794 (concurring and dissenting opinion, Powell, J.). *See* Edwards, *Race Discrimination in Employment: What Price Equality?*, 1976 U. ILL. L.F. 572. Both in school desegregation and employment discrimination cases, the urgent conceptual question involves not the initial discriminatory act, but the subsequent use of class-conscious remedial devices. *See also* Acha v. Beame, 531 F.2d 648, 656 (2d Cir. 1976); Patterson v. American Tobacco Co., 535 F.2d 257, 268-69, 273-74 (4th Cir. 1976), *cert. denied*, 97 S. Ct. 314 (1976).

[288] *See, e.g.*, Contractors Ass'n of E. Pa. v. Secretary of Labor, 442 F.2d 159 (3d Cir. 1971) (the "Philadelphia Plan" case; concerning executive order requiring government contractors to take affirmative action to increase hiring of minority employees and to avoid discriminatory practices during employment).

[289] As has been pointed out, it "would be difficult to rationalize the granting of preferences if a company were able to show that all qualified applicants were not equal, that some were clearly better than others." Edwards, *supra* note 287, at 598.

[290] *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971).

[291] In the "Philadelphia Plan" case, Contractors Ass'n of E. Pa. v. Secretary of Labor, 442 F.2d 159 (3d Cir. 1971), the court of appeals rejected an equal protection argument that the Plan really involved racial quotas, concluding simply that the action was designed to "remedy tbe perceived evil that minority tradesmen have not been included in the labor pool." *Id.* at 177.

[292] The "trigger" for such temporary remedial action may be either a violation of Title VII of the Civil Rights Act (*see, e.g.*, Franks v. Bowman Transp. Co., 424 U.S. 747 (1976)), or a violation of the equal protection clause of the fourteenth amendment, as in NAACP v. Allen, 493 F.2d 614 (5th Cir. 1974). The extensive remedial decree recently issued on Title VII grounds against the Western Electric company by a federal district court in Virginia illustrates this point. The court awarded full backpay to a class of black and female employees from 1965 through most of 1976, and continuous future payment to class members if lack of vacancies precluded actual placement in higher rated positions. *See* THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, COMMITTEE REPORT No. 23, Oct. 1976, at 8.

[293] 426 U.S. 229 (1976).

ing, although not on the preference question per se. The suit in *Washington* was brought not under a fair employment statute, but under the equal protection component of the fifth amendment. The Court held that a showing of disproportionate racial impact adverse to blacks under facially neutral public employment tests was insufficient to establish a prima facie case of *constitutional* violation, where there was no proof of discriminatory governmental purpose.[294] At issue was the United States Civil Service Commission's widely used functional literacy test, challenged because four times as many black applicants for the District of Columbia police force failed it as did whites. In upholding the test, the Court rejected the concept of automatically requiring a showing of job-relatedness of tests whenever disproportionate racial impact is shown.[295] The Court viewed such a simple prima facie approach as a new form of equal protection strict scrutiny, operating to shift a quick and heavy burden of proof to the government. It said the approach would invalidate many laws and regulations which, though neutral in purpose and phrasing, impact more heavily on blacks or the poor generally (*e.g.*, the regressive sales tax).[296]

In requiring proof of discriminatory purpose,[297] not just disproportionate impact,[298] *Washington* seems to undergird the school desegregation cases such as *Keyes v. School District No. 1*[299] and *Milliken v. Bradley*,[300] which held that a showing of state in-

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[294] *Id.* at 243-45. The Court thus contradicted the ruling in *Griggs*, but that case, the Court explained, rested on Title VII statutory grounds, not on a principle of constitutional law. *Id.* at 236-39.

[295] *Id.* at 243-45. *Washington* thus struck down a rule that had been applied in almost all federal judicial circuits since 1972. *See* cases cited *id.* at 244 n.12.

[296] *Id.* at 248. In rejecting a broad prima facie rule as a matter of constitutional law, the Court seemed to leave open the possibility that such a rule might be permissible as a statutory requirement in certain areas, as it presently is in the area of public employment. *Id.*

[297] The Court went all the way back to Strauder v. West Va., 100 U.S. 303 (1879), and traced from there the principle that a showing of official discriminatory purpose is central to an equal protection claim. 426 U.S. at 239-41. Contrary language in some cases, stressing racial impact, was treated as unnecessary dicta. *Id.* at 242-43, *citing* Wright v. Council of Emporia, 407 U.S. 451 (1972); Palmer v. Thompson, 403 U.S. 217 (1971).

[298] In his concurring opinion, Justice Stevens perceptively noted that the burden of proving a prima facie case will vary in different contexts and that "the line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps not quite as critical, as the reader of the Court's opinion might assume." 426 U.S. at 254. In Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 97 S. Ct. 555 (1977), however, a decision in which Justice Stevens did not take part, the Court did clarify the distinction somewhat, supplying several factors to be considered in determining racially discriminatory intent. *See* note 303 *infra*.

[299] 413 U.S. 189, 208 (1973).

[300] 418 U.S. 717, 748 (1974). *See also* Pasadena Bd. of Educ. v. Spangler, 96 S. Ct. 2697 (1976), where, in reversing the lower courts, the Court noted the absence of any

volvement was essential to prove a constitutional violation. *Washington* thus necessarily reinforces the *Brown*-based concept of distinguishing "de jure," and hence judicially-remediable, from "de facto," and hence not judicially-remediable, school segregation. By extrapolation, it can by hypothesized that the *Washington* decision offers little encouragement for suits challenging the constitutionality of various artisan or professional examinations, on facts showing only that more blacks fail than whites.[301] Such a hypothesis is supported by the Court's recent holding in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[302] requiring proof of racially discriminatory intent—rather than merely a racially disproportionate result—in a case of alleged discriminatory zoning.[303]

Despite its decision in *Washington*, the Court seemingly left untouched the practice of allowing proof of disproportionate racial impact to trigger integrative remedies in cases based on Title VII of the 1964 Civil Rights Act.[304] Can two different approaches to the "prima facie" test continue to coexist, when the factual settings are so similar? Even with a spirit of deference to Congress, which the Court mentioned but did not explain,[305] how long can the left

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"showing . . . that those post-1971 changes in the racial mix . . . which were focused upon by the lower courts were in any manner caused by segregative actions chargeable to the defendants." *Id.* at 2704.

[301] The Fifth Circuit has already rejected one such suit for lack of proof of intentional discrimination. Tyler v. Vickery, 517 F.2d 1089, 1093 (5th Cir.), *cert. denied*, 426 U.S. 940 (1976). *Compare* Anthony v. Massachusetts, 415 F. Supp. 485 (D. Mass. 1976) (invalidating requirement that all veterans who passed civil service examination be hired before non-veterans), *with* Branch v. Du Bois, 418 F. Supp. 1128 (N.D. Ill. 1976) (Illinois statute granting preference points to veterans in civil service examination scores held constitutional absent a showing of intent to discriminate against non-veterans).

[302] 97 S. Ct. 555 (1977).

[303] Expanding on its holding in *Washington*, the Court suggested several factors which courts could consider in determining whether a racially discriminatory intent existed, including: evidence of disproportionate racial impact; historical background of the challenged action; specific antecedent events; departures from normal procedures; and contemporary statements of those involved in the decisionmaking. *Id.* at 564-65.

[304] The parties had litigated *Washington* on the mistaken assumption that the simple "prima facie" approach to proving employment discrimination, developed in Title VII cases, was applicable also to cases based on the equal protection component of the due process clause. 426 U.S. at 236-37 n.6. Today a suit such as *Washington* could be grounded directly on Title VII, which was made applicable to public employees by a 1972 amendment (42 U.S.C. § 2000e-16 (Supp. V 1975)). 426 U.S. at 238 n.10.

In the *Arlington Heights* case, the Court remanded a fair housing claim based on Title VIII of the 1964 Civil Rights Act, as well as the constitutional challenge to the local zoning ordinance. 97 S. Ct. at 566. While directing the court of appeals to require a showing of discriminatory intent as to the constitutional claim, the Court did not suggest a proper test for the Title VIII claim. The case thus leaves open the question of whether less stringent standards of proof will be required to show a Civil Rights Act violation than a constitutional violation.

[305] *See* note 296 *supra*.

hand of statutory affirmative action be kept separate from the right hand of constitutionalism? The answer may lie not in the employment cases, but in the higher education cases.

2. *Higher Education Cases*

Is it constitutional to reserve some places in higher education for minority group applicants by applying lower academic standards than those regularly applied, when the effect is to disadvantage identifiable members of the majority group? This question is troublesome on several counts: the theoretical justification for the preference; the "minorities" to be included, and sub-quotas or ranking within the "minorities"; the degree of the preference; and the duration of the preference. The last point is especially critical because here there is no clear "termination date" analogous to that in the school desegregation cases, where the dismantling of an officially segregated system can be accomplished in a finite time period.[306]

The Supreme Court avoided the issue in the famous case of *De Funis v. Odegaard*,[307] involving preferential admissions at the University of Washington Law School. It found "mootness" on the ground that plaintiff De Funis, who had been admitted pending appeal by lower court order, was about to graduate.[308] Justice Douglas dissented from the mootness conclusion[309] and wrote an ambivalent opinion on the merits, renewing his opposition to racial registers[310] and espousing the concept of a color-blind Constitution. Nevertheless, faced with the reality of the black experience, he strained to find a constitutionally inoffensive way to permit some black preference in law school admissions. He suggested supplementing the conventional academic admissions criteria with indicators taking into account socio-economic class factors, in order

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[306] *See* Pasadena Bd. of Educ. v. Spangler, 96 S. Ct. 2697 (1976).

[307] 416 U.S. 312 (1974). *See generally* Posner, *supra* note 16, at 7-32; *De Funis Symposium*, 75 COLUM. L. REV. 483 (1975); *De Funis: The Road Not Taken*, 60 VA. L. REV. 917 (1974).

[308] The Washington Supreme Court had reversed the trial court order directing De Funis' admission, but Justice Douglas stayed that reversal pending review of the case in the Supreme Court. By the time the 28 briefs were filed, De Funis was beginning his final year. The University told the Court that De Funis would be allowed to complete the year regardless of the outcome of the case. 416 U.S. at 314-16.

[309] *Id.* at 320. Justice Brennan also dissented from the mootness dismissal but did not join Justice Douglas' discussion of the merits. *Id.* at 348.

[310] *See also* Wright v. Rockefeller, 376 U.S. 52 (1964), a case involving alleged racial gerrymandering, where Justice Douglas said that "in a society that honors the Lincoln tradition" grouping by race has no place. *Id.* at 66. In *De Funis*, he said that the "Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized." 416 U.S. at 342.

to reach the "disadvantaged" generally.[311]

More recently, the New York Court of Appeals also managed to avoid a conclusive ruling on racial preferences in a medical school admissions case, *Alevy v. Downstate Medical Center*.[312] The court relied on the fact that the plaintiff had not shown that he would have been admitted even in the absence of a race preference policy.[313] Much of the court's opinion was devoted to a quest for the appropriate level of scrutiny to be applied under the equal protection clause in a race preference case. By rejecting strict scrutiny and opting for a middle level review,[314] the court was able to offer the dictum that race preference might be a permissible legislative experiment in narrowly limited circumstances. But its list of arguments against reverse discrimination was longer than its list of justifications:[315]

> [O]ur recognition that benign discrimination is permissible should not be taken as tacit approval of such practices. We reiterate that preferential policies, laudable in origin and goal, may be laden with substantial detrimental side effects which make their use undesirable. If such practices really work, the period and extent of their use should be temporary and limited for as goals are achieved, their utilization should be diminished.[316]

In a similar medical school admissions case, *Bakke v. Regents of the University of California*,[317] the Supreme Court of California did reach the merits, even though it was not clear that the plaintiff

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[311] 416 U.S. at 340-41.

[312] 39 N.Y.2d 326, 348 N.E.2d 537, 384 N.Y.S.2d 82 (1976).

[313] *Id.* at 338, 348 N.E.2d at 547, 384 N.Y.S.2d at 91-92. The plaintiff's academic credentials, although better than those of the students admitted under the preference program, did not place him high enough on the list of other nonminority candidates to ensure his admission even if the minority places were opened to competition. However, the court noted that "petitioner's MCAT average of 680 was higher than every one of the accepted minority students." *Id.* at 331, 348 N.E.2d at 542, 384 N.Y.S.2d at 86.

[314] Once the court settled on a middle level review, the upholding of reverse discrimination was assured, without requiring serious inquiry into the hard questions involved in such a decision. This is not an uncommon danger in the Supreme Court's recent "levels of review" scholasticism under equal protection.

[315] The court said that there was nothing inherently suspect in discrimination by the majority against itself, and that the stigma is not serious when a majority member is denied admission. But it said that reverse discrimination was a questionable policy because it would encourage polarization of races, perpetuate thinking in racial terms, tend to undermine minority incentive for self-improvement, cause those advanced by reverse discrimination to be held in lower esteem, and require extremely difficult racial determinations. 39 N.Y.2d at 335-36, 348 N.E.2d at 545, 384 N.Y.S.2d at 90.

[316] *Id.* at 337, 348 N.E.2d at 546, 384 N.Y.S.2d at 91.

[317] 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976), *modified*, 18 Cal. 3d 252b ___ P.2d ___, ___ Cal. Rptr. ___, *cert. granted*, 45 U.S.L.W. 3555 (U.S. Feb. 22, 1977).

would have been admitted even if there had been no minority preference policy.[318] In a somewhat involuted opinion, the court invalidated the overt use of race as an admissions criterion, at least where the preferential placement of minority group members deprived nonminorities "of benefits which they would otherwise have enjoyed."[319] The spirit of the Douglas opinion in *De Funis* thus came to fruition.[320] Although rejecting race preference in strong, even moral terms, the court said that integration was a valid public policy objective, and that subsidies and special programs were constitutionally permissible means of increasing minority enrollment.[321]

The *Bakke* dissent asked the troublesome question. If racial integration is a valid purpose, why can it not be accomplished directly by considering race at the "means" stage and overtly recruiting blacks as blacks, instead of engaging in "manipulation of labels"?[322] The majority conceded that classification by race does not always render a program unconstitutional, but it distinguished the past instances in which racial classification had been permitted from the preferential admission situation. In the previous cases, the racial classification did not deprive any nonminority persons of benefits they otherwise would have enjoyed[323] (except for tempo-

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[318] Although other nonminority candidates denied admission were more qualified than Bakke, his grade point average of 3.51 and MCAT percentile scores of 96, 94, 97, and 72 placed him above all 16 of the minority candidates accepted. Some minority students who were admitted had grade point averages below 2.5 and the mean percentage MCAT scores of minority students admitted in 1973 and 1974 classes were below the fiftieth percentile in all four areas tested. *Id.* at 43, 553 P.2d at 1158-59, 132 Cal. Rptr. at 686-87.

[319] *Id.* at 46, 553 P.2d at 1160, 132 Cal. Rptr. at 688.

[320] For another case rejecting an affirmative action program in higher education on reverse discrimination grounds, see Cramer v. Virginia Commonwealth Univ., 415 F. Supp. 673 (E.D. Va. 1976). As in *Bakke*, the preferential action challenged (sex preference in hiring to meet a supposed federally imposed affirmative action duty) was not predicated on any finding of past discrimination needed to constitutionalize such discriminatory action by the state.

A similar result has been reached under the Civil Rights Act of 1964. *See* Flanagan v. President & Director of Georgetown College, 417 F. Supp. 377 (D.D.C. 1976) (pro-black discrimination in student aid invalidated under Title VI). *See also* Cramer v. Virginia Commonwealth Univ., 415 F. Supp. 673 (E.D. Va. 1976) (Title VII as alternative ground of decision).

[321] The court mentioned such approaches as aggressive recruitment, remedial schooling for all races, increased enrollment, and expanded admission criteria including consideration of "matters relating to the needs of the profession and society, such as an applicant's professional goals." 18 Cal. 3d at 55, 553 P.2d at 1166, 132 Cal. Rptr. at 694.

[322] *Id.* at 90, 553 P.2d at 1190, 132 Cal. Rptr. at 718.

[323] The court cited, *inter alia*, Lau v. Nichols, 414 U.S. 563 (1974) (requiring instruction in English for students of Chinese ancestry). 18 Cal. 3d at 46, 553 P.2d at 1160, 132 Cal. Rptr. at 688.

rary deprivations imposed to remedy illegal acts of discrimination[324]).

There are several values to be achieved by race preference in admission to higher education, and facially they have substantial appeal. In the language of conventional equal protection litigation, it may be argued that even if race is normally a "suspect" category, it may be used as a classification device when the purpose is to achieve a public policy which is supported by a compelling state interest.[325] In a broad sense one can of course say that integration is a social good. It is objective evidence that the elusive "melting pot" has been achieved and that tensions have eased. Stated this baldly, however, ethnic proportionalization becomes an end in itself, rather than an occasionally permissible device for achieving other neutral, but "compelling," ends. Several such neutral ends are commonly mentioned as justifying racial preferences.

One end is the need for more black lawyers to improve legal representation for blacks. In *De Funis*, Justice Douglas argued that the goal of providing "black lawyers for blacks"[326] was not even a *valid* state purpose, let alone a compelling governmental interest justifying racial preferences (and the California court in *Bakke* agreed[327]). Yet there clearly is serious imbalance between the size of minority groups and the number of minority lawyers available to serve them.[328]

Another factor supporting preferential admissions is the educational benefit derived by students from attending schools with

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[324] Reasonable men can differ on what constitutes a legally significant deprivation. With respect to busing for school desegregation, the *Bakke* majority (in dictum) saw a discommoding effect, but not total deprivation of an education. 18 Cal. 3d at 46, 553 P.2d at 1160, 132 Cal. Rptr. at 688. But the *Bakke* dissenter saw a real detriment when a middle-class white student is bused into a lower quality school, even though he still receives an education. *Id.* at 73-75, 553 P.2d at 1179-80, 132 Cal. Rptr. at 707-08.

[325] *See, e.g.*, Korematsu v. United States, 323 U.S. 214, 223-24 (1944); Karst & Horowitz, *Affirmative Action and Equal Protection*, 60 VA. L. REV. 955, 965-66 (1974); O'Neil, *Racial Preference and Higher Education: The Larger Context*, 60 VA. L. REV. 925, 934-39 (1974). See also Porcelli v. Titus, 431 F.2d 1254 (3d Cir. 1970), where the court upheld, as a measure to achieve a more integrated faculty, the replacement of a promotion list system with a system in which race was the primary (but, the court argued strongly, not the only) factor.

[326] 416 U.S. at 342 (dissenting opinion, Douglas, J.).

[327] 18 Cal. 3d at 53, 553 P.2d at 1165, 132 Cal. Rptr. at 693. To improve service to the minority community, the *Bakke* court suggested offering more medical school courses on the needs of minorities, and specific training for general practitioners in serving the needs of the poor. *Id.* at 57, 553 P.2d at 1167, 132 Cal. Rptr. at 695.

[328] Blacks constitute 12% or more of the American population, about 1.4% of the legal profession, and 2% of the medical profession. Brief for the Ass'n of Am. Law Schs. as Amicus Curiae at 12, Bakke v. Regents of Univ. of Cal., 18 Cal. 3d 34, 533 P.2d 1152, 132 Cal. Rptr. 680 (1976).

racially and culturally diverse student bodies.[329] And in our pluralistic multiracial society, there is also a social benefit because the graduates of our professional schools often become societal leaders.

When longer lists of justifications are compiled,[330] the factor of reparations for past wrongs or discrimination looms large.[331] The idea of reparations, like the concept of guilt by association, does not easily find a niche in American legal theory. A person may control his associations, but a racial reparations policy rests on a concept of guilt by inheritance. It visits the sins of prior generations and particular forbears on members of the present generation.

The legal literature inspired by the *De Funis* case is revealing, since it indicates the troubling nature of the race preference concept, even for those who accept it on one ground or another. Seldom has a mooted case set emotion in conflict with intellect among so many learned men. Although Erwin Griswold had signed the Association of American Law Schools brief[332] supporting the position of the University of Washington, in his subsequent *De Funis* essay[333] he almost gave the argument away by observing that the University did seem to have gone "overboard" in its minority admissions program. The results reached would have been easier to defend, Griswold now argued, if the school "had limited [preferential admissions] to perhaps ten specially selected members of minority groups, had carefully documented each of these, had also carefully documented the cases of non-minority applicants in the same zone of consideration who were not admitted, and had made reasoned comparative judgments with respect to these."[334] Agreed. But such a policy would not be workable without extreme effort, would have little quantitative impact, and would probably not accomplish the results achieved in race preference admissions programs as now commonly operated. Nor would it be easy to

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[329] Greenawalt, *Judicial Scrutiny of "Benign" Racial Preference In Law School Admissions*, 75 COLUM. L. REV. 559, 590 (1975); Griswold, *Some Observations On The DeFunis Case*, 75 COLUM. L. REV. 512, 518 (1975).

[330] *See, e.g.*, Greenawalt, *supra* note 329, at 579-99; Nickel, *Preferential Policies in Hiring and Admissions: A Jurisprudential Approach*, 75 COLUM. L. REV. 534, 536-44 (1975).

[331] *See generally* B. BITTKER, THE CASE FOR BLACK REPARATIONS (1973); Hughes, *Reparations for Blacks*, 43 N.Y.U. L. REV. 1063 (1968).

[332] Brief for the Ass'n of Am. Law Schs. as Amicus Curiae (signed by Erwin N. Griswold, Soia Mentschnikoff, and Clifford C. Alloway), DeFunis v. Odegaard, 416 U.S. 312 (1974).

[333] Griswold, *supra* note 329, at 513.

[334] *Id.*

devise nominally nonracial admissions criteria in terms of various objective characteristics of the "disadvantaged," as suggested by Justice Douglas in *De Funis*,[335] and by the California court in *Bakke*.[336] A major predicate of the Douglas position was that the universally used Law School Admission Test might be unfair to blacks, thus yielding a basis for judicial intervention to correct outright discrimination. Those who have analyzed this matter with care, however, tell us that the Law School Admission Test as a predictor of law school grades is "about as adequate for minority persons as for majority persons."[337]

Especially questionable is the suggestion that race preference policies should simply be allowed to operate without being subjected to careful constitutional analysis. A few years ago, John Kaplan put the point bluntly when he said that "the necessity of considering not only the reality of governmental action, but also its appearance, may justify the belief that in [the racial preference area] we cannot afford complete openness and frankness on the part of the legislature, executive or judiciary."[338] In the short run, justifying a policy of racial preferment by calling it a diversification process, or the product of giving special weight to nonacademic factors, may both ease the feelings of the rejected white and avoid inferiority feelings on the part of the accepted black. But as Kent Greenawalt suggests, judicial honesty is the soundest policy in the "absence of an unanswerable argument for hypocrisy."[339] Surely a policy of evasion, concealment, and deception is not the way to achieve the ultimate goal of interracial recognition, tolerance, and especially, respect.

There is much the government legitimately can do in terms of grants, programs to identify the full talent pool, and special programs to improve qualifications. It would be an extremely dangerous precedent, however, for a state school to impose preferential race quotas or goals in form or in fact, if ever constitutionalized. Recognizing this, some supporters of minority admissions programs have characterized reverse discrimination as a remedial program, pointing out that "no one argues that preferential minority

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[335] 416 U.S. at 340-41 (dissenting opinion, Douglas, J.).

[336] 18 Cal. 3d at 54-55, 553 P.2d at 1166, 132 Cal. Rptr. at 694.

[337] Linn, *Test Bias and the Prediction of Grades in Law School*, 27 J. LEGAL EDUC. 293, 322-23 (1975). *See also* Hart & Evans, Major Research Efforts of the Law School Admission Council, Apr. 1976.

[338] Kaplan, *Equal Justice In An Unequal World: Equality For The Negro—The Problem Of Special Treatment*, 61 NW. U.L. REV. 363, 410 (1966).

[339] Greenawalt, *supra* note 329, at 602. *See also* Karst & Horowitz, *supra* note 325, at 972-74.

admissions programs of law schools are anything but temporary, designed to last only so long as they are needed to secure integrated law schools and an integrated bar."[340]

The argument is superficially appealing and brings us back to the "right-remedy" distinction.[341] If an established right is violated, remedies follow, and in extraordinary situations[342] action may be required which courts could not constitutionally order in other situations. The crucial point is that in the area of reverse discrimination, exemplified by the *De Funis-Alevy-Bakke* line of cases, there have been no power-creating and power-limiting (with respect to duration) adjudications of legal violations on the part of the state professional schools at issue. Instead, there is an appropriate policy choice—a legislative choice really—to try to bring more blacks and other minorities into the profession. But such legislative action must be distinguished from adjudication. Legislative action against a social wrong is not the equivalent of a judicial finding of constitutional violation.

In the normal process of public policy-making, various needs and wrongs are identified, and the responsible bodies adopt appropriate policies. There is strength in the argument that courts should not generally interfere with legislative judgments on how to ameliorate the primary race problem—the problem of the black minority.[343] But policy-making exists inside a constitutional system, and the Constitution limits the means by which even urgent policies can be achieved. Calling a rule "remedial,"[344] or calling the rule's target a social wrong, should not create legislative power to

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[340] Karst & Horowitz, *supra* note 325, at 972.

[341] *See* notes 248-64 and accompanying text *supra*.

[342] Examples include dismantling of a dual school system as in Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) (where the Court emphasized the point that, remedy aside, there is no "substantive constitutional right" to "any particular degree of racial balance," *id.* at 24), and correcting discrimination in hiring, as in NAACP v. Allen, 493 F.2d 614 (5th Cir. 1974) (where the court upheld the district court's order for a one-to-one black-white hiring ratio until 25% of the work force was black).

[343] This is the ultimate defense of reverse discrimination given in Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role*, 42 U. CHI. L. REV. 653 (1975), although he recognizes the "risk" and is "uncomfortable" with it. *Id.* at 703. Edwards and Zaretsky have expressed similar discomfort, stressing the transitory nature of preferential employment remedies, and the "legal and moral questions concerning reverse discrimination against white male workers." Edwards and Zaretsky, *Preferential Remedies For Employment Discrimination*, 74 MICH. L. REV. 1, 46 (1975).

[344] The "remedial theory," which justifies temporarily transcending normal constitutional bounds, may be available to Congress when it acts in response to court decisions identifying a pattern of constitutional violation by some states, as in South Carolina v. Katzenbach, 383 U.S. 301 (1966), where the Court sustained the temporary federal takeover of the setting of voting qualifications—even though the Constitution allocates to the states the power to set voting qualifications.

operate, even temporarily, in discriminatory, constitutionally forbidden ways—absent an adjudicated wrong.

To treat a statutory policy as the equivalent of an adjudicated constitutional wrong is to give the legislature a power to circumvent the Constitution. Indeed, it would mean that substantive goals can be accomplished by illegal means if the legislature uses "right-remedy" rhetoric rather than conventional policy-making language. The only principle that may safely be a constitutional principle must be a simple and enduring one for all men in all seasons: overt, official discrimination on racial grounds is not permissible as a general legislative policy.

CONCLUSION

Writing in 1835, De Tocqueville saw the "progressive development of social equality" as part of the sweep of history over a 700-year period.[345] He saw the freeing of the social structure, but not the philosophical tensions in the equality concept itself. It can now be more clearly perceived that "equality," taken seriously, is the most elusive value of all, with internal inconsistencies and uncertain boundaries. It is also apparent that the equal protection of the laws clause, the most explicit recognition of an equality principle in our Constitution, is our most refractory constitutional clause. Long dormant, even in its application to racial matters, the equal protection clause has undergone a revival in recent years that has been a constitutional law event. Today, the clause is an important vehicle for judicial scrutiny of legislative classifications. But the equal protection clause gives little more guidance to the judiciary now than did the due process clause in an earlier day. Because legislation is the result of compromise and adjustment, and all legislative classifications are inexact, a vigorous equal protection review may permit the judiciary to substantially inhibit the legislative process.

From equal protection, the judiciary also derives a newly asserted power to order the restructuring of government, as in school desegregation and legislative reapportionment, rather than to merely negate governmental action, as has been the traditional pattern in constitutional law. The clause is now invoked to limit governmental imposition of "inequalities" through such policies as race preferences and reverse discrimination. It can be predicted that both the new vigor and old elusiveness of the equal protection concept will continue as we attempt to adjust individualistic and egalitarian values in a dynamic and increasingly interdependent society.

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[345] A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 7 (H. Commager ed. 1946).