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FIRST AMENDMENT EQUAL PROTECTION: ON DISCRETION, INEQUALITY, AND PARTICIPATION

*Daniel P. Tokaji**

[A]n ordinance which . . . makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official — as by requiring a permit or license which may be granted or denied in the discretion of such official — is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.

— Shuttlesworth v. City of Birmingham[1]

In light of the safeguards designed to minimize racial bias in the process, the fundamental value of jury trial in our criminal justice system, and the benefits that discretion provides to criminal defendants . . . the Baldus study does not demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital sentencing process.

— McCleskey v. Kemp[2]

The recount mechanisms implemented in response to the decisions of the Florida Supreme Court do not satisfy the minimum requirements for non-arbitrary treatment of voters . . . . The formulation of uniform rules to determine [voter] intent . . . is practicable and, we conclude, necessary.

— Bush v. Gore[3]

INTRODUCTION

The tension between equality and discretion lies at the heart of some of the most vexing questions of constitutional law. The considerable discretion that many official decisionmakers wield raises the spectre that violations of equality norms will sometimes escape detec-

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1. 394 U.S. 147, 151 (1969) (quoting Staub v. City of Baxley, 355 U.S. 313, 322 (1958)).

2. 481 U.S. 279, 313 (1987) (footnote omitted).

3. 531 U.S. 98, 105-06 (2000).

tion. This is true in a variety of settings, whether discretion lies over speakers' access to public fora, implementation of the death penalty, or the recounting of votes. Is the First Amendment[4] violated, for example, when a city ordinance gives local officials broad discretion to determine the conditions under which political demonstrations may take place?[5] Is equal protection denied where the absence of uniform standards for vote recounts gives low-level bureaucrats wide latitude in determining which votes to count?[6]

The subject of this Article is the role of the courts in policing the distorting effects of discretion upon constitutional equality, particularly where rights of political participation are at stake. It uses the term "First Amendment Equal Protection" to refer to those cases applying an especially searching mode of analysis where the government threatens to undermine equality in the realm of expression.[7] At the core of First Amendment Equal Protection, I argue, is the democratic ideal that all citizens should have an equal opportunity to participate in public discourse. The cases that I include under this rubric exhibit a heightened sensitivity to the threat to equality posed by excessive official discretion,.[8] This sensitivity has led to stringent

4. Although using the term "First Amendment" throughout, this Article does not address the religion clauses of the First Amendment but instead focuses on cases involving the speech, press, assembly, and petition clauses. This should not be taken as denying that the Establishment and Free Exercise Clauses have an egalitarian component. *See* Newdow v. United States Congress, 292 F.3d 597, 607-08 (9th Cir. 2002) (concluding that the words "under God" in the Pledge of Allegiance violate the Establishment Clause's requirement of neutrality), *amended by* 328 F.3d 466 (9th Cir. 2003), *cert. granted sub nom.* Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 384 (Oct. 14, 2003). The egalitarian aspects of the First Amendment's religion clauses, however, present a subject for another day.

5. *See, e.g.*, Thornhill v. Alabama, 310 U.S. 88, 91-92 (1940); Hague v. Comm. for Indus. Org., 307 U.S. 496, 501 (1939).

6. *See Bush*, 531 U.S. at 102-03.

7. The use of this term is meant to recall Professor Monaghan's use of the term "First Amendment 'Due Process' " in his article of the same title. Henry P. Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518 (1970). While Professor Monaghan focused on the special procedural rules that were at the time developing to safeguard liberty of expression, this Article focuses upon the egalitarian component of the First Amendment. It takes up Kenneth Karst's insight that "the principle of equal liberty lies at the heart of the first amendment's protections against government regulation of the content of speech." Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 21 (1975) [hereinafter Karst, *Equality in the First Amendment*].

8. While libertarian rhetoric often surrounds First Amendment discourse, *see, e.g.*, Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225 (1992); David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334 (1991), implicit in my argument is that the *egalitarian* component of the freedom of speech has always been prominent. It thus takes issue with those who argue that equality "should be banished from moral and legal discourse as an explanatory norm," *see, e.g.*, Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 542 (1982), as well as those who contend that "the constitutional doctrine of free speech has developed without taking equality seriously," *see, e.g.*, CATHARINE A. MACKINNON, ONLY WORDS 71 (1993).

tests designed to "smoke out" illicit motivations.[9] Among the doctrines developed to cabin discretion in the realm of speech are rules requiring exceptionally clear standards where government requires permission to speak in public places, and liberal rules regarding facial challenges, justiciability, and appellate factfinding.[10] These safeguards against inequality in the realm of speech have for the most part endured, despite the changing makeup of the Court and judicial philosophies of its members.

This searching mode of analysis contrasts sharply with the standard applied where nonspeech forms of equality are at issue. Outside the area of free speech, the Court generally exhibits a much greater tolerance for schemes that vest broad discretion in government officials. That is true even where the existence of such discretion may allow intentional group-based discrimination, including race discrimination, to persist undetected and thereby defy judicial remedy.[11] Cases such as *Washington v. Davis*[12] and *McCleskey v. Kemp*,[13] for example, rest on a presumption that decisionmakers will generally exercise their discretion free from racial bias. Even in the face of evidence showing a statistically significant disparate impact on those of a particular racial or ethnic group,[14] the Court is loathe to find an equal protection violation without "smoking gun" evidence of illicit motive.[15] Put simply, the Court exhibits a much greater willingness to trust government decisionmakers — to assume that they will exercise their discretion in a fair and unbiased manner — where race is concerned, than where speech is concerned.

9. *Cf.* David A. Strauss, *Affirmative Action and the Public Interest*, 1995 SUP. CT. REV. 1, 26 (describing strict scrutiny as a means by which to "smoke out" illicit motivations).

10. *See* Richard H. Fallon, Jr., *The Supreme Court 1996 Term — Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 96-97 (1997) [hereinafter Fallon, *Implementing the Constitution*] (identifying strict First Amendment rules for licensing schemes as a means by which to prevent discrimination on forbidden bases); Anthony G. Amsterdam, Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 75 (1960) ("[T]he doctrine of unconstitutional indefiniteness has been used by the Supreme Court almost invariably for the creation of an insulating buffer zone of added protection at the peripheries of several Bill of Rights freedoms.").

11. Throughout this Article, I use the term "race" to include both race and ethnicity.

12. 426 U.S. 229 (1976).

13. 481 U.S. 279 (1987).

14. *See, e.g., McCleskey*, 481 U.S. at 312-13 (holding that Georgia's capital sentencing system did not deny equal protection, despite disparities that "appear[] to correlate with race").

15. This Article does not quarrel with the general requirement that discriminatory intent must be shown in order to establish an equal protection violation. Indeed, it argues that a concern with intentional discrimination lies not only at the heart of equal protection cases in the area of race, but also at the root of First Amendment cases involving discretionary schemes of speech regulation.

The critical distinction between First Amendment Equal Protection and Conventional Equal Protection lies not so much in how they answer the theoretical question of *what* constitutes a violation. The difference lies instead in their answer to the question of *how* to prevent and remedy such violations.[16] Thus, it is important to consider why these mechanisms for dealing with discretion differ so dramatically.

In considering this question, it is instructive to examine three lines of equal protection jurisprudence that depart from the norm: specifically, those involving jury exclusion,[17] political restructuring,[18] and the "one person, one vote" standard.[19] These areas exhibit modes of analysis similar though not identical to First Amendment Equal Protection, reflecting the importance of safeguarding equality in realms of democratic participation. Even without clear evidence of discriminatory intent, the Court has been willing to find an equal protection violation in these areas.[20]

This Article argues that the decision whether to cabin official discretion, or, alternatively, to adopt a more deferential test in a given context reflects a judgment, usually a silent one, about the relative value of discretion and equality. The First Amendment Equal Protection cases suggest a new gloss on inequalities that have not traditionally been viewed as serious equal protection problems. These include not only the electoral inequalities that have received considerable attention in the wake of *Bush v. Gore*,[21] but also practices such as incumbent-preferential gerrymandering schemes and viewpoint-based peremptory challenges. Considering such practices in the light cast by First Amendment Equal Protection cases should, I argue, cause courts

16. *See* AKHIL REED AMAR, THE BILL OF RIGHTS 243 (1998) ("[C]onstitutional text does not specify precisely which institutional, procedural, and doctrinal rules best implement the First Amendment's substantive values."); Guido Calabresi, *The Supreme Court 1990 Term — Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80, 84 (1991) ("[T]he definition of fundamental rights and the judicial enforcement of those rights are two very different inquiries."); Fallon, *Implementing the Constitution*, *supra* note 10, at 57, 60 (stating that the role of courts is not simply to articulate constitutional norms but also to define how those norms should be implemented).

17. *See, e.g.*, Castaneda v. Partida, 430 U.S. 482 (1977).

18. *See, e.g.*, Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982).

19. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533 (1964).

20. As explained in Part III.B, I view these three sets of cases as "soft purpose" cases, designed to smoke out intentional discrimination in cases where the existence of government discretion makes it hard to detect. *Cf.* Vikram D. Amar & Evan H. Caminker, *Equal Protection, Unequal Political Burdens, and the CCRI*, 23 HASTINGS CONST. L.Q. 1019, 1035 (1996) (arguing that equal protection cases involving unequal restructuring of political process are not best understood as "soft intent" cases).

21. 531 U.S. 98 (2000).

to view the exercise of official discretion in these contexts more skeptically than Conventional Equal Protection doctrine would demand.

* * * *

Part I of this Article assesses various areas in which official and quasi-official[22] decisionmakers are called upon to exercise discretion, and describes two equality norms that may be threatened by such discretion: racial equality and expressive equality. Part II traces the development of First Amendment Equal Protection and shows how its special doctrinal rules are rooted in concerns that public officials will misuse their discretion to suppress dissenting viewpoints.

Part III contrasts First Amendment Equal Protection with "Conventional Equal Protection," a term I use to refer to the less searching mode of analysis generally applied to official discretion *outside* the realm of speech. Part IV discusses three areas, collectively referred to as "Unconventional Equal Protection,"[23] which represent exceptions to this general rule. In these cases, the Court has adopted different modes of analysis, which place a higher premium on eliminating inequality even where it requires some diminution of official discretion.

Part V attempts to explain these divergent approaches to the problem of equality and discretion, noting that the equal protection cases that most closely resemble the First Amendment model are those concerning inequalities in the realm of political participation. I argue that this heightened sensitivity suggests a First Amendment-like dimension to questions of political equality that have traditionally been examined under the lens of the Equal Protection Clause. The Article closes by suggesting a new analytic framework within which to examine such problems as inequalities in voting systems, incumbent gerrymandering, and peremptory challenges, drawing from the approach to official discretion developed in First Amendment Equal Protection cases.

22. I use the term "quasi-official" or "quasi-governmental" to include jurors, public defenders, civil litigants, and others who, though not generally thought of as government officials, are in some contexts deemed state actors and therefore subject to the constraints of the Constitution. *See, e.g.*, Edmonson v. Leesville Concrete Co., 500 U.S. 614, 631 (1991) (holding that private litigants exercising peremptory challenges are state actors).

23. Joel Swift uses the term "unconventional equal protection" to describe the mode of analysis applied by the Supreme Court in assessing discrimination in the exercise of peremptory challenges. Joel H. Swift, *The Unconventional Equal Protection Jurisprudence of Jury Selection*, 16 N. ILL. U. L. REV. 295, 296-97 (1996). This Article agrees that this area presents a prime example in which the Supreme Court has departed from its ordinary equal protection analysis, and attempts to explain its relationship to other areas in which the Court has looked with skepticism on discretionary schemes that threaten either racial or expressive equality.

I. Discretion and Inequality

Discretion pervades our systems of government, from the actions of police officers on the beat, to verdicts handed down by juries, to decisions made by innumerable administrative agencies, to the manner in which states and localities choose to structure their political processes. Any system aspiring to individualized justice depends upon placing some degree of discretionary decisionmaking authority in public or quasi-public officials.[24] Discretion to determine how the law should be applied — and to decide when *not* to apply the law — is therefore an integral component of our systems of justice.[25]

This Part begins by examining the literature regarding official discretion in various spheres. It then provides an overview of two types of equality that the misuse of official discretion jeopardizes: expressive equality and racial equality. As I shall attempt to show, First Amendment and Equal Protection Clause jurisprudence is centrally occupied with how best to curb intentional discrimination without unduly infringing on official discretion.

A. *Defining Discretion*

Roscoe Pound defined discretion as "an authority conferred by law to act in certain conditions or situations in accordance with an official's or an official agency's own considered judgment and conscience."[26] In a similar vein, Kenneth Culp Davis stated that "[a] public officer has discretion whenever the effective limits on his power leave him free to make a choice among possible courses of action or inaction."[27]

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24. *See, e.g.*, Roscoe Pound, *Discretion, Dispensation, and Mitigation: The Problem of the Individual Special Case*, 35 N.Y.U. L. REV. 925, 927 (1960) ("[T]he life of today is too complex and its circumstances are too varied and too variable to make possible, in practice, reduction to rules of everything with which the regime of justice according to law must deal.").

25. *See, e.g.*, Inmates of Attica Corr. Facility v. Rockefeller, 477 F.2d 375, 380 (2d Cir. 1973):

> In the absence of statutorily defined standards governing reviewability, or regulatory or statutory policies of prosecution, the problems inherent in the task of supervising prosecutorial decisions do not lend themselves to resolution by the judiciary. The reviewing courts would be placed in the undesirable and injudicious posture of becoming "superprosecutors." In the normal case of review of executive acts of discretion, the administrative record is open, public and reviewable on the basis of what it contains. The decision not to prosecute, on the other hand, may be based upon the insufficiency of the available evidence, in which event the secrecy of the grand jury and of the prosecutor's file may serve to protect the accused's reputation . . . .

26. Pound, *supra* note 24, at 926.

27. KENNETH CULP DAVIS, DISCRETIONARY JUSTICE 4 (1969). Davis's thesis was that "[w]here law ends, discretion begins." *Id.* at 3.

The common thread running through these two definitions is the idea that discretion exists where the law leaves public officials free to exercise their judgment. So defined, discretion permeates virtually every aspect of governmental functioning.[28] Police officers, for example, enjoy considerable discretion in deciding which of the many drivers speeding through an intersection to stop. But discretion does not only come into play where the law ends. It also exists where it is unclear what the law prescribes and where there are no effective means to ensure that the law's prescription is followed. One such example is a jury's discretion to acquit a criminal defendant, even in the face of overwhelming evidence of guilt. If jurors refuse to follow the law and acquit despite an instruction that would in the face of the evidence require a guilty verdict, there is no check upon the jury's decision. The jury therefore enjoys discretion to acquit, even though the law mandates the opposite outcome. And of course, the modern administrative state — with its countless agencies at the local, state, and national level — is critically dependent upon the exercise of official discretion to engage in both quasi-legislative and quasi-judicial functions.[29]

Vesting discretion in public and quasi-public officials allows those officials to base their decisions on circumstances that by their very nature are impossible to codify.[30] For this reason, official discretion is vital to ensuring "individualized justice," the ability of decisionmakers to take particular circumstances into account in order to achieve a fair

28. *See* HANS KELSEN, THE PURE THEORY OF LAW 349 (Max Knight trans., Univ. of Cal. Press 1970) (1934) ("Even the most detailed command must leave to the individual executing the command some discretion."); Erwin Chemerinsky, *In Defense of Equality: A Reply to Professor Westen*, 81 MICH. L. REV. 575, 581 (1983) ("Discretion is inevitable in enforcing any law."). A substantial body of literature examines both the benefits and dangers of official discretion. *See, e.g.*, DAVIS, *supra* note 27; Burton Atkins & Mark Pogrebin, *Introduction: Discretionary Decision-Making in the Administration of Justice*, *in* THE INVISIBLE JUSTICE SYSTEM: DISCRETION AND THE LAW (Burton Adkins & Mark Pogrebin eds., 2nd ed. 1982); Pound, *supra* note 24, at 926.

29. Jerry Mashaw describes the tension between the enforcement of legal rights and the administration of policy as follows:

> In a legal culture largely oriented toward court enforcement of individual legal rights, "administration" has always seemed as antithetical to "law" as "bureaucracy" is to "justice." Law focuses on rights, administration on policy. Rights, if enforced, must limit policy, thereby stifling administration. When policy is wanted, the law's typical response is to create no-right, no-law policy enclaves where discretion can flourish. But permitting uncontrolled discretion generates a demand for law, and the competitive cycle of law and policy begins anew.

JERRY L. MASHAW, BUREAUCRATIC JUSTICE 1 (1983).

30. *See, e.g.*, Atkins & Pogrebin, *supra* note 28, at 3 ("[D]iscretion is important because it maintains a flexible, individualized system of justice. Nevertheless it is a system vulnerable to abuse.").

result.[31] Nevertheless, the existence of discretion creates a substantial risk that government actors will contravene equality norms. Left to their own devices, the various entities that exercise discretionary decisionmaking authority — including police officers, bureaucrats, judges, juries, and even the electorate — may base their decisions on improper considerations.

From a constitutional standpoint, two such considerations warrant special attention. The first is that public officials may misuse their discretion either to target speech based on the messages or ideas sought to be conveyed. The second is that official decisionmakers may misuse their discretion to discriminate based on race or ethnicity. In both contexts, requiring greater precision in the criteria that guide decisionmakers' judgment decreases the likelihood that they will base their decisions on constitutionally impermissible considerations.[32] Yet, in some circumstances, it may be impossible or imprudent to demand such precise standards because of the need to preserve official discretion. In those cases, the pertinent question becomes how discretion can be managed or cabined so as to minimize the threat of inequality.

The governmental and quasi-governmental players vested with discretion that is subject to misuse include:

- Prosecutors deciding whether to bring charges and whether to enter into a plea bargain:[33] May prosecutors exercise their charging discretion to target only those draft dodgers who are vocal in their opposition, in an effort to suppress dissent?[34] May they ex-

31. *Id.*; *see also* Kathleen M. Sullivan, *The Supreme Court 1991 Term — Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58-59 (1992) (noting that the rules/standards debate turns on how much discretion is afforded to decisionmakers).

32. *See* Spencer Overton, *Rules, Standards, and* Bush v. Gore*: Form and the Law of Democracy*, 37 HARV. C.R.-C.L. L. REV. 65, 65 (2002) ("More flexible standards give decisionmakers the discretion to protect political participation in particular contexts, but this discretion may also allow a decisionmaker's biases to enter the political process.").

33. There is an abundance of scholarship regarding the benefits and dangers of prosecutorial discretion. *See, e.g.*, Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50 (1968) (discussing hazards posed by prosecutorial discretion in plea bargaining process); Richard Bloom, *Prosecutorial Discretion*, 87 GEO. L.J. 1267 (1999) (summarizing case authority on the exercise of prosecutorial discretion); Peter J. Hennig, *Prosecutorial Misconduct and Constitutional Remedies*, 77 WASH. U. L.Q. 713, 722-27 (1999) (analyzing tests for determining whether prosecutors have exercised their broad authority in an unconstitutional manner, and arguing that subjective intent should be irrelevant to this inquiry); Wayne LaFave, *The Prosecutor's Discretion in The United States*, 18 AM. J. COMP. L. 532 (1970) (examining prosecutorial discretion and dangers of misuse); Cynthia Kwei Yung Lee, *Prosecutorial Discretion, Substantial Assistance, and the Federal Sentencing Guidelines*, 42 UCLA L. REV. 105, 121-30 (1994) (criticizing the Sentencing Guidelines' grant of discretionary power to prosecutors); Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 BYU L. REV. 669, 704 (asserting that while prosecutorial discretion is both "unavoidable and desirable," prosecutors must impose upon themselves a responsibility to exercise that discretion only where they are assured of guilt beyond a reasonable doubt).

34. In *Wayte v. United States*, 470 U.S. 598 (1985), the Supreme Court rejected a selective-prosecution challenge to "a passive enforcement policy under which the

ercise their discretion to investigate and prosecute only African Americans for cocaine trafficking offenses because they believe that African Americans are more likely to be convicted?[35]

- Police officers determining whom among the many violating the traffic laws should be stopped and arrested:[36] May police officers stop speeding drivers based upon a racial profile showing that Latinos on that interstate are more likely to be trafficking in drugs?[37] May they choose, out of a sense of patriotism, to refrain from stopping those with American flags flying from their antennas?
- Judges determining what sentences should be given to people convicted of crimes: May judges give enhanced sentences to those who harbor political views hostile to the United States Government? May a judge give a particularly harsh sentence to a white teenager from an affluent suburb, viewing his conduct to be inexcusable in light of the advantages he has enjoyed?[38]
- Civil attorneys deciding how to exercise peremptory challenges to prospective jurors: May a civil defendant strike black jurors on the belief that they tend to favor more generous judgments against large corporations? May a plaintiff strike all libertarian

Government prosecutes only those who report themselves as having violated the law, or who are reported by others." *Id.* at 600. Relying on the "broad discretion" of the government to decide whom to prosecute, the Court held that the policy violated neither the Equal Protection Clause nor the First Amendment. *Id.* at 607-14.

35. In *United States v. Armstrong*, 517 U.S. 456 (1996), the Supreme Court reversed an order requiring discovery in a selective prosecution claim. The district court had permitted discovery, where the Federal Public Defenders office provided evidence that all of the twenty-four crack cocaine cases tried by the U.S. Attorney's Office in 1991 involved African Americans. The Supreme Court held that, in order to obtain discovery on a selective-prosecution claim, the defendant must show that the government did not prosecute similarly situated persons of a different race. *Id.* at 470.

36. The subject of police discretion to enforce and to choose not to enforce the laws is one that has received considerable scholarly attention. *See, e.g.*, Joseph Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543 (1960) (explaining how police wield discretionary power through their decisions whether to enforce the criminal law). Other scholars have emphasized the values served by police officers' exercise of "common sense" discretion. *See, e.g.*, KENNETH CULP DAVIS, POLICE DISCRETION 62 (1975). For more recent studies of how the exercise of necessary police discretion may be subjected to more effective public scrutiny, see Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551 (1997), and Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107 (2000).

37. *See, e.g.*, Chavez v. Illinois State Police, 251 F.3d 612, 620 (7th Cir. 2001).

38. For a discussion of the discretion allowed to judges sentencing criminal defendants under the Federal Sentencing Guidelines, see Ian Weinstein, *The Discontinuous Tradition of Sentencing Discretion: Koon's Failure to Recognize the Reshaping of Judicial Discretion Under the Guidelines*, 79 B.U. L. REV. 493, 506-15 (1999).

jurors out of belief that they tend to favor corporate interests over those of consumers?[39]

- Juries deciding guilt and meting out punishment:[40] May jurors consider the race of the victim in determining whether to impose the death penalty? May they choose not to impose the death penalty where the defendant and the victim are both white, because they do not view that crime to be as egregious as a cross-race murder?[41]
- The president of the United States deciding whether to grant pardons: May the potential pardonees' race or their support for the president's political party play a role in his decision?[42]
- Municipalities determining whether to close streets for marches and parades, and what fees to impose for those events: May they choose to target for protection racial minorities marching in the streets without a required permit? May they charge greater fees for a white supremacist group preaching a message of racial intolerance, likely to generate a hostile response?[43]
- Administrative agencies charged with setting policy and with applying policies to individual cases:[44] May an administrative law

39. *See* Purkett v. Elem, 514 U.S. 765, 769 (1995) (per curiam) ("[A] 'legitimate reason' [to strike a juror] is not a reason that makes sense, but a reason that does not deny equal protection.").

40. For a discussion of the dangers of placing unguided capital-sentencing discretion in juries, see Scott E. Erlich, Comment, *The Jury Override: A Blend of Politics and Death*, 45 AM. U. L. REV. 1403 (1996). Much of the contemporary scholarly debate regarding the discretion vested in juries relates to jury nullification (i.e., the power of juries to disregard laws they believe to be unjust and to make decisions in accordance with their collective conscience). *See, e.g.*, Nancy J. King, *Silencing Nullification Advocacy Inside the Jury Room and Outside the Courtroom*, 65 U. CHI. L. REV. 433 (1998); Andrew D. Leipold, *Rethinking Jury Nullification*, 82 VA. L. REV. 253, 257-58 (1996); Alan Scheflin & Jon Van Dyke, *Jury Nullification: The Contours of a Controversy*, LAW & CONTEMP. PROBS., Autumn 1980, at 51; Ran Zev Schijanovich, Note, *The Second Circuit's Attack on Jury Nullification in* United States v. Thomas*: In Disregard of the Law and the Evidence*, 20 CARDOZO L. REV. 1275 (1999).

41. *See* Chaka M. Patterson, *Race and the Death Penalty: The Tension Between Individualized Justice and Racially Neutral Standards*, 2 TEX. WESLEYAN L. REV. 45, 80-94 (1995).

42. *See, e.g.*, Greg B. Smith, *Clinton Library Fundraiser Helped Perjurer Get Pardon*, WASH. POST, Mar. 4, 2001, at A2 (" 'I was aware of the ... rule[s], but I was also aware that the president has discretion,' said [former White House counsel Bernard] Nussbaum, who handled the case for free.").

43. *See* Forsyth County v. Nationalist Movement, 505 U.S. 123, 130 (1992).

44. There is a voluminous body of scholarship addressing the forms of discretion exercised by administrative agencies and the ways in which that discretion may be managed. *See, e.g.*, GARY C. BRYNER, BUREAUCRATIC DISCRETION: LAW AND POLICY IN FEDERAL REGULATORY AGENCIES 6 (1987) (defining "two basic kinds of discretionary authority given to administrative agencies: (1) authority to make legislative-like policy decisions, and (2) authority to decide how general policies apply to specific cases"); DAVIS, *supra* note 27, at 23-24 (describing problems of discretionary justice that arise in both administrative adju-

judge's racial biases be allowed to affect the determination whether social security benefits should be awarded?[45] May agencies exercise their rulemaking discretion to craft policies designed to benefit politically well-connected interest groups?[46]

- The electorate or legislature determining how to structure the government: May the people enact a referendum imposing special barriers on those who seek to enact race-remedial programs, such as school desegregation?[47] May the legislature impose special barriers on those who wish to engage in certain forms of speech, such as "raves" known to be associated with drug activity?[48]

These examples suggest the range of areas in which discretion may lead to inequality, and elucidate the difficulties in policing the exercise of official discretion. For even if one believes that the answer to some of the above questions is no — and even if one believes that a no answer is constitutionally mandated — the question of how to *enforce* such a prohibition must still be answered.

In perhaps no other area has there been greater scholarly attention to the relationship between discretion and inequality than in the literature examining the operation of the criminal justice system. More than forty years ago, Joseph Goldstein described the enormous discretionary power that street-level law enforcement officers wield through their decisions whether to enforce the criminal law.[49] While there is now consensus that vesting some degree of discretion in police agen-

dication and rulemaking); JOEL F. HANDLER, THE CONDITIONS OF DISCRETION 11-12 (1986) (arguing that achieving just administration depends not only on the existence of discretion, but on using it to promote "shared decision making between autonomous, responsible participants"); ADMINISTRATIVE DISCRETION AND PUBLIC POLICY IMPLEMENTATION (Douglas H. Shumavon & H. Kenneth Hibbeln eds., 1986) (collection of articles studying administrative discretion and attempts to control its misuse).

45. *See* LINDA G. MILLS, A PENCHANT FOR PREJUDICE: UNRAVELING BIAS IN JUDICIAL DECISION MAKING 4-5 (1999) (finding bias based on race and poverty in administrative law judge decisions regarding social security disability benefits). *See generally* MASHAW, *supra* note 29 (assessing the quality of justice in social security disability adjudications).

46. *See* BRYNER, *supra* note 44, at 10 ("Administrative rule making . . . represents the kind of administrative action that is most in need of external checks and constraints, because of its legislative nature. It has become a focal point for criticisms for government regulation and the broad discretionary powers enjoyed by administrative bodies.").

47. *See* Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 487 (1982) (striking down a Washington initiative prohibiting local school districts from maintaining voluntary desegregation programs); Coalition for Econ. Equity v. Wilson, 110 F.3d 1431, 1448 (9th Cir. 1997) (upholding a California initiative prohibiting local governmental entities from maintaining voluntary affirmative action programs), *amended by* 122 F.3d 692 (9th Cir. 1997).

48. *See* Assembly Bill 1941, 2001-2002 Reg. Sess. (Cal. 2002) (imposing special permit requirements on promoters of any "rave party").

49. Goldstein, *supra* note 36.

cies is both desirable and unavoidable,[50] more recent scholarship has argued that mechanisms should exist to hold police agencies accountable for the exercise of their discretion. Erik Luna, for example, emphasizes that the legitimacy of democratic government depends on police discretion being exercised in a manner that is "open to the electorate."[51] For police departments to operate behind a veil of secrecy contravenes fundamental principles of self-governance and threatens the rights of minorities.[52] The debate over racial profiling — and the means by which to stop it — reflects increasing concern with the discriminatory enforcement of criminal laws by police officers vested with broad discretion over whom to stop, detain, and arrest.[53]

Because the power to be lenient encompasses the power to discriminate,[54] one might ask why discretion in each of these areas should not be eliminated entirely. If specific enough rules were prescribed to dictate how discretion should be exercised, one might argue, the potentially discriminatory exercise of discretion could be curtailed if not eliminated. The problem with this argument is the impossibility of crafting rules specific enough to deal with the many

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50. *See* SAMUEL WALKER, THE POLICE IN AMERICA 209 (2d ed. 1992) (stating that while Goldstein concluded that police discretion should be eliminated, "[v]irtually all other experts have rejected the idea of abolishing discretion").

51. Luna, *supra* note 36, at 1108.

52. *Id.* at 1132. Professor Luna's two concerns regarding the consequences of police departments operating under the radar screen recall those upon which Madison focuses in Federalist 51: first, that government cannot be held accountable to the electorate it is supposed to serve; and, second, that the rights of numerical minorities will be placed in jeopardy. THE FEDERALIST NO. 51, at 291 (James Madison) (Clinton Rossiter ed., 2d ed. 1999); *see also* AMAR, *supra* note 16, at 21, 237 (describing the twin concerns of Federalist 51 as "protecting the people against unrepresentative government" and "protecting minorities from 'factional' majority tyranny").

53. *See, e.g.*, DAVID COLE, NO EQUAL JUSTICE 16-62 (1999) (surveying evidence of racial discrimination by police and arguing that courts have failed to exercise adequate oversight); SAMUEL WALKER ET AL., THE COLOR OF JUSTICE 100 (1996) (finding evidence of discrimination against African Americans in making arrests); John R. Hepburn, *Race and the Decision to Arrest: An Analysis of Warrants Issued*, 15 J. RES. CRIME & DELINQ. 54, 66-69 (1978) (finding racial disparity in arrests between whites and nonwhites); Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214 (1983); Tracy Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 344-54 (1998) (analyzing evidence that police officers disproportionately target African-American and Latino motorists); Douglas A. Smith et al., *Equity and Discretionary Justice: The Influence of Race on Police Arrest Decisions*, 75 J. CRIM. LAW & CRIMINOLOGY 234, 246-49 (1984) (finding police are generally more likely to take action when the victim is white than black, but finding no difference based on the race of the suspect); Christopher Hall, Note, *Challenging Selective Enforcement of Traffic Regulations After the Disharmonic Convergence:* Whren v. United States, United States v. Armstrong, *and the Evolution of Police Discretion*, 76 TEXAS L. REV. 1083, 1116-23 (1998) (proposing an application of exclusionary rule to police practices that have a discriminatory effect); Carl J. Schifferle, Note, *After* Whren v. United States*: Applying the Equal Protection Clause to Racially Discriminatory Enforcement of the Law*, 2 MICH. L. & POL'Y REV. 159, 161-62 (1997) (explaining how broad police discretion gives rise to a specter of discriminatory enforcement against racial minorities).

54. DAVIS, *supra* note 27, at 231-32.

different factual scenarios that official decisionmakers confront. Even if one believes that the answer to most, if not all, of the above questions should be no — i.e., that the government entities in question should not exercise their discretion in the ways indicated — the question of how to ensure that such discretion is not exercised remains. Many discretionary decisions seem, by their very nature, to defy judicial review. And too closely circumscribing the exercise of discretion, even if possible, would risk missing aggravating or mitigating circumstances that call for special treatment in the individual case.[55]

Preserving some discretion therefore is essential not only to the efficient operation of government, but also to the promotion of individualized justice.[56] Entrusting public officials with the power to make individualized judgments comes at a great price, however, where risks of racial bias or the suppression of disfavored ideas are at play.[57] Thus, there must be some limitation placed upon the exercise of official discretion.[58] But in what circumstances should courts restrict official discretion? And how should they enforce such restrictions?

B. *Two Kinds of Equality*

While the exercise of governmental discretion may lead to various evils, the focus of this Article is upon two that are of special concern: first, that discretion will lead to intentional discrimination against speakers based upon their ideas or message; and second, that it will lead to intentional discrimination based upon race.[59] There are substantial differences of opinion over the character of the equality that the First Amendment and the Equal Protection Clause demand, differences that correspond to conflicting theories of what values these constitutional mandates should serve.[60] It is not my purpose, at this point, to adjudicate these differences. What is important, for my

55. *See* Sullivan, *supra* note 31, at 66-69.

56. *E.g.*, Patterson, *supra* note 41, at 53.

57. *See id.*

58. *See* Pound, *supra* note 24, at 927 ("[C]areful limitation of the cases in which discretion may be resorted to is clearly indicated.").

59. I limit my discussion here to racial discrimination because it is often understood as the archetype of group-based discrimination forbidden by the Equal Protection Clause. The insights this Article attempts to draw regarding racial discrimination, however, may be applicable to other forms of discrimination as well.

60. For an extensive discussion of the constitutional ideal of equality that considers both expressive and racial equality, see generally Kenneth Karst, *Why Equality Matters*, 17 GA. L. REV. 245 (1983). Professor Karst traces the development of constitutional equality, stressing the " 'moral ideal' of equal citizenship" as a guiding force. *Id.* at 288 (citation omitted); *see also* KENNETH KARST, LAW'S PROMISE, LAW'S EXPRESSION 189 (1993) (viewing the Civil Rights Act of 1991, preservation of abortion rights, and limitations on school prayer as "reflecting the centrality and the endurance of the principle of equal citizenship in American law and the American civic culture").

purposes, is to recognize that these contrasting theories share a commitment to some form of equality, in the realms of both race and speech. At least for the moment, a relatively thin conception of what these equalities entail will suffice.[61]

The limitation of this approach, as I explain below, is that it cannot deal with problems upon which differing conceptions of constitutional equality come into conflict. For example, it cannot resolve the conflict over affirmative action, between those who see the Equal Protection Clause's core command as colorblindness and those who see it as antisubordination. Nor can it resolve the conflict over limits on campaign expenditures, between those who see the First Amendment's underlying rationale as protection of individual autonomy and those who see its rationale as promotion of a more balanced public discourse. This approach is nevertheless adequate for my present purposes, which is to define broadly shared equality norms, and then to consider how these norms are to be reconciled with the countervailing values served by discretion.[62]

1. *Racial Equality*

Race discrimination is the archetype of the group-based discriminations that the Equal Protection Clause was enacted to forbid. Since *Korematsu v. United States*,[63] the Supreme Court has held that racial classifications are subject to "the most rigid scrutiny."[64] There are of course profoundly different visions of what the Fourteenth Amendment's commandment of racial equality requires and, accordingly, of whether the Equal Protection Clause requires heightened scrutiny of *all* race-based classifications. At one end of the spectrum, some would view virtually any race-conscious government action as constitution-

61. The approach taken here to the development of constitutional principles draws upon John Rawls's idea of "overlapping consensus." *See* JOHN RAWLS, POLITICAL LIBERALISM 15 (1993) [hereinafter RAWLS, POLITICAL LIBERALISM]; *see also* JOHN RAWLS, A THEORY OF JUSTICE 340 (rev. ed. 1999) [hereinafter RAWLS, A THEORY OF JUSTICE]. Rawls endeavors to develop principles of justice that would be deemed acceptable by those adhering to a wide range of comprehensive moral, religious, and philosophical doctrines. RAWLS, POLITICAL LIBERALISM, *supra*, at 15. Similarly, my starting point is to articulate norms of equality upon which those adhering to different (and conflicting) constitutional theories might agree. I then examine whether and how these norms are enforced when they come into conflict with the countervailing values served by official discretion.

62. *See* Sullivan, *supra* note 31, at 62 (describing the argument that rules promote formal equality by limiting decisionmakers' discretion to act on bias or arbitrariness). *But see id.* at 67 (describing the countervailing argument that more loosely written standards may promote substantive equality better than rules).

63. 323 U.S. 214 (1944).

64. Race-based classifications that target both whites and people of color, such as miscegenation bans or those which require racial segregation, are also subject to high-level scrutiny. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 10-11 (1967) (striking down Virginia's law forbidding whites from marrying non-Caucasians).

ally infirm, no matter what group is burdened and what the purposes of those distinctions might be.[65] According to this view, rooted in Justice Harlan's famous declaration in *Plessy v. Ferguson* that the "Constitution is color-blind,"[66] the fundamental principle underlying the Equal Protection Clause is equal treatment regardless of race. Proponents of the equal-treatment view would therefore regard race-conscious affirmative action programs — designed, for example, to increase the diversity of universities or to redress the unequal distribution of public contracts — as inherently invidious, because they violate the equal treatment principle.

At the other end of the spectrum are those who hold that the essential principle underlying the Equal Protection Clause is a prohibition against subordination.[67] If equal treatment is the core principle underlying the first view of equal protection, then *equal status* might be viewed as the core principle animating the second view. Proponents of the antisubordination view would therefore look much more favorably on race-conscious affirmative action or desegregation programs aimed at redressing existing inequalities in the opportunities available to persons of color.[68]

Despite the differences between the two theories of equal protection — one focused on colorblindness and the other on antisubordination — there is broad consensus that intentional race discrimination is highly suspect if not always impermissible.[69] There is, for example,

65. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 520 (1989) (Scalia, J., concurring in the judgment) (disagreeing with the plurality's suggestion that "state and local governments may in some circumstances discriminate on the basis of race in order (in a broad sense) 'to ameliorate the effects of past discrimination' " (internal citation omitted)).

66. 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

67. *See, e.g.*, Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 146 (1976); Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1007 (1986); Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind"*, 44 STAN. L. REV. 1, 63 (1991); Allan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, *in* CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 29, 35 (1995).

68. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 361 (1978) (Brennan, J., concurring in part and dissenting in part) (stating the view that race-conscious affirmative action should be permitted so long as there is "an important and articulated purpose for its use"). The focus of this Article is not on the cases, such as those involving affirmative action or "majority-minority" voting districts, in which these two theories of racial equality conflict. It is instead on those cases in which the equal protection norm that these two conceptions share comes into conflict with the countervailing value of preserving official discretion.

69. Of course, many would argue that the Equal Protection Clause should prohibit not only intentional discrimination, but also practices having a disparate impact. *See, e.g.*, Theodore Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 36, 40-41 (1977). This Article does not take up this theoretical debate. It instead assumes that the Equal Protection Clause proscribes intentional discrimination, while leaving open the question whether it should also be read to proscribe other practices.

agreement that government should not exclude citizens from jury venires on the basis of ethnicity; that it should not pass laws designed to handicap racial minorities' access to the political process; and that police officers should not selectively target those of a certain race for enforcement of traffic laws.

Of course, defining the constitutional presumption against intentional race discrimination tells us nothing about the principal subject of my inquiry here: the mechanisms by which this norm should be enforced without sacrificing the values served by official discretion.[70] It also does not answer the important question of how courts should go about determining whether intentional race discrimination is present, what sorts of evidence they might consider or whether special prophylactic remedies should be developed to stop such discrimination.

The dangers and difficulties of policing official discretion are most prominent in cases where officials may be engaging in intentional discrimination, despite the absence of a facial classification. Settled equal protection doctrine subjects to heightened scrutiny government action that is intended to disadvantage one group in comparison with another. Mere disproportionate impact on people of one racial group compared to others is not enough, however, as *Washington v. Davis*[71] and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*[72] famously hold.

Determining whether intentional discrimination has occurred can be a thorny problem, especially when considered in light of the considerable discretion that public officials wield in the performance of their duties. In the absence of smoking gun evidence of intentional discrimination, for example, how should courts determine whether police officers are exercising their discretion to discriminate against drivers of a particular race? How should courts determine whether voting districts have been drawn to prevent minorities from electing

70. *See* RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 5 (2001) (contending that the Supreme Court's role is not simply to divine the meaning of the Constitution, but also to "devise[] and then implement[] strategies for enforcing constitutional values").

71. 426 U.S. 229 (1976). In *Washington v. Davis*, black applicants for employment as police officers in the District of Columbia brought suit under the Equal Protection Clause, claiming that the District's recruiting procedures, including a written test, were racially discriminatory. *Id.* at 229, 232-33. Rejecting plaintiffs' claim that the racially disparate impact of the test alone could show an equal protection violation, the Court stated "the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose." *Id.* at 240. *Washington v. Davis* famously rejected the argument that disparate impact was sufficient to make out a prima facie equal protection case, saying that such evidence was "not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution." *Id.* at 242.

72. 429 U.S. 252 (1977).

any candidates? How should courts assess discrimination in a prosecutor's exercise of peremptory challenges? Should evidence of disproportionate impact be sufficient to make out a prima facie case in any of these contexts? If so, how should it be measured? And what is needed to rebut the prima facie case?

The norm against intentional race discrimination does not by itself answer any of these questions. It does, however, provide a starting point for assessing the dangers to racial equality posed by official discretion, and the mechanisms that have been developed to deal with this threat.

2. *Expressive Equality*

It may be less obvious that the First Amendment mandates equality. Yet the general principle that government, when it regulates expression, should do so *evenhandedly* is a staple of First Amendment jurisprudence.[73] The statement that perhaps best captures the central place of First Amendment equality comes from Justice Marshall's opinion for the Court in *Police Department of Chicago v. Mosley*: "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[74] While this may be an overstatement, given the areas in which speech can be regulated based on content,[75] Justice Marshall's words state the general rule of content and viewpoint neutrality in the regulation of speech.[76] The rationale behind the rule is that government discrimination of this sort "raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace."[77]

73. *See, e.g.*, RAV v. City of St. Paul, 505 U.S. 377, 382 (1992) ("The First Amendment generally prevents government from proscribing speech, or even expressive conduct, because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid." (internal citations omitted)).

74. 408 U.S. 92, 95 (1972) (internal citations omitted); *see also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-18, at 941 (2d ed. 1988) (citing *Mosley* for the "basic requirement that the government may not aim at the communicative impact of expressive conduct without triggering . . . exacting and usually fatal scrutiny").

75. *See* Miller v. California, 413 U.S. 15, 32-33 n.13 (1973) ("Obscene material may be validly regulated by a State in the exercise of its traditional local power to protect the general welfare of its population despite some possible incidental effect on the flow of such materials across state lines." (internal citations omitted)); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 297-98 (1964) (stating that plaintiffs may be allowed to recover tort damages for defamation when a defendant's statements were made either "with knowledge" that they were false, or with "reckless disregard" of the statements' veracity).

76. For a restriction on speech to be considered "content-neutral," it must be "justified without reference to the content of the regulated speech." Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976).

77. Simon & Shuster v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991); *see also* Turner Broad. Sys. v. FCC, 512 U.S. 622, 641 (1994) ("Laws of this sort pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but

Like the Equal Protection Clause, then, the First Amendment looks with disfavor on laws that facially discriminate.[78] While the First Amendment is not exclusively concerned with equality, there is a widely shared consensus that equality — particularly the idea that government should not favor some speakers over others because of their point of view — lies at its core. As Kenneth Karst has observed, "the principle of equal liberty lies at the heart of the first amendment's protections against government regulation of the content of speech."[79] While acknowledging that absolute equality in the realm of speech is impossible as a practical matter, Professor Karst recognizes that the principle of equal liberty lies at the heart of First Amendment decisions limiting government officials' discretion to dictate whether speech will be permitted.[80]

Just as the Equal Protection Clause frowns on laws that draw express racial classifications, the First Amendment frowns on laws that draw express viewpoint-based distinctions.[81] Beyond that, however, considerable disagreement exists over precisely what sort of equality the First Amendment demands.

One theory sees the First Amendment's fundamental purpose as the protection of individual autonomy, and views with great skepti-

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to suppress unpopular ideas or information or to manipulate the public debate through coercion rather than persuasion.").

78. Of course, the First Amendment is not *exclusively* concerned with discrimination against disfavored messages or ideas. There are some restrictions on speech, for example, that the government may not impose, no matter how evenhandedly it does so. Indeed, the classic First Amendment protections are more often conceived of in libertarian rather than egalitarian terms — that is, as things that the government may not do to anyone, rather than as things they must do (or refrain from doing) equally to all. *See* Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939) (Roberts, J., concurring) ("Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thought between citizens, and discussing public questions."); *see also* Owen M. Fiss, *Silence on the Street Corner*, 26 SUFFOLK U. L. REV. 1, 1-3 (1992) [hereinafter Fiss, *Silence on the Street Corner*] (discussing the silencing of the streetcorner speaker as the paradigmatic First Amendment violation).

79. Karst, *Equality in the First Amendment*, *supra* note 7, at 21.

80. *Id.* at 29.

81. Even in this area, however, there are significant differences, as *RAV v. City of St. Paul*, 505 U.S. 377 (1992), exemplifies. In that case, the Court struck down a St. Paul ordinance that drew a content-based distinction within a category of generally proscribable speech, namely "fighting words." *Id.* at 395-96. In particular, the ordinance prohibited the burning of a cross on private property, if done to convey a message of racial hatred. *Id.* at 380. The majority opinion, authored by Justice Scalia, held that the prohibition against content-based and viewpoint-based discrimination applies even within categories of generally proscribable speech, such as defamation, obscenity, and libel. *Id.* at 390-94. In his concurring opinion, Justice Stevens vigorously disagreed, and would have held that the government was free to draw content-based (and one would presume even viewpoint-based) distinctions within such categories. *Id.* at 413-26 (Stevens, J., concurring).

cism any governmental intrusion into this protected sphere.[82] Charles Fried summarizes this theory's underlying premise as follows: "Freedom of expression is properly based on autonomy: the Kantian right of each individual to be treated as an end in himself, an *equal sovereign citizen* in the kingdom of ends with a right to the greatest liberty compatible with the like liberty of all others."[83] Proponents of the individual-autonomy school tend to focus on negative liberty — that is, on the idea that freedom of speech is best promoted when the government adopts a hands-off approach to the regulation of speech. But while this vision of the First Amendment might be characterized as libertarian, or more precisely, negative libertarian,[84] what is striking about Professor Fried's formulation is its emphasis upon equality as well as liberty.[85] To be sure, Professor Fried's conception of the equality that the First Amendment requires may well differ from Professor Karst's, but equal liberty is integral to both conceptions.[86]

A conflicting theory holds that the First Amendment's principal purpose is not to protect individual autonomy or liberty, but to advance collective self-determination. Associated with Alexander Meiklejohn, this theory privileges political speech and affords protection to other forms of speech only insofar as they must be protected to advance the goal of producing an informed electorate.[87] It focuses less

82. *See, e.g.*, Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 233-34 (1992); Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 212-14 (1972). As Richard Fallon points out, First Amendment theorists employ varying conceptions of autonomy. Richard H. Fallon, Jr., *Two Senses of Autonomy*, 46 STAN. L. REV. 875, 876-79 (1994) [hereinafter Fallon, *Two Senses of Autonomy*]. Professors Scanlon and Fried exemplify the conception that Professor Fallon refers to as "negative libertarian." *Id.* at 880.

83. Fried, *supra* note 82, at 233 (emphasis added and internal citation omitted).

84. *See* Fallon, *Two Senses of Autonomy*, *supra* note 82, at 880-83 (describing negative libertarian conceptions of autonomy).

85. *See* Charles Fried, *Perfect Freedom, Perfect Justice*, 78 B.U. L. REV. 717, 735 (1998) (defining our shared "capacity to respond to argument and evidence" as the "true marriage of reason as equality" underlying the freedom of speech).

86. For Professor Karst's conception of equality, see Karst, *Equality in the First Amendment*, *supra* note 7, at 26-35. Professor Karst's approach draws on both conceptions of speech equality that I discuss in the text. His insistence that the fundamental value served by expressive equality is "the dignity of the individual" suggests an emphasis on the rights of individual speakers to be treated as equals, typically an argument of the "autonomy" school. On the other hand, there are aspects of Professor Karst's view that seem to emphasize the interests of listeners in having access to a marketplace of ideas in which a diversity of views are available. He notes, for instance, that the equality principle supports claims of access to the media, because they tend to promote a diversity of views, *id.* at 48, a sentiment more characteristic of those who view promotion of a balanced public debate as the First Amendment's preeminent value.

87. As Alexander Meiklejohn famously put it: "I believe, as a teacher, that the people do need novels and dramas and paintings and poems 'because they will be called upon to vote.' " Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 263; *see also* ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM 25-28 (1960) [hereinafter MEIKLEJOHN, POLITICAL FREEDOM].

on ensuring each individual the right to speak than on making sure that a spectrum of viewpoints are available to the listening audience.[88] This school understands the First Amendment not simply as a negative libertarian command that government should butt out where speech is concerned, but also as a positive libertarian command that governmental action is sometimes necessary to promote a "rich public discourse."[89]

The structure of the debate between these two competing theories of expressive equality resembles that of the debate between the two competing theories of racial equality. Both areas present a conflict between what might be termed an *atomistic* vision of equality (one that tends to focus on differences in the government's treatment of individuals) and a *systemic* vision of equality (one that tends to focus on the impact of government action or inaction upon groups, defined either by shared race or shared viewpoints).[90]

As in the area of racial equality, the two competing theories often yield the same conclusion. In the area of race, the colorblindness and antisubordination views lead to the same conclusion in dealing with traditional equal protection problems, such as Jim Crow segregation, miscegenation laws, and employment discrimination, but collide in areas such as race-based affirmative action. So too, in the First Amendment area, the competing visions of expressive equality lead to

88. MEIKLEJOHN, POLITICAL FREEDOM, *supra* note 87, at 25-28. Jerome Barron took up Professor Meiklejohn's emphasis on this point, arguing that a laissez-faire approach to speech is inadequate to ensure a robust marketplace of ideas. Jerome A. Barron, *Access to the Press — A New First Amendment Right*, 80 HARV. L REV. 1641, 1656 (1967) ("As a constitutional theory for the communication of ideas, laissez faire is manifestly irrelevant."). Asserting that the development of the mass media rendered the traditional negative-libertarian approach to the First Amendment obsolete, Professor Barron argued for the creation of a right of access to print and broadcast media, so as to promote the expression of diverse viewpoints that would otherwise be repressed. More recently, this view finds expression in the work of Owen Fiss, who advocates the advancement of a public discourse that, in Justice Brennan's words, is "uninhibited, robust, and wide open." Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1407 (1986) [hereinafter Fiss, *Free Speech and Social Structure*] (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (internal quotation marks omitted)); *see also* Owen M. Fiss, *Freedom and Feminism*, 80 GEO. L.J. 2041, 2043-46 (1992). Other contemporary exponents of this general theoretical view urge using the First Amendment as a means to advance race or gender equality. *See, e.g.*, CATHARINE A. MACKINNON, FEMINISM UNMODIFIED 140 (1987) (suggesting those who really care about the First Amendment "should turn their efforts to getting speech for people . . . who have not been able to speak or to get themselves heard"). The relationship between racial equality and the First Amendment has also received considerable attention from critical race theorist scholars. *See, e.g.*, MARI MATSUDA ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (1993).

89. *See* Fiss, *Free Speech and Social Structure*, *supra* note 88, at 1410.

90. Greg Magarian uses the terms "public rights" and "private rights" to describe a similar distinction in the First Amendment cases addressing regulations of political parties. *See* Gregory P. Magarian, *Regulating Political Parties Under a "Public Rights" First Amendment*, 44 WM. & MARY L. REV. 1939 (2003). Professor Magarian uses the term "private rights" to describe what I here refer to as the "atomistic" conception of the First Amendment, and "public rights" for what I call the "systemic" conception. *Id.* at 1947, 1972.

identical conclusions with respect to traditional free speech problems, such as government action that prevents political dissenters from expressing their views. Some of the most contentious First Amendment debates, however, arise in areas where the "individual autonomy" and "public discourse" theories tend toward opposing conclusions. The debate over campaign finance reform illuminates the clash between these competing theories of expressive equality.[91]

Without minimizing the significant differences between these schools of thought, what is most striking is their shared commitment to equality. For Professor Fried, for example, freedom of expression is integral to the right of each person to be treated as an "equal sovereign citizen;"[92] for Professor Meiklejohn, the "reason for this equality . . . lies deep in the very foundation of the self-governing process."[93] Whatever one's conception of the equality demanded by the First Amendment, there is a widely shared consensus on the proposition that government should not use its power to suppress speech based on the message it seeks to convey. In this respect also, free speech jurisprudence bears a noteworthy resemblance to the jurisprudence of racial equality. Just as there is a widely shared consensus that government should avoid intentional racial discrimination, it is also recognized that government should act evenhandedly when it regulates speech, and avoid disfavoring speakers because of their messages or ideas.

Some of the most pressing difficulties emerge where there is no *express* content- or viewpoint-based law, but there is nevertheless reason to believe that government is targeting speakers based on disapproval of their messages or ideas. The Supreme Court has long

91. *See* Spencer Overton, *But Some Are More Equal: Race, Exclusion, and Campaign Finance*, 80 TEXAS L. REV. 987, 991-1001 (2002) (describing the conflicting visions of free speech and democracy animating campaign-finance debate). Proponents of individual autonomy are much more likely to look with disfavor on schemes that limit contributions or expenditures on behalf of political candidates. *See, e.g.*, Lillian R. BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 CAL. L. REV. 1045, 1046-47 (1985); Daniel R. Ortiz, *The Democratic Paradox of Campaign Finance Reform*, 50 STAN. L. REV. 893, 895 (1998); Martin H. Redish, *Free Speech and the Flawed Postulates of Campaign Finance Reform*, 3 U. PA. J. CONST. L. 783, 783-84 (2001). On the other hand, proponents of balanced public discourse are much more likely to look favorably on such schemes, on the ground that they help give a more equal voice to all citizens. *See, e.g.*, Owen M. Fiss, *Money and Politics*, 97 COLUM. L. REV. 2470, 2479 (1997) (arguing that limits on spending may be defended under a democracy-based conception of the First Amendment, because they prevent distortion of public debate); David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369, 1370 (1994) (asserting that the objective of campaign finance reform is equality). For a study of the ability of well-financed groups to influence "direct democracy" (i.e., the exercise of the initiative and referendum power by voters), see Daniel H. Lowenstein, *Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory and the First Amendment*, 29 UCLA L. REV. 505, 517-26 (1982).

92. Fried, *supra* note 82, at 233.

93. ALEXANDER MEIKLEJOHN, FREE SPEECH 26 (1948).

recognized that vesting excessive discretion to regulate speech in the hands of public officials can be destructive to the equality that the First Amendment demands. As Professor Tribe puts it:

> Statutes which open-endedly delegate to administering officials the power to decide how and when sanctions are applied or licenses issued are overbroad because they grant such officials the power to discriminate — to achieve indirectly through selective enforcement a censorship of communicative content that is clearly unconstitutional when achieved directly.[94]

The open-ended delegation of such discretion not only allows public officials to discriminate based upon the message or idea expressed, but also makes judicial review extremely difficult.[95] Absent clearly defined rules that limit official decisionmakers' discretion, discrimination against unpopular speech may escape detection. In Part II, I shall discuss both the development of First Amendment doctrine designed to guard against this risk, and the core features of this doctrine as they stand today.

II. DISTRUSTING DISCRETION: FIRST AMENDMENT EQUAL PROTECTION

The development of First Amendment Equal Protection jurisprudence reflects a distrust of official discretion. From its earliest speech and assembly cases, the Supreme Court has recognized that laws vesting broad discretion in official actors to regulate or restrict speech threaten the principle of expressive equality and, in particular, the imperative that government should not "restrict expression because of its message, its ideas, its subject matter, or its content."[96]

This Part first examines the cases that developed special First Amendment doctrines to guard against the threat to expressive equality posed by official discretion. It then identifies four prominent features of First Amendment doctrine, each of which provides a check on excessive discretion in the regulation of speech: (1) more permissive standing rules; (2) a suspicion of vague legal standards; (3) a willingness to strike down laws on their face rather than simply as applied; and (4) a thorough appellate review of the evidentiary record. This

94. TRIBE, *supra* note 74, § 12-28, at 1056 (footnote omitted). Professor Tribe makes a related point with respect to the debate between those who take an "absolutist" view of the First Amendment versus those who urge "balancing" of competing interests, noting that a categorical approach leaves less room for prejudices to affect the decision whether speech is to be restricted or regulated. *See id.* § 12-3, at 794 ("Categorical rules . . . tend to protect the system of free expression better because they are more likely to work in spite of the defects in the human machinery on which we must rely to preserve fundamental liberties.").

95. *Id.* § 12-38, at 1056-57.

96. Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972).

Part concludes with a discussion of a recent case presenting a serious challenge to this doctrine: *Thomas v. Chicago Park District*.[97]

A. *The Genesis of First Amendment Equal Protection*

1. *Public Fora*

The Supreme Court has long viewed laws requiring speakers to obtain permits or licenses before using public fora as "prior restraints,"[98] and looked with disfavor on schemes vesting officials with broad discretion to regulate speech in public fora.[99] The limitations upon discretion in this area arise from the risk that public officials might otherwise give preferences to some and disfavor others for constitutionally impermissible reasons — in particular, because of the message or ideas expressed.[100]

Skepticism of laws granting government broad discretion over the licensing of speech in public places can be traced to three cases decided between 1938 and 1940 — *Lovell v. City of Griffin*,[101] *Hague v. Committee for Industrial Organization*,[102] and *Cantwell v. Connecti-*

97. 534 U.S. 316 (2002).

98. Professor Fiss refers to these cases as involving restrictions upon the "street corner speaker." *See* Fiss, *Silence on the Street Corner*, *supra* note 78, at 1-2; Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781, 784-86 (1987) [hereinafter Fiss, *Why the State?*].

99. *See, e.g.*, Forsyth County v. Nationalist Movement, 505 U.S. 123, 130 (1992); Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150-51 (1969); Niemotko v. Maryland, 340 U.S. 268, 271 (1951). For defenses of the heavy presumption of the prior-restraint doctrine, see Vincent Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 MINN. L. REV. 11, 92-93 (1981), and Thomas I. Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 648 (1955). For a critique of prior-restraint doctrine, see Martin H. Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 VA. L. REV. 53, 53-58 (1984).

100. Summarizing the state of the law in 1958, the Court in *Staub v. City of Baxley*, 355 U.S. 313, 322 (1958), observed:

> It is settled by a long line of recent decisions of this Court that an ordinance which . . . makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official — as by requiring a permit or license which may be granted or withheld in the discretion of such official — is an unconstitutional censorship or prior restraint upon the exercise of those freedoms.

Interestingly, the above quotation is *not* limited to freedom of speech, but also expresses concern about laws vesting control over any constitutional freedoms in the "uncontrolled will of an official." Notwithstanding this broad language, as explained herein, it is government officials' discretion in the area of freedom of speech that the Court has viewed with the greatest suspicion.

101. 303 U.S. 444 (1938) (distributor of religious pamphlets challenged a permit requirement giving broad discretion to city manager).

102. 307 U.S. 496 (1939) (unions and union members challenged an ordinance regulating street meetings and public assemblies).

cut.[103] In each of these cases, the Court struck down laws requiring official permission to speak subject to vaguely defined standards.[104]

The requirement of clear standards for regulating speech served as a surrogate for a showing of discriminatory intent, as illustrated by *Saia v. New York.*[105] In *Saia*, a Jehovah's Witness minister challenged an ordinance regulating the use of sound-amplification equipment. Despite the lack of clear evidence of intentional viewpoint discrimination, the Court reversed the convictions and held the ordinance facially unconstitutional due to the unbridled discretion accorded to the police chief.[106] The Court explained: "To use a loud-speaker or amplifier one has to get a permit from the Chief of Police. *There are no standards prescribed for the exercise of his discretion.*"[107] This discretion created an irrebuttable presumption of unconstitutionality without demanding any showing that the scheme had been applied in a less than evenhanded manner.[108]

By 1951, when the Court decided *Kunz v. New York*,[109] the prohibition upon laws giving broad discretion to grant or deny permits to speak in public places was well established.[110] In *Kunz*, a Baptist minister's permit to speak had been revoked, allegedly because he had ridiculed other religious beliefs.[111] He was thereafter convicted for speaking in a public place without the required permit.[112] The Court struck down the permit ordinance as unconstitutionally vague, despite the fact that the city had introduced evidence that there might well have been good reasons for regulating Kunz's activities, specifically,

103. 310 U.S. 296 (1940) (Jehovah's Witnesses distributing literature challenged a state law regulating solicitation).

104. *See also* Poulos v. New Hampshire, 345 U.S. 395, 402-04 (1953) (upholding a statute because the scheme left administrators with "no discretion as to granting permits" and thus "no power to discriminate").

105. 334 U.S. 558 (1948).

106. *Saia*, 334 U.S. at 559-60.

107. *Id.* at 560 (emphasis added).

108. *But see* Kovacs v. Cooper, 336 U.S. 77, 88-89 (1949) (plurality opinion) (upholding a blanket ban on the use of sound "amplified to a loud and raucous volume"). In *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 764 (1988), the Court explained the difference between *Saia* and *Kovacs* as follows:

> In *Saia*, this Court held that an ordinance prohibiting the use of sound trucks without permission from the Chief of Police was unconstitutional because the licensing official was able to exercise unbridled discretion in his decisionmaking, and therefore could, in a calculated manner, censor certain viewpoints. Just seven months later the Court held in *Kovacs* that a city could absolutely ban the use of sound trucks. The plurality distinguished *Saia* precisely on the ground that there the ordinance constituted censorship by allowing some to speak, but not others; in *Kovacs* the statute barred a particular manner of speech for all.

109. 340 U.S. 290 (1951).

110. *Kunz*, 340 U.S. at 293-94.

111. *Id.* at 292.

112. *Id.* at 292-93.

evidence that the speaker's meetings had in the past resulted in disorder.[113] The mere possibility that such discretion might be used to discriminate against those with unpopular points of view, even without proof of intentional discrimination against disfavored viewpoints, was held sufficient to strike down the law on its face.

2. *Censorship of Film and the Printed Word*

Closely related to the Court's early public forum cases are decisions considering laws that vest public officials with censoring authority over books, newspapers, and motion pictures. In *Near v. Minnesota ex rel. Olson*,[114] most commonly invoked for its articulation of the prior restraint doctrine,[115] the Court struck down a state law that allowed government attorneys to obtain injunctions against those publishing "malicious, scandalous and defamatory" newspapers.[116] The Court explained:

> If such a statute, authorizing suppression and injunction on such a basis, is constitutionally valid, it would be equally permissible for the legislature to provide that at any time the publisher of any newspaper could be brought before a court, or even an administrative officer (as the constitutional protection may not be regarded as resting on mere procedural details) and required to produce proof of the truth of his publication, or of what he intended to publish, and of his motives, or stand enjoined. If this can be done, the legislature may provide machinery for determining in the complete exercise of its discretion what are justifiable ends and restrain publication accordingly. And it would be but a step to a complete system of censorship.[117]

One might quibble with *Near* for underestimating the importance of procedural protections for speech,[118] and for seeming to conflate the various entities — including legislators, administrators, and the courts — that might exercise discretion to impose prior restraints on speech. In fact, the Minnesota system, which at least required a judicial hearing before restraining publication of newspapers, surely provided *greater* protection for speech than a scheme allowing speech to be

113. *Id.* at 294.

114. 283 U.S. 697 (1931).

115. *See, e.g.*, Emerson, *supra* note 99, at 654 (describing *Near* as "a landmark case" because it is "the major pronouncement of the Supreme Court on the doctrine of prior restraint").

116. *Near*, 283 U.S. at 702. The statute allowed any county attorney in the state to go into court to "enjoin perpetually the persons committing or maintaining any such nuisance from further committing or maintaining it." *Id.* at 702-03.

117. *Id.* at 721.

118. *See, e.g.*, Monaghan, *supra* note 7, at 518-20 (describing procedural safeguards that the Supreme Court has implemented to protect First Amendment rights).

restrained upon the mere whim of an administrative official.[119] The example given by the Court — that of a *legislature* creating the "machinery for determining in the complete exercise of its discretion" who may speak — is arguably less problematic than the discretionary scheme at issue in *Near*. For if the legislature creates clear rules regulating speech, then those rules can at least be evaluated to assess their fairness; on the other hand, the type of scheme at issue in *Near* (vesting discretion in an administrative official) made it very difficult to assess whether expression was being regulated in an evenhanded manner.

Although not described in the most transparent fashion, what the *Near* Court really seems to be concerned with is the possibility of *sub rosa* viewpoint discrimination. The problem with the Minnesota statute, the Court suggests, is that it allows government officials to determine the "justifiable ends" of speech. This risk is no more tolerable in a situation where amorphous standards tend to mask viewpoint discrimination than it is where the legislature expressly engages in viewpoint discrimination by making a law that favors one speaker over another. The government's failure to provide sufficiently clear guidance as to what speech could be regulated effectively ceded to county authorities and judges the power to decide what could be published.

Subsequent cases extended *Near*'s skepticism of official discretion to the censorship of film. In *Joseph Burstyn, Inc. v. Wilson*,[120] the Court mandated adamantine precision in government laws giving public officials authority to censor "sacrilegious" material. Relying on *Joseph Burstyn*, the Court would thereafter strike down laws from other jurisdictions allowing censorship of motion pictures deemed "immoral" or "harmful,"[121] those portraying "sexual immorality,"[122] and those judged by city authorities to be "prejudicial to the best interests of the people of said City."[123] In each case, loosely worded standards resulted in government officials being granted overly broad authority to determine what could be exhibited.[124]

119. *See, e.g.*, Manual Enters., Inc. v. Day, 370 U.S. 478, 519 (1962) (Brennan, J., concurring) (noting that administrative designation of certain materials as "obscene" was constitutionally infirm, in the absence of a "judicial proceeding under closely defined procedural safeguards").

120. 343 U.S. 495, 504-05 (1952).

121. Superior Films, Inc. v. Dep't of Educ., 346 U.S. 587, 589 (1954).

122. Kingsley Int'l Pictures Corp. v. Regents of the Univ. of N.Y., 360 U.S. 684, 687-88 (1959).

123. Gelling v. Texas, 343 U.S. 960, 960 (1952) (Douglas, J., concurring).

124. While striking down laws setting amorphous standards for censoring films, thereby taking from public officials the discretion to determine which motion pictures the public could see, the Court refused to take the additional step of prohibiting *all* prior restraint schemes in this area. The five-to-four decision in *Times Film Corp. v. City of Chicago*, 365

The Court's distrust of official discretion comes to the fore in a trio of opinions authored by Justice Brennan in the early 1960s: *Marcus v. Search Warrant*,[125] *Bantam Books, Inc. v. Sullivan*,[126] and *Freedman v. Maryland*.[127] These decisions contain some of the Supreme Court's most extensive discussions of the dangers of schemes vesting unbridled discretion to regulate speech in administrators or courts. *Marcus* struck down a Missouri law authorizing searches for and the seizure of allegedly "obscene" materials.[128] While recognizing that obscene materials do not enjoy protection under the First Amendment, the Court struck down the law because it gave executing officers "the broadest discretion" to decide what material was "obscene."[129] *Bantam Books* extends *Marcus*'s intolerance of unbridled discretion in the area of prior restraints to informal censorship schemes.[130] Not only did the Court broaden standing rules,[131] it also recognized that "informal censorship may sufficiently inhibit the circulation of publications to warrant injunctive relief."[132] And in *Freedman*, the Court set forth certain "procedural safeguards" to which censoring bodies must adhere, including an "adversary proceeding" and a "prompt final judicial decision."[133] The case thus embodies a procedural model for cabining official discretion to censor speech.[134]

3. *The Civil Rights Movement*

The censorship cases pave the way for cases occurring at the nexus between racial discrimination and viewpoint discrimination, where

U.S. 43 (1961), reaffirmed the prohibition against vague and indefinite licensing standards for motion pictures, while clarifying that prior restraints on film are not automatically unconstitutional. The Chicago ordinance challenged in *Times Film Corp.* required the commissioner to refuse a permit if the film failed to satisfy certain standards. Instead of challenging these standards, the petitioner based its constitutional claim on the "complete and absolute freedom to exhibit, at least once, any and every kind of motion picture." *Id.* at 46. The Court declined to forbid all prior restraints, explaining that its prior cases were limited to laws setting a " 'vague' or 'indefinite' " standard susceptible to abuse by the decisionmakers. *Id.* at 47.

125. 367 U.S. 717 (1961).

126. 372 U.S. 58 (1963).

127. 380 U.S. 51 (1965).

128. *Marcus*, 367 U.S. at 719.

129. *Id.* at 732.

130. *Bantam Books*, 372 U.S. at 59-61.

131. *Id.* at 64 n.6.

132. *Id.* at 67.

133. Freedman v. Maryland, 380 U.S. 51, 58-59 (1965).

134. *Freedman* typifies the approach to protecting speech against censorship which Professor Monaghan termed "First Amendment 'Due Process.' " *See* Monaghan, *supra* note 7, at 522.

First Amendment Equal Protection comes into full bloom.[135] These decisions evince a deeper and broader skepticism of official discretion than was evident in the permitting and censorship cases, moving beyond classic prior restraints to restrictions on expressive associations, breach of peace, and jury verdicts. Though couched in libertarian terms, these cases are centrally concerned with expressive equality and, more specifically, with preventing racial bias from infecting the regulation of public discourse.

Heightened concern with the dangers of official discretion at the speech/race nexus actually predates the civil rights movement, figuring prominently in *Herndon v. Lowry*,[136] a 1937 case involving a black man and member of the Communist Party convicted in Georgia for inciting insurrection.[137] Although the result in this case may seem obvious from a contemporary standpoint,[138] the Court's opinion is noteworthy for its distrust of juror discretion in the area of political speech, particularly when questions of race are at issue — a concern that would reappear almost thirty years later in *New York Times Co. v. Sullivan*.[139] A Fulton County jury had found Herndon guilty of "induc[ing] others to join in combined resistance to the lawful authority of the state with intent to deny, to defeat, and to overthrow such authority by open force, violent means, and unlawful acts,"[140] a crime punishable by death. The record, however, contained evidence that Herndon had solicited contributions for the Communist party, but not that he had personally advocated violent overthrow of the government.[141]

While the Court might have overturned Herndon's conviction simply because there was no evidence of imminent violence, it went further, striking down the statute on its face because it "license[d] the jury to create its own standard in each case."[142] As the Court explained:

> [The Georgia statute] amounts merely to a dragnet which may enmesh anyone who agitates for a change of government if a jury can be per-

135. *See* HARRY KALVEN, JR., THE NEGRO AND THE FIRST AMENDMENT 4 (1965).

136. 301 U.S. 242 (1937).

137. For an illuminating discussion of *Herndon*, see Kendall Thomas, Rouge et Noir *Reread: A Popular Constitutional History of the Angelo Herndon Case*, 65 S. CAL. L. REV. 2599 (1992).

138. *But see* ZECHARIAH CHAFFEE, JR., FREE SPEECH IN THE UNITED STATES 397 (4th prtg. 1948) ("[Of] all the chief sedition defendants .... all but one seem to me fairly harmless. The one exception is Herndon.").

139. 376 U.S. 254 (1964).

140. *Herndon*, 301 U.S. at 245. The law had been enacted as the result of Nat Turner's 1832 rebellion, but had not been used for almost a century. HARRY KALVEN, JR., A WORTHY TRADITION 170 (1988).

141. *Herndon*, 301 U.S. at 253.

142. *Id.* at 263.

> suaded that he ought to have foreseen his words would have some effect in the future conduct of others. No reasonably ascertainable standard of guilt is prescribed. So vague and indeterminate are the boundaries thus set to the freedom of speech and assembly that the law necessarily violates the guarantees of liberty embodied in the Fourteenth Amendment.[143]

As obvious as the result in *Herndon* may seem today, the opinion is remarkable in several respects. First, it refuses to defer to the state jurors' finding that imminent violence would result from the speech at issue, instead undertaking a thorough examination of the record.[144] Second, the opinion does not simply overturn the conviction but also strikes down the statute on its face, because it was so loosely written as to allow jurors' discretion to impair fair adjudication.[145] Third, the Court suggests that such discretion may carry special dangers where the death penalty may be imposed,[146] foreshadowing later cases that consider the special dangers of discretion in the context of capital punishment.[147] Fourth, the Court's opinion suggests a distrust of jury discretion as well as of *judicial* discretion, in that the Court conducts an independent review of the evidence, reverses the conviction, throws out the statute, and insists upon clearly written standards less subject to judicial manipulation.[148] Fifth, the Court evinces special concern for the potential infringement of speech given the racial undertones of the case, recognizing the enhanced dangers of quasi-official discretion where racial bias interacts with official authority to suppress disfavored ideas.[149]

New York Times Co. v. Sullivan[150] inherits *Herndon*'s acute concern with the dangers of juror discretion where viewpoint discrimination and racial discrimination overlap. Though *Sullivan* is famous for holding that public officials may not obtain damages for libel absent "actual malice,"[151] equally significant is the Court's insistence — also implicit in *Herndon* — that "we must also in proper cases review the

143. *Id.* at 263-64.

144. *Id.* at 247-53, 259-60.

145. *Id.* at 263-64.

146. *Id.* at 262 (noting that under the law, if some causal chain resulting in violence may follow from the speaker's words, "he is bound to make the prophesy and abstain [from speaking], under pain of punishment, possibly of execution").

147. *See infra* Part III.B.2.

148. *Herndon*, 301 U.S. at 259-64.

149. *Id.* at 245 (noting the indictment described Herndon's "speeches for the purpose of organizing and establishing groups and combinations of white and colored persons under the name of the Communist Party of Atlanta"); *id.* at 250-52 (quoting materials found in Herndon's possession advocating African Americans' right to self-determination).

150. 376 U.S. 254 (1964).

151. *Sullivan*, 376 U.S. at 283.

evidence to make certain that those [constitutional] principles have been constitutionally applied."[152] Instead of remanding, the Court engaged in a thorough review of the facts,[153] concluding that actual malice could not be established on the evidence adduced at trial. As Professor Monaghan observed, this skepticism of juror discretion can be viewed as reflecting a shift in the very meaning of the First Amendment, from one "conceived primarily as a guarantee that the voice of the people — *the majority* — would be heard" to one concerned primarily with "protecting unpopular speech."[154]

Concerns about the special dangers presented by official discretion when combined with racial bias also figure prominently in *NAACP v. Button*,[155] which struck down on its face a Virginia statute regulating the solicitation of legal business.[156] The Court's opinion highlighted the danger of unequal administration inherent in loosely worded laws,[157] a concern that was especially prominent given the backdrop of racial bias: "In such circumstances, a statute broadly curtailing group activity leading to litigation may easily become a weapon of oppression, however evenhanded its terms appear."[158] The Court did not expressly find that the Virginia statute had been enforced in a discriminatory way; rather the *possibility* that the broad discretion vested in official decisionmakers might be abused was enough to warrant facial invalidation.[159]

Most prominent among the First Amendment Equal Protection cases decided during the Civil Rights Movement are a series of cases

152. *Id.* at 285; *see also* Steven Alan Childress, *Constitutional Fact and Process: A First Amendment Model of Censorial Discretion*, 70 TUL. L. REV. 1229, 1254 (1996).

153. *See* THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 536 (1970) (stating that the *Sullivan* Court "carefully reviewed the evidence and itself drew the conclusions which the jury would be bound to reach"); Childress, *supra* note 152, at 1256 (arguing that the *Sullivan* Court's "exercise amounted to a virtual reexamination of the facts on appeal").

154. Monaghan, *supra* note 7, at 528-29. As Professor Monaghan put it, *Sullivan* exemplifies the Court's concern that "like administrative agencies, the jury cannot be expected to be sufficiently sensitive to the first amendment interests involved in any given proceeding." *Id.* at 527-28. Akhil Amar makes the point more directly, noting the Court's implicit concern that "a southern jury composed of good old boys" would suppress speech advocating racial equality. AMAR, *supra* note 16, at 243.

155. 371 U.S. 415 (1963).

156. *Button*, 371 U.S. at 419-20, 426.

157. *Id.* at 433.

158. *Id.* at 435-36.

159. The danger that such a facially neutral statute might be used by the politically dominant white majority to suppress the speech of the black minority obviated the need to address the NAACP's alternative claim of race discrimination in the application of Virginia's law. *Id.* at 444 ("Because our disposition is rested on the First Amendment . . . we do not reach the considerations of race or racial discrimination which are the predicate of petitioner's challenge to the statute under the Equal Protection Clause.").

in which the Court invalidated government attempts to regulate various civil rights demonstrations. In *Garner v. Louisiana*,[160] the Court reversed the convictions of African Americans prosecuted for disturbing the peace by taking seats at a whites-only lunch counter.[161] Following *Garner*, the Court reversed convictions for refusing to leave a whites-only bus depot,[162] marching and singing outside the South Carolina State House,[163] "cheering, clapping and singing" near a courthouse,[164] demonstrating in front of a department store,[165] sitting in a library,[166] and marching from city hall to the mayor's home.[167] These decisions focus on the broad discretion vested in police, prosecutors, and judges to regulate expression — and, specifically, on the danger that they will apply such laws in a racially discriminatory manner that might escape detection absent facial invalidation. As in *Herndon* and *Sullivan*, the threat to expressive equality posed by state judges' and jurors' discretion leads the Court to insist upon "an independent examination of the whole record."[168] The cases share a concern with white public officials using discretion given to them under seemingly neutral laws to target disfavored speech and speakers.[169]

Shuttlesworth v. City of Birmingham,[170] one of the cases involving civil rights demonstrations, represents the apotheosis of the Court's concern with the dangers of official discretion to regulate speech

160. 368 U.S. 157 (1961).

161. *Garner*, 368 U.S. at 173-74.

162. Taylor v. Louisiana, 370 U.S. 154, 156 (1962).

163. Edwards v. South Carolina, 372 U.S. 229, 236-38 (1963).

164. Cox v. Louisiana, 379 U.S. 536, 557-58 (1965).

165. Shuttlesworth v. City of Birmingham, 382 U.S. 87, 89-95 (1965).

166. Brown v. Louisiana, 383 U.S. 131, 143 (1966).

167. Gregory v. City of Chicago, 394 U.S. 111, 112-13 (1969).

168. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 285 (1964) (quoting *Edwards*, 372 U.S. at 235).

169. For example, in the first *Shuttlesworth v. Birmingham* decision, the Court struck down a law that required people to "move on" from any street or public sidewalk when asked to do so by police officers. 382 U.S. at 88. In overturning the conviction of a civil rights protester who had refused to move along when asked to do so by a policeman, the Court emphasized the danger of laws dependent upon "moment-to-moment opinions of a policeman on his beat" where speech is concerned. *Id.* at 90 (internal citation omitted). Although the ordinance was not focused upon speech activities, the Court's opinion relied on the threat to expressive equality in striking it down: "Instinct with its ever-present potential for arbitrarily suppressing First Amendment liberties, that kind of law bears the hallmark of a police state." *Id.* at 90-91 (footnote omitted). *Cox v. Louisiana* likewise exemplifies this concern, citing early permitting and licensing cases for the proposition that "lodging of such broad discretion in a public official allows him to determine which expressions of view will be permitted" and "thus sanctions a device for the suppression of the communication of ideas." 379 U.S. at 557.

170. 394 U.S. 147 (1969).

where racial equality is implicated. *Shuttlesworth* extends that concern from police, commissions, prosecutors, and trial judges to state appellate courts. After leading a four-block march from a Birmingham church, Reverend Shuttlesworth was convicted of engaging in a demonstration without first having obtained the required permit.[171]

As written, the Birmingham ordinance under which Shuttlesworth was convicted gave the city commission a "virtually unbridled and absolute power to prohibit any 'parade,' 'procession,' or 'demonstration' on the city's streets and public ways."[172] Without a narrowing construction, therefore, the ordinance would plainly have violated the First Amendment.[173] The Alabama Supreme Court, however, had adopted an extremely narrow construction of the statute, under which a permit "must be granted if, after an investigation, it is found that the convenience of the public in use of the streets or sidewalks would not thereby be unduly disturbed."[174]

Despite this narrowing construction, the United States Supreme Court reversed. It first held that Reverend Shuttlesworth was free to challenge the statute, even though he had not applied for the permit, since he challenged the constitutionality of Birmingham's licensing law on its face.[175] On the merits, the Court acknowledged that the Alabama Supreme Court's narrowing construction left a law providing for nothing more than the "even-handed" regulation of traffic.[176] The Court nevertheless reversed the convictions because, at the time that Shuttlesworth was arrested, the law on the books allowed the city commission to deny permission to speak on virtually any ground it saw fit.[177] *Shuttlesworth* thus extends the doctrine of allowing facial challenges to laws infringing on freedom of speech: it requires not only clear standards, but clear standards *prescribed in advance.* In doing so, the Court recognizes not merely that policemen may abuse their discretion, but also that state judges (both trial and appellate) may do so as well.

The First Amendment Equal Protection cases arising during the civil rights movement thus demonstrate a profound distrust of official and quasi-official discretion to regulate speech, whether placed in the hands of police, administrators, jurors, prosecutors, or even state

171. *Shuttlesworth*, 394 U.S. at 148-49.

172. *Id.* at 150 (footnote omitted).

173. *Id.*

174. Shuttlesworth v. City of Birmingham, 206 So. 2d 348, 350-52 (Ala. 1967).

175. *Shuttlesworth*, 394 U.S. at 151 ("[A] person faced with such an unconstitutional licensing law may ignore it and engage with impunity in the exercise of the right of free expression for which the law purports to require a license." (footnote omitted)).

176. *Id.* at 154-55.

177. *Id.* at 156.

supreme court judges. While the Court does not expressly rely on equal protection doctrine to justify the results reached or the legal standards articulated, recognition of the dangers to expressive equality posed by official and quasi-official racial bias is implicit in these decisions. Absent federal court intervention, racial bias would inevitably translate into viewpoint-based discrimination. These cases thus cried out for closer supervision of government discretion by the federal courts, and demanded the formulation of strict boundaries to ensure that officials' prejudices did not result in expressive inequality.

B. *The Features of First Amendment Equal Protection*

Skepticism of official discretion animates the public fora, censorship, and civil rights era cases. For the most part, these cases arise in contexts where the Court smelled a rat — that is, where circumstances suggested that discrimination against disfavored viewpoints or certain speakers was at play, but where that discrimination was difficult to substantiate. The special doctrines created in response to this general problem have remained relatively stable. This Section describes four features of First Amendment Equal Protection, each of which serves to limit the threat to expressive equality posed by excessive discretion.

1. *The Requirement of Precision*

The most obvious respect in which the Court has demonstrated its skepticism of official discretion is in continuing to strike down laws with vaguely defined standards that delegate to public officials virtually unbridled discretion to determine who may speak.[178] The term "unbridled discretion" has become a watchword for what the First Amendment forbids, and is closely linked to the Court's general intolerance for vagueness where speech is criminalized or otherwise regulated.[179]

For example, the Court in *City of Lakewood v. Plain Dealer Publishing Co.*[180] struck down an ordinance giving the mayor "unbridled discretion" to grant or deny applications for newsracks on city property.[181] In the course of its decision, the Court explained why precise standards are so vital, even where an abuse of authority cannot be shown:

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178. *See, e.g.*, Amsterdam, *supra* note 10, at 102 (discussing special skepticism of laws that "delegat[e] to executive agencies widely discretionary or imprecisely measured powers of censorship").

179. *See* TRIBE, *supra* note 74, § 12-2, at 794 ("Categorical rules thus tend to protect the system of free expression better because they are more likely to work in spite of the defects in the human machinery on which we must rely to preserve fundamental liberties.").

180. 486 U.S. 750 (1988).

181. *City of Lakewood*, 486 U.S. at 772.

> Standards provide guideposts that check the licensor and allow courts quickly and easily to determine whether the licensor is discriminating against disfavored speech. Without these guideposts, *post hoc* rationalizations . . . and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable, expression.[182]

The requirement of clear standards prescribed in advance prevents public officials from tilting the expressive playing field. Without such a requirement, it is all too easy for government to favor or disfavor speakers in ways that escape detection. But if there are statutes, ordinances, or regulations limiting government discretion to regulate or prohibit speech, it is much more difficult for public officials to discriminate based on the messages expressed. As the Court expressly states, the danger of such discrimination is "at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official."[183] Without clearly defined standards, it is simply too easy for the suppression of disfavored points of view to escape judicial detection.

To be sure, cabining government officials' ability to discriminate is not the *only* reason for the rule against vagueness. The requirement of precision also provides notice to prospective speakers of what conduct is prohibited,[184] and avoids the "chilling effect" upon constitutionally protected expression arising from unclear regulations.[185] Guarding against discrimination is, however, one of the principal reasons why the Court has long insisted on precision when government regulates expression.

City of Lakewood and other First Amendment Equal Protection cases requiring clear standards prescribed in advance can thus be understood as "soft purpose" cases — cases in which the Court has been willing to find a violation, even where direct evidence of intentional discrimination is lacking, due to the mere possibility that such discrimination might occur. The opinion in *Forsyth County v. Nationalist Movement*[186] illustrates this point. In *Forsyth County*, the

182. *Id.* at 758.

183. *Id.* at 763.

184. *See, e.g.*, Smith v. Goguen, 415 U.S. 566, 574 (1974) (holding unconstitutional a law forbidding "contemptuous[]" treatment of the flag because it "fails to draw reasonably clear lines between the kinds of nonceremonial treatment that are criminal and those that are not"); Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971) (holding that a law making it a crime for people to annoy passers-by on sidewalk "is unconstitutionally vague because it subjects the exercise of the right of assembly to an unascertainable standard").

185. *See, e.g.*, NAACP v. Button, 371 U.S. 415, 433 (1963) (noting that freedom of speech is "delicate and vulnerable" and therefore that "threat of sanctions may deter their exercise almost as potently as the actual application of sanctions").

186. 505 U.S. 123 (1992).

Court struck down a local ordinance that allowed government administrators to adjust the fee required for speech activities based upon the degree of hostility likely to be provoked. When the Nationalist Movement sought to demonstrate in opposition to a federal holiday commemorating Martin Luther King, Jr.'s birthday, the County sought to "adjust the amount paid in order to meet the expense incident to the administration of the Ordinance and to the maintenance of public order in the matter licensed."[187] The Court held that the absence of specific standards for determining what fee to charge was enough to invalidate Forsyth County's scheme.[188]

Nor is suspicion of "unbridled discretion" limited to permit requirements and other forms of prior restraint. For example, in *City of Houston v. Hill*,[189] the Court struck down a Houston ordinance that made it unlawful to "oppose, molest, abuse or interrupt any policeman in the execution of his duty, or any person summoned to aid in making arrest."[190] The Court concluded that this ordinance swept too broadly, and intruded upon the ability of citizens to challenge police actions verbally without arrest. As the Court explained, "we have repeatedly invalidated laws that provide the police with unfettered discretion to arrest individuals for words or conduct that annoy or offend them."[191] Although the ordinance was content and viewpoint neutral,[192] the Court held it facially invalid because it gave police officers too much leeway to target speakers of whom they disapproved.[193]

More recently, the Court's decision in *Reno v. ACLU* struck down portions of the Communications Decency Act prohibiting the dissemination of "indecent" and "patently offensive" materials to those under 18 as insufficiently specific under the First Amendment.[194] The absence of precise definitions for either term left open an impermissibly large "risk of discriminatory enforcement" that required the

187. *Nationalist Movement*, 505 U.S. at 127 (internal citation omitted). The record included testimony regarding the various rates that the administrator had charged for various permitted activities in the past, ranging from $5 to $100. *Id.* at 132.

188. *Id.* at 133.

189. 482 U.S. 451 (1987).

190. *Hill*, 482 U.S. at 455 (quoting HOUSTON, TEX., ORDINANCES § 34-11(a) (1984) (internal quotation marks omitted)).

191. *Id.* at 465.

192. *Id.* at 459.

193. *Id.* at 465 n.15 ("Houston's [ordinance] effectively grants police the discretion to make arrests selectively on the basis of the content of the speech."). There was general agreement on this point, even amongst the justices who considered the majority's opinion too sweeping in other respects. *See id.* at 480 (Powell, J., concurring in part and dissenting in part, joined by O'Connor and Scalia, JJ.) (agreeing that the ordinance is unconstitutional because "it is clear that Houston has made no effort to curtail the wide discretion of police officers under the present ordinance").

194. 521 U.S. 844, 870-71 (1997).

statute's facial invalidation.[195] The Court recognized this risk and upheld the plaintiffs' vagueness challenge to the term "patently offensive" notwithstanding the fact that this term is part of the three-prong test for assessing whether material is "obscene."[196]

All of these cases rest on the Court's recognition that, absent restraints upon official discretion, government may discriminate against disfavored viewpoints in a manner likely to escape detection. Subject to narrow exceptions,[197] the Court has generally required government to walk a fine line when it regulates expression.

2. *Receptivity to Facial Challenges*

The requirement of precision is but one manifestation of the Court's more general suspicion of official and quasi-official discretion where expressive equality is at issue. Another feature of First Amendment doctrine closely linked to concerns regarding official discretion is the Court's receptivity to facial challenges.

Outside the First Amendment context, the standard for facial challenges is extremely strict. For a successful facial challenge to be mounted outside the First Amendment context, "the challenger must

195. *Reno*, 521 U.S. at 872.

196. *Id.* at 872 (citing Miller v. California, 413 U.S. 15, 24 (1973)).

197. One of the few Supreme Court decisions to uphold regulations of demonstrations is *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). *Ward* considered a regulation that required speakers in the Central Park bandshell to use amplification equipment and an experienced sound technician provided by the City. *Id.* at 784. The Court rejected the argument that this arrangement gave government officials impermissibly broad discretion to regulate speech, stating that "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Id.* at 794; *see also* Hill v. Colorado, 530 U.S. 703, 724, 732-33 (2000) (upholding a Colorado "bubble zone" law regulating speech in front of health-care facilities, despite imprecision as to the meaning of the activities regulated, namely "protest, education, or counseling"); *id.* at 739-40 (Souter, J., concurring) (acknowledging that these terms "at first blush" seem to present a vagueness problem, but finding it "not fatal" because it "pretty clearly fails to limit very much at all").

The Court has also applied a more relaxed standard where the government funds artistic expression. For example, in *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998), the Court upheld a scheme vesting a federal agency with substantial discretion to award grants to artists and charging the agency with responsibility to ensure "artistic merit." *Id.* at 572-73. The Court actually rests its conclusion that the statute is viewpoint-neutral on the indeterminacy of terms like "decency" and "respect," stating that "one would be hard pressed to find two people in the United States" who would agree on their meaning. *Id.* at 583. *Finley* thus permits the exercise of discretion in this area for a reason somewhat different than *Ward*: not because the dangers of discrimination are minimal, but because of the impossibility of crafting standards to prohibit such discrimination without obliterating the discretion that public officials must have in order to carry out their duties. *See also* Arkansas Educ. Television Comm'n v. Forbes, 523 U.S. 666, 683 (1998) (allowing a public television station to exclude an independent candidate from political debate, where there was no evidence that it did so based on opposition to his views).

establish that no set of circumstances exists under which the Act would be valid."[198]

In free speech cases, by contrast, a facial challenge may be brought even where a law may validly be applied in some of its applications.[199] The question, as explained in *City of Houston v. Hill*, is whether the law in question reaches "a substantial amount of constitutionally protected conduct."[200] Thus, the *Hill* Court struck down a municipal ordinance prohibiting interference with police officers, even though there were some forms of interference with the police that could justifiably be proscribed without infringing on speech, and even though there was no evidence that the content-neutral statute had been applied against disfavored viewpoints.[201] The mere possibility that the law could be used to suppress speech critical of police officers was enough to strike it down on its face.[202]

Within the general category of laws susceptible to facial challenges on First Amendment grounds, it is important to distinguish laws that are impermissibly vague (for failing to set sufficiently precise standards for regulating speech) from those that are impermissibly overbroad (because they burden a substantial amount of protected speech).[203] The dangers of discriminatory enforcement, as I have already explained, are obvious with respect to the vague laws which, by their very nature, give authorities room to discriminate against speakers whose message they disapprove of.[204] Yet, dangers are also present with respect to overbroad laws — even ones that set reasonably clear standards and are therefore not vague — because those laws may be selectively enforced in a manner that infringes upon speech.[205] As Professor Karst has observed, overbreadth doctrine often serves the First Amendment interest in equality, since an overbroad statute

198. United States v. Salerno, 481 U.S. 739, 745 (1987). For a critique of the *Salerno* rule, see Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 239-42 (1994).

199. Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973).

200. 482 U.S. 451, 458 (1987) (quoting Vill. of Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494 (1982)).

201. *Hill*, 482 U.S. at 459.

202. *Id.* at 459.

203. *See* TRIBE, *supra* note 74, § 12-31, at 1033-35; Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 903-07 (1991) [hereinafter Fallon, *Making Sense of Overbreadth*].

204. The prohibition against vague laws is not limited to those which infringe upon free speech, although this prohibition has been applied more robustly in speech cases. *See* Fallon, *Making Sense of Overbreadth*, *supra* note 203, at 904.

205. *See id.* at 908 (observing that overbroad statutes may "provide a cover for content-based hostility to constitutionally protected expressive activity").

raises a more pronounced risk of selective enforcement.[206] An excessively broad law may function as a sort of dragnet, sweeping in many from which authorities may target those harboring disfavored views.

As with the requirement of precise standards, the Court's willingness to entertain facial challenges under the First Amendment is not *solely* grounded in the need to cabin the possibilities of discrimination that can accompany official discretion. Among the other justifications for this rule are elimination of laws that would chill people from engaging in protected speech,[207] and vindication of the litigants' rights "to be judged in accordance with a constitutionally valid rule of law."[208] But limiting official opportunities to suppress disfavored speech is one of the important purposes served by allowing facial challenges under the First Amendment.

3. *Liberal Rules of Justiciability*

Related to, though analytically distinct from, the Court's willingness to entertain facial First Amendment challenges is its relaxation of ordinary rules of justiciability.[209] For purposes of assessing the relationship between procedural safeguards and official discretion, two aspects of First Amendment doctrine are noteworthy.

First, in prior restraint cases, the Court has allowed litigants to challenge the constitutionality of laws infringing upon speech even when such litigants have not applied for the permit or license required under the challenged scheme. For example, in *City of Lakewood*, the

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206. Karst, *Equality in the First Amendment*, *supra* note 7, at 38. For example, in *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 622 (1980), the Court struck down an ordinance prohibiting solicitation by charitable organizations that used less than 75% of monies received for nonadministrative purposes. Also, in *Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947, 956 (1984), the Court struck down a statute that differed only in that it allowed an administrative waiver for "financial necessity." In both cases, the statutes at issue set reasonably clear standards, yet still raised the possibility of imposing a disproportionate burden on those with "unpopular" messages. *See id.* at 967 ("It is equally likely that the statute will restrict First Amendment activity that results in high costs but is itself a part of the charity's goal or that is simply attributable to the fact that the charity's cause proves to be unpopular.").

207. *See, e.g.*, City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 757 (1988) ("[T]he mere existence of the licensor's unfettered discretion . . . intimidates parties into censoring their own speech, even if the discretion and power are never actually abused."); Thornhill v. Alabama, 310 U.S. 88, 97 (1940) ("It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion.").

208. Henry Paul Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1, 3.

209. To say that laws vesting public officials with broad authority to censor speech may be struck down on their face is one thing; to allow litigants whose speech is not itself protected to bring such a challenge is another. *See* Dorf, *supra* note 198, at 261-62 (distinguishing two views of overbreadth). *But see* TRIBE, *supra* note 74, § 12-27, at 1023 (noting that some have understood overbreadth as an exception to ordinary standing rules, but taking the position that it really reflects a right to be judged by a properly drawn rule).

Court allowed a newspaper publisher to challenge a municipal licensing requirement without having applied for the license. The Court observed that "a licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship," even without a showing that the power vested in the hands of public officials has actually been abused.[210] The very absence of standards makes it difficult to distinguish between the legitimate exercise of the power to deny a permit and the exercise of that power to suppress a disfavored viewpoint.[211]

The second rule confers more generous standing by allowing litigants to challenge the constitutionality of a vague or overbroad law, "even though its application in the case under consideration may be constitutionally unobjectionable."[212] Indeed, litigants may bring facial challenges to such laws without showing that their conduct is itself protected by the First Amendment.[213] Under this rule, litigants need not show that others affected are incapable of bringing suit on their own.[214] The Court has justified this "exception" to the general rule forbidding third-party standing by reasoning that the "very existence" of imprecise or overinclusive laws can inhibit the expression of others not before the Court.[215]

4. *Independent Factfinding*

A staple of First Amendment doctrine is an independent examination of the evidentiary record on appeal. The Court's willingness to discard ordinary rules against appellate factfinding in First Amendment cases — and to second guess lower-level decisionmakers — arises in part from concern that official discretion will be applied in a less-than-evenhanded fashion.[216]

As *New York Times Co. v. Sullivan* exemplifies, the Court is not content simply to articulate principles in speech cases, but frequently insists upon making its own review of the evidence "to make certain that those principles have been constitutionally applied."[217] The

210. *City of Lakewood*, 486 U.S. at 757.

211. *Id.* at 758.

212. Forsyth County v. Nationalist Movement, 505 U.S. 123, 129 (1992); *see also* Sec'y of State v. Joseph H. Munson Co., 467 U.S. 947, 956 (1984).

213. Virginia v. Am. Booksellers Ass'n, 484 U.S. 383, 392-93 (1988).

214. *Joseph H. Munson Co.*, 467 U.S. at 957-58.

215. *Id. But see* Dorf, *supra* note 198, at 261 (noting that the special standing and overbreadth rules developed in First Amendment cases have also been applied in cases implicating other fundamental rights).

216. The line of cases involving demonstrations during the civil rights era, *see* discussion *supra* Section II.A.3, exemplify the willingness to engage in such appellate factfinding.

217. 376 U.S. 254, 285 (1964). So, too, in *Bose Corp. v. Consumers Union, Inc.*, 466 U.S. 485, 502 (1984), another defamation case involving the actual-malice standard, the Court

willingness to undertake a thoroughgoing reexamination of the record, rather than deferring to a lower court's findings, also extends to areas other than defamation. In determining whether expression falls within the generally proscribable category of obscenity under the standards set forth in *Miller v. California*,[218] the Court has long insisted upon an "independent examination" of the evidentiary record to determine whether the material in question is patently offensive and appeals to prurient interests.[219] Like the rules allowing for broader standing and facial challenges in First Amendment cases, this rule stems at least in part from a concern that official discretion will be abused to suppress speech conveying a disfavored message or idea.

The flip-side of such heightened judicial inquiry into the underlying facts, of course, is an unwillingness to defer to nonjudicial findings and conclusions. This is perhaps evident in the *Freedman v. Maryland* guidelines, which require prompt judicial review of certain "prior restraints" on speech, and place the burden on the government to obtain such review.[220] It is equally evident in *Sullivan* and its progeny which, in recognition of the dangers to expressive equality posed by juror discretion, characterize issues as legal rather than factual so as to take matters out of the jury's hands and into the court's.[221] Just as the *Freedman* guidelines stem from an unwillingness to defer to low-level bureaucrats, the rules crafted in the defamation cases evince an unwillingness to defer to juries. In both cases, the Court's refusal to defer arises from concern that expressive inequality is an inevitable by-product of the decisionmakers' discretion.

C. Thomas v. Chicago Park District

At first glance, the Supreme Court's recent unanimous opinion in *Thomas v. Chicago Park District*[222] might seem like a repudiation of at

held it "imperative that judges — and in some cases judges of this Court — make sure that it is correctly applied." *See also* Childress, *supra* note 152, at 1261-67.

218. 413 U.S. 15, 24 (1973).

219. *See, e.g.*, City of Houston v. Hill, 482 U.S. 451, 458 n.6 (1987) ("[A]n independent review of the record is appropriate where the activity in question is arguably protected by the Constitution."); Jenkins v. Georgia, 418 U.S. 153, 160 (1974) (holding that appellate courts must conduct an independent review in order to protect against possible abuses by censoring authorities and juries).

220. 380 U.S. 51, 58 (1965).

221. In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349-50 (1974), for example, the Court held that the remedies for defamation should reach "no farther [sic] than is necessary," and therefore struck down state standards allowing publishers and broadcasters to be subjected to punitive damages. In so holding, the Court expressly relied on the dangers inherent in leaving juries with discretion to award punitive damages for defamation — specifically, that juries would be "free to use their discretion selectively to punish expressions of unpopular views" thereby leading to self-censorship by the press. *Id.* at 350.

222. 534 U.S. 316 (2002).

least some of the features of First Amendment Equal Protection. In *Thomas*, the Supreme Court upheld a Chicago scheme regulating the usage of public parks, despite arguments from would-be speakers that the regulations accorded municipal officials unacceptably broad discretion. The Supreme Court held: (1) that public entities need not comply with the *Freedman* procedural guidelines when they engage in "content-neutral" speech regulation, even when that regulation takes the form of a prior restraint; and (2) that Chicago's ordinance prescribing when a permit would issue was sufficiently specific to minimize the risk of *sub rosa* viewpoint-based discrimination and to permit effective judicial review.[223]

To understand the significance of *Thomas*, both in terms of what it does and what it does *not* do, it is helpful to contrast the Supreme Court's opinion in the case with the more sweeping opinion of the Seventh Circuit authored by Judge Posner.[224] Had the Supreme Court adopted Judge Posner's analysis, it would have represented a sharp departure from settled rules designed to guard against discrimination with respect to political speech. As it stands, however, the Supreme Court's opinion represents a slight shift in the discretion/equality balance toward greater recognition of the need for some discretion to be vested in municipal decisionmakers regulating the use of public spaces.

Both the Seventh Circuit and Supreme Court rejected a facial First Amendment challenge to Chicago's park-permit scheme brought by a group advocating the repeal of marijuana laws. The Seventh Circuit's opinion embraces a conception of the First Amendment that focuses on the *quantity* of speech permitted rather than on equality of opportunities for expression, at odds with the Supreme Court's longstanding skepticism of laws leaving officials with broad discretion to grant or deny permits to speak in public places. For example, while ostensibly recognizing the "danger in giving officials broad discretion over which political rallies shall be permitted to be conducted on public property,"[225] Judge Posner's opinion proceeds to minimize the dangers posed by such a scheme. For Judge Posner, the critical question was whether the regulations imposed by the city "reduce[] the *amount* of speech" in this public forum, suggestive of a "more speech is better" interpretation of the First Amendment.[226] Yet his opinion gives short shrift to the critical question: whether the city's rules are sufficient to ensure equality of opportunities for expression and, more specifically, to guard against public officials' misusing their discretion to suppress

223. *Thomas*, 534 U.S. at 323-24.

224. Thomas v. Chicago Park Dist., 227 F.3d 921, 923-28 (7th Cir. 2000).

225. *Id.* at 924.

226. *Id.* (emphasis added).

disfavored messages or ideas. Under Judge Posner's standard, plaintiffs would be obliged to show that the regulations were actually applied to them in an unfair way because of hostility toward their message or ideas[227] — a standard close to the intentional discrimination requirement typically applied to allegations of race discrimination under the Equal Protection Clause.

Among the provisions challenged by plaintiffs was one giving Chicago officials discretion to reject a permit because of a "material" misrepresentation. While one might believe that the term "material" is sufficiently specific as to present a tolerably low risk of content- and viewpoint-based discrimination, Judge Posner's opinion goes further, asserting that "if this discretionary feature of the regulation were excised, the regulation would be more restrictive than it is."[228] Likewise, in rejecting the challenge to the discretionary "waiver" provision contained in the regulation, the circuit court stated that "[c]urtailing speech is an odd way of protecting speech."[229] What the court appears to mean by these statements is that a more precisely written regulation might bar more speech. The problem with this statement is that it disregards that ensuring *equality*, and in particular preventing against governmental discrimination based upon disapproval of the speaker's message, is at the heart of the traditional requirement of precision in rules that regulate speech.

The Seventh Circuit's opinion in *Thomas* also represents a significant departure from traditional First Amendment doctrine with respect to the facial-challenge rule. Judge Posner's opinion asserts that facial challenges to speech regulations, as distinct from as-applied challenges, invite "semantic nitpicking and judicial usurpation of the legislative drafting function in an effort to avert, without creating loopholes, dangers at best hypothetical and at worst chimerical."[230] Put another way, Judge Posner views the mere possibility that official discretion will be abused to be insufficient to justify facial invalidation, even where public demonstrations in parks — among the quintessential public fora — are at issue.

Judge Posner was surely correct to recognize that *some* degree of regulation is necessary for anyone's speech rights effectively to be exercised — without some regulation, after all, competing groups would be hard pressed to determine who gets to use the stage at what times. Where the opinion departs from established precedent is the high threshold it imposes upon the would-be speaker to demonstrate

227. *Id.* at 925 ("The opportunities for abuse are manifest but are minimized by the fact that if there is an abuse the victims can bring a judicial challenge to the permit regulation as applied to them.").

228. *Id.* at 925.

229. *Id.*

230. *Id.* at 924.

that the government acted for improper reasons in refusing to grant a permit. Absent a showing that the government is "trying to restrict the expression of unpopular ideas,"[231] Judge Posner's opinion suggests that courts should defer to the decisions of governmental decision-makers charged with regulating the use of public spaces. This ignores the teaching of cases such as *Shuttlesworth*, *Forsyth County*, and *City of Lakewood*, which recognize that the very absence of sufficiently precise rules makes it practically impossible to assess whether discrimination against disfavored speakers is taking place.

Although the Supreme Court affirmed the Seventh Circuit's conclusion that Chicago's permit scheme was facially constitutional, it did so on narrower grounds. The Court's opinion tinkers with First Amendment Equal Protection jurisprudence while leaving its basic structure intact. The Supreme Court agreed with the Seventh Circuit in recognizing the need for municipalities to exercise some control over limited public spaces such as parks through the enactment of a permit process.[232] It also agreed with the Seventh Circuit on the inapplicability of the *Freedman* procedural requirements in the absence of some sort of content-based scheme.[233] Where the Supreme Court departed from the Seventh Circuit was in its recognition of the dangers to expressive equality that exist even where the law in question does not expressly draw a content-based distinction.[234]

The Court emphasized that a permit may be denied only for one of the specified reasons set forth in the ordinance, finding these grounds to be "reasonably specific and objective."[235] While recognizing that the city's power to grant waivers might conceivably be abused to advantage favored speakers, the Court held that the regulations were sufficiently specific to prevent discrimination against unpopular ideas from occurring beneath the surface:

> The prophylaxis achieved by insisting upon a rigid, no-waiver application of the ordinance requirements would be far outweighed, we think, by the accompanying senseless prohibition of speech (and of other activity in the park) by organizations that fail to meet the technical requirements of the ordinance but for one reason or another pose no risk of the evils that those requirements are designed to avoid.[236]

231. *Id.* at 928

232. Thomas v. Chicago Park Dist., 534 U.S. 316, 322-23 (2002).

233. *Id.*

234. Citing *Forsyth County*, the *Thomas* Court stated the long-standing principle that "where the licensing official enjoys unduly broad discretion in determining whether to grant or deny a permit, there is a risk that he will favor or disfavor speech based on its content." *Id.* at 323.

235. *Id.* at 324.

236. *Id.* at 325.

Justice Scalia's majority opinion highlights this point by emphasizing that the alternative view — one that would permit *no* discretion to be exercised by officials charged with regulating speech — would have far-reaching consequences. It would, he notes, invalidate "every obscenity law, or every law placing limits upon political expenditures,"[237] since all of these laws vest some discretion in government officials to determine when to enforce them. Implicit in this opinion is a recognition that vesting some degree of discretion in public officials is inevitable — even where the regulation of speech is at issue. The opinion does not, however, abandon the insistence upon clear and definite standards that, as cases such as *City of Lakewood* emphasize, are essential to guard against the discriminatory use of this discretion.

In the end, the principal significance of *Thomas* is its narrowing of the circumstances under which the procedural model championed by Professor Monaghan and embodied in *Freedman* will be applied.[238] *Thomas* does not overrule *Freedman*, but holds its guidelines inapplicable to content-neutral schemes of speech regulation. It shifts the balance slightly — but only slightly — toward greater recognition of the need for official discretion in regulating access to public places, given the minimal danger of expressive inequality that the Court perceived to exist.

III. Discretion and Discrimination: Conventional Equal Protection

Part II traced the development of and described the doctrines designed to prevent official discretion from distorting the expressive playing field. This Part assesses the quite different standard that the Supreme Court has applied in considering the exercise of official discretion outside the realm of speech. In particular, it examines cases where governmental or quasi-governmental actors are claimed to have exercised their discretion to discriminate based on race.

If the First Amendment cases described in Part II share a distrust of official discretion, then the Equal Protection Clause cases discussed in this Part share a resignation that some degree of inequality must be tolerated in order to preserve needed discretion. In the area of public education, for example, the Court has exhibited a willingness to tolerate educational inequalities, absent clear evidence of intentional racial discrimination. In the administration of the death penalty, the Court has acknowledged that the discretion which permeates our criminal justice system may sometimes allow racial bias to enter the

237. *Id.*

238. *See supra* notes 133-134 and accompanying text.

decisionmaking process, and has frankly stated that such inequalities are inevitable.

The general approach taken in constitutional race discrimination cases is that the imperative of preserving official discretion necessarily limits the ability of courts to ferret out discrimination. At least one of the reasons for this tolerance is suggested by *Thomas v. City of Chicago* and made explicit in *McCleskey v. Kemp*: namely, that it would prove too much or, more precisely, thrust upon the courts an impracticable burden. Government (let alone the courts) could hardly function if, in the name of promoting equality, the courts stripped decisionmakers of discretion in any circumstance where discretion might possibly result in invidious discrimination. The benefit of this approach is that it allows for individualized justice, empowering jurors and other decisionmakers to consider intangible factors that call for lenity in particular cases. The cost is that, as *McCleskey* suggests, it necessarily requires that some inequalities remain beyond the reach of the courts.

A. *The Intent Standard Revisited*

The Supreme Court has repeatedly affirmed that the Equal Protection Clause does not forbid practices having a disparate racial impact, but only those having a racially discriminatory intent or purpose.[239] This Article does not take issue with the now-settled proposition that the Equal Protection Clause's target is intentional discrimination.[240] The critical issue, for my purposes, is not whether this is correct as a theoretical matter, but how courts are supposed to implement this norm. More specifically, I seek to answer the question why the Court has not adopted mechanisms comparable to those adopted in the First Amendment Equal Protection cases to guard against intentional racial discrimination occurring behind a veil of discretion.[241]

At first glance, the requirement of showing discriminatory intent might seem the most obvious distinction between the Supreme Court's equality doctrines in the areas of expression and race. After all, the

239. *See, e.g.*, Washington v. Davis, 426 U.S. 229, 239 (1976). This Article uses the terms "motive," "intent" and "purpose" synonymously. *But see* GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 751-52 (13th ed. 1997) (raising the possibility that focus on discriminatory "motive" may differ from focus on discriminatory "purpose").

240. For critiques of the intentional discrimination standard, see generally Charles L. Lawrence III, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987), and Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105 (1989).

241. Implicit in my approach is the idea that race and speech equality cases articulate a similar norm — namely, prohibiting intentional discrimination — but have adopted very different mechanisms to implement this norm. *See* Fallon, *Implementing the Constitution*, *supra* note 10, at 57, 60 (distinguishing the Supreme Court's role in articulating norms from its role in developing a means by which to enforce these norms).

Supreme Court has never expressly limited the First Amendment's mandate of equality to intentional discrimination against those with a disfavored message or viewpoint. Nevertheless, as set forth in Part II, the Supreme Court on numerous occasions has suggested that intentional discrimination is at the root of its doctrines requiring particularly searching review of schemes that vest government decisionmakers with broad discretion to regulate speech. These rules are not only designed to detect intentional discrimination based on speakers' messages or ideas; they are also designed to prevent such discrimination from occurring in the first place. This is perhaps most explicit in *City of Lakewood*, where the Court explains its insistence upon clear guidelines as a prophylactic measure designed to prevent "discriminat[ion] against disfavored speech."[242] As the Court further explains, the absence of clear standards makes it all too easy for decisionmakers to explain their decisions on content- and viewpoint-neutral grounds, using "*post hoc* rationalizations" and "shifting or illegitimate criteria" to hide their discriminatory intent.[243]

The question I seek to address is why the Court has not embraced comparable doctrines in Equal Protection Clause cases to detect, deter, and remedy race discrimination. To be sure, the Court has clearly held that disproportionate impact may be a factor in determining whether discriminatory intent exists.[244] But in cases stretching from *Milliken v. Bradley*[245] through *Washington v. Davis*, and from *McCleskey v. Kemp* through *United States v. Armstrong*,[246] the Court has — in most though not all contexts — made it increasingly difficult to prove discriminatory intent. This high standard is, at least in part, rooted in the Courts' recognition that tolerating some racial inequalities is simply the price to be paid for providing governmental and quasi-government actors with the discretion they need in order to function properly.

Although *Washington v. Davis* and *Arlington Heights* are the decisions most commonly cited as defining the requirement of discriminatory intent, they are not the first to state it. Even before *Brown*,[247] the Supreme Court's decision in *Snowden v. Hughes* declared that the "unequal application" of state laws is "not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination."[248] *Snowden* discusses earlier cases in which

242. City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 758 (1988).

243. *Id.*

244. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977).

245. 418 U.S. 717 (1974).

246. 517 U.S. 456 (1996).

247. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

248. 321 U.S. 1, 8 (1944).

discrimination based on race was found to violate equal protection. For example, it characterizes *Yick Wo v. Hopkins*[249] as a case in which "extrinsic evidence" revealed a discriminatory purpose. *Snowden* likewise characterizes jury selection cases as involving "extrinsic evidence of purposeful discriminatory administration of a statute fair on its face," while carefully qualifying those cases by stating that the mere showing that blacks were not included on a particular jury is insufficient to make out an equal protection violation.[250] The *Snowden* Court's characterization thus expressly acknowledges that facially neutral laws may be susceptible to discriminatory enforcement, where public officials are given latitude with respect to their administration and enforcement. What is not clear is *how* courts are supposed to gauge whether that discretion is being misused, and what sort of "extrinsic" evidence suffices to demonstrate (or at least raise a prima facie case of) purposeful discrimination.[251]

Justice Stevens raises this question in his *Washington v. Davis* concurrence. While agreeing with the Court's holding that the Equal Protection Clause bars only "purposeful discrimination," Justice Stevens trenchantly remarked that this holding raises the question how courts should go about assessing whether such a purpose exists.[252] In different contexts, Justice Stevens suggested, application of the discriminatory intent requirement will implicate different evidentiary issues, such as the extent of deference to be paid to the trial court's factfinding, the extent to which one characterizes the issue as factual or legal, and empirical evidence of disproportionate impact.[253] Stating that the Equal Protection Clause's prohibition extends only to intentional discrimination, then, raises as many questions as it answers. Left unresolved by *Washington v. Davis* and even by *Arlington Heights*, despite the latter's delineation of some factors that may bear upon the intent inquiry, is precisely how courts should determine whether discriminatory intent exists in different contexts.

B. *The Intent Standard Applied*

Two areas are particularly useful in illustrating the general approach to discerning whether discriminatory intent exists when governmental decisionmaking occurs behind a veil of discretion. The first is the Court's approach to the problem of assessing intentional

249. 118 U.S. 356 (1886).

250. *Snowden*, 321 U.S. at 9.

251. *Cf.* Ortiz, *supra* note 240, at 1127 (describing numerous factors that the Court has taken into consideration in determining discriminatory intent in the educational context).

252. 426 U.S. 229, 253-54 (1976) (Stevens, J., concurring).

253. *Washington v. Davis*, 426 U.S. at 253-54 (Stevens, J., concurring).

discrimination in the context of school segregation. The second is its approach to claims of racial discrimination in the implementation of the death penalty, where the discretion vested in prosecutors and jurors makes it difficult to discern whether improper motives are at work in any particular case. In both areas, the Court has shifted from a posture of skepticism toward official discretion, to one of greater trust. Implicit in this shift is a willingness to allow some intentional race discrimination to persist undetected as the inevitable by-product of the need to protect official discretion.

1. *Desegregation*

While the Court had stated the intent requirement even before *Brown v. Board of Education*,[254] the early desegregation cases demonstrated a willingness to find that equal protection had been denied even where clear evidence of deliberate racial discrimination was absent. *Brown* itself eschewed a reliance upon discriminatory intent, focusing instead on the effects of segregation — in particular, the "feeling of inferiority" that segregation tended to create in black schoolchildren.[255] The Court's school segregation opinions over the next two decades adopted a similar approach both in determining whether equal protection was violated and in assessing the scope of permissible remedies.[256] The focus upon eliminating segregation "root and branch" reflects the Court's early willingness to look beyond the noxious intent of individual evildoers, and instead commit the courts to remedying a system that, through the actions of numerous anonymous decisionmakers, denies equality of educational opportunities based on race.[257] In so doing, the Court considerably narrowed the discretion of local school boards to make decisions on such matters as pupil reassignment, entrusting that authority instead to the federal courts.

The Supreme Court has subsequently construed these cases as involving discriminatory intent, even though their holdings were not couched in those terms.[258] The difficult question that remains is how

254. 347 U.S. 483 (1954).

255. *Brown*, 347 U.S. at 494.

256. *See* Mark D. Rosenbaum & Daniel P. Tokaji, *Healing the Blind Goddess: Race and Criminal Justice*, 98 MICH. L. REV. 1941, 1950-57 (2000) (book review). Illustrative of the more intense scrutiny devoted to public education is *Green v. County School Board*, 391 U.S. 430, 435-37 (1968) (focusing on absence of racially identifiable schools as a measure of whether equal protection had been achieved).

257. *See* Rosenbaum & Tokaji, *supra* note 256, at 1950-51 (citing *Green*, 391 U.S. at 438-39).

258. As *Washington v. Davis*, for example, states: "The school desegregation cases have also adhered to the basic equal protection principle that the invidious quality of a law

the courts should go about assessing whether such a discriminatory purpose exists. To borrow from *City of Lakewood*, the question is how courts can and should go about detecting racial discrimination shrouded behind "*post hoc* rationalizations," without unduly infringing upon official discretion.[259]

While immediate post-*Brown* desegregation cases loosely applied the requirement of discriminatory intent (in contrast to *Snowden* and later decisions such as *Davis* and *Arlington Heights*), the tension between the promotion of racial equality and the maintenance of official discretion appeared even in those early cases.[260] This difficulty is comparable to those which led the Supreme Court, in the context of speech regulations, to insist upon clear standards prescribed in advance, thus limiting official discretion and preventing speech regulators from discriminating based on the messages or ideas expressed.

Why, then, has the Court not imposed similar procedural requirements on such decisionmaking in its equal protection cases? One obvious answer is that decisions in this area do not lend themselves to the sort of precise standards that the Court has insisted upon in its First Amendment cases. Judgment calls regarding the allocation of scarce financial resources, for example, may necessitate giving government entities broad discretion to determine how to manage their schools. Ferreting out racial bias in all such decisions would arguably require a degree of judicial supervision that would deprive local school boards and city councils of the discretion they require to function and, quite possibly, overwhelm the federal courts.

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claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose." 426 U.S. at 240.

259. City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 758 (1988).

260. Two cases decided against the backdrop of court-ordered desegregation, both authored by Justice Black, illustrate the Court's difficulties in grappling with this tension. In both *Griffin v. County School Board*, 377 U.S. 218 (1964), and *Palmer v. Thompson*, 403 U.S. 217 (1971), the question before the Court was whether a government entity's decision to close public facilities in the wake of a desegregation order violated equal protection. *Griffin* held unconstitutional a Virginia county's decision to shut down its public schools and shift resources to a fund formed to operate private schools for white children in that county. While recognizing that states enjoy "wide discretion" to determine whether their laws will operate statewide or only in certain counties, Justice Black's opinion for the Court saw through this attempt to evade court-ordered desegregation. *Griffin*, 377 U.S. at 231. In *Palmer v. Thompson*, the Jackson, Mississippi city council closed five public swimming pools in the wake of a desegregation order. 403 U.S. at 219. Although the circumstances bore a striking similarity to those in *Griffin* — in particular, it seemed clear that the pools had been closed to prevent blacks and whites from swimming together — Justice Black distinguished *Griffin*, expressly grounding his opinion in *Palmer* in the difficulties inherent in discerning discriminatory intent, noting, "[I]t is extremely difficult for a court to ascertain the motivation, or collection of different motivations, that lie behind a legislative enactment." *Palmer*, 403 U.S. at 224. For criticism of the motivation-blind approach taken by Justice Black in *Palmer*, see Paul Brest, *The Supreme Court 1975 Term — Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 26-27 (1976).

Such concerns with giving local entities adequate breathing space within which to operate come to the fore in *Milliken v. Bradley*,[261] which reversed a lower court order that required an interdistrict remedy for school segregation in Detroit. Chief Justice Burger's opinion in *Milliken* put a premium on protecting "local autonomy" over decisions of educational policy, asserting that "[n]o single tradition in public education is more deeply rooted than local control over the operation of schools."[262] By the time of *Dayton Board of Education v. Brinkman*,[263] decided after *Washington v. Davis* and *Arlington Heights*, the Court had backed away from the searching scrutiny of local officials' education-related decisions that was evident in its earlier desegregation cases. The Court in *Brinkman* vacated the imposition of a systemwide remedy because of an inadequate showing of systemwide discriminatory intent.[264] Like Justice Black's *Griffin* opinion, the Court acknowledged the perils of attempting to discern the motivations of multimember public bodies.[265] But as in *Milliken*, the Court nevertheless held that deference to the autonomy of local officials requires that federal courts refrain from a systemwide remedy absent a clear showing.

The latter desegregation cases strike the balance in favor of discretion, holding that federal oversight of local school boards' decisions on educational policy is impermissible without clear evidence that a local school board has engaged in purposeful discrimination.[266] Implicit in these decisions, most notably *Milliken* and *Brinkman*, is an inclination to respect the discretion of government officials, even if it means that illicit discrimination may remain undetected. The proper functioning of public schools, the Court seems to suggest, depends upon preserving such discretion. Also implicit in these decisions is a heightened sensitivity to the limitations of courts in discerning whether invidious discrimination is really at work with respect to any particular decision of a public entity. Undoubtedly, the Court's reluctance to intrude too deeply into local decisionmaking — and its concomitant willingness to tolerate such discrimination — is partly a reflection of the changing makeup of the Court during these years. Yet it might also be construed as reflecting an increasing awareness of the practical difficulties involved in detecting illicit motivation, and a skepticism about

261. 418 U.S. 717 (1974).

262. *Milliken*, 418 U.S. at 741.

263. 433 U.S. 406 (1977).

264. *Brinkman*, 433 U.S. at 414.

265. *Id.*; *see also* Hunter v. Underwood, 471 U.S. 222, 228 (1985) (recognizing the "difficulties in determining the actual motivations of the various legislators that produced a given decision").

266. *See* Rosenbaum & Tokaji, *supra* note 256, at 1951-52.

the capacity of the courts adequately to remedy segregation even where it may be the product of intentional discrimination. The school desegregation cases thus evince a shift from skepticism to greater tolerance of official discretion, at least in the context of racial discrimination.

2. *The Death Penalty*

A similar shift is evident in the Court's consideration of claims of racial equality in the administration of the death penalty, and particularly in the shift that took place between the decisions in *Furman v. Georgia*[267] and *McCleskey v. Kemp*.[268] While the Justices who formed the *Furman* majority expressed concern with the threat to equality posed by the discretion inherent in the imposition of the death penalty, *McCleskey* contains perhaps the most explicit declaration that some inequality in the imposition of criminal punishment is the inevitable price to be paid for giving the institutions of democratic self-government the discretion they need to function.[269]

In *Furman*, a fractured Court struck down the death penalty as administered in Georgia and Texas, and in other states by implication.[270] Although the case was decided under the Eighth Amendment, the potential for racial discrimination arising from the discretionary system for implementing the death penalty is a common thread running through the opinions of the justices who formed the fractured majority.[271] Justice Douglas's opinion, for example, stated that the "uncontrolled discretion of judges or juries" made it impossible to assess how great an impact racial bias had on the outcomes.[272] His reasoning resembles the First Amendment Equal Protection line of

267. 408 U.S. 238 (1972).

268. 481 U.S. 279 (1987).

269. The Court's attempts to grapple with the problematic relationship between discretion and racial equality begins even before *Furman*. In *McGautha v. California*, 402 U.S. 183 (1971), the Court rejected a claim that the absence of standards to guide the jury's discretion violated the Constitution. "In light of history, experience, and the present limitations of human knowledge," the *McGautha* Court broadly stated, "we find it quite impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution." *Id.* at 207.

270. Steven F. Shatz & Nina Rivkind, *The California Death Penalty Scheme: Requiem for* Furman?, 72 N.Y.U. L. REV. 1283, 1285 (1997).

271. The five justices who formed the majority joined only in a brief per curiam opinion, but otherwise wrote separately. Only Justices Brennan and Marshall would have invalidated the death penalty outright. The other three, Justices Douglas, Stewart, and White, reserved judgment on this question, concluding only that the manner in which it was applied was constitutionally unacceptable. For a more detailed discussion of the justices' concerns regarding discretion and attendant inequality in the administration of the death penalty, evident in the five *Furman* concurrences, see Patterson, *supra* note 41, at 47-53.

272. *Furman*, 408 U.S. at 253 (1972) (Douglas, J., concurring).

reasoning — evident in such cases as *Shuttlesworth*, *City of Lakewood*, and *Forsyth County* — in which the Court has recognized that the lack of precise guidelines for regulating speech makes it practically impossible for courts to determine whether improper motives (such as a desire to suppress particular viewpoints) are at work. While not going so far as to hold the death penalty unconstitutional per se, Justice Douglas thought the "discretionary statutes" before the Court unconstitutional in their operation: "They are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws . . . ."[273]

Post-*Furman* decisions struggled to resolve the tension between the constitutional mandate of racial equality and the discretion intrinsic in the states' systems for determining whether to impose the death penalty.[274] The difficulty in reconciling these two values is evident in *Gregg v. Georgia*,[275] in which seven members of the Court stated their view that the death penalty does not under all circumstances violate the Eighth and Fourteenth Amendments.[276] The *Gregg* plurality nevertheless insisted that states must articulate guidelines for the administration of the death penalty, stating that "where discretion is afforded a sentencing body . . . that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."[277]

The *Gregg* plurality opinion thus presents a noteworthy point of comparison with the standards set in First Amendment Equal Protection cases such as *City of Lakewood*. The public fora cases have long emphasized the need for public entities to specify clearly the reasons for which applications to speak may be granted or denied. The requirement of clear rules specified in advance — in both the prior

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273. *Id.* at 256-57. The other four justices who formed the *Furman* majority likewise linked discretion and discrimination in the administration of the death penalty. *See* Patterson, *supra* note 41, at 53 (citing concurring opinions). Justice Marshall's opinion labeled the discretion authorized by the earlier decision in *McGautha* "an open invitation to discrimination," observing that blacks were sentenced to death at a much higher rate than whites. *Furman*, 408 U.S. at 364-65 (Marshall, J., concurring). In attempting to explain the apparent inconsistencies in the imposition of the death penalty, Justice Stewart's concurring opinion likewise observed: "[I]f any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race." *Id.* at 310 (Stewart, J., concurring).

274. In the four years after *Furman*, at least thirty-five state legislatures enacted statutes allowing the death penalty in at least some murder cases. Gregg v. Georgia, 428 U.S. 153, 179-80 & n.23 (1976) (citing statutes).

275. 428 U.S. 153 (1976).

276. *See Gregg*, 428 U.S. at 187 (opinion of Stewart, Powell, and Stevens, JJ.) ("We hold that the death penalty is not a form of punishment that may never be imposed . . . ."); *id.* at 207 (White, J., concurring, joined by Burger, C.J. and Rehnquist, J.); *id.* at 227 (Blackmun, J., concurring).

277. *Id.* at 189 (plurality opinion).

restraint and death penalty contexts — is designed to prevent discretion from resulting in discrimination, while at the same time making it easier for courts to meaningfully review cases in which authorities are alleged to have acted on constitutionally impermissible grounds.

There is, however, an important respect in which the death penalty cases depart from the First Amendment Equal Protection model. In the speech cases, the Court has imposed upon regulating authorities the obligation to delineate what may trigger both the grant and denial of permission to speak. Two of *Gregg*'s companion cases, however, expressly disallowed a comparable symmetry. *Roberts v. Louisiana*[278] and *Woodson v. North Carolina*[279] both hold that some discretion *must* be left with the sentencing authority. While recognizing that *Furman* disapproved of "unbridled jury discretion" in the imposition of the death penalty, *Woodson* deems some such discretion necessary.[280]

After *Furman*'s emphasis on the dangers of racial inequality inherent in a discretionary system for administering the death penalty, one might have thought that a system that clearly set forth the circumstances in which the death penalty is obligatory would comply with the Constitution. Such a system could be expected to reduce the dangers of racial inequality to which the various *Furman* opinions pointed. The opinions in *Woodson* and *Roberts*, however, emphasize the countervailing value in allowing "consideration of the character and record of the individual offender and the circumstances of the particular offense."[281] Allowing the jury to consider such factors, under this view, promotes more individualized justice, since mitigating circumstances that call for lenity may come into play. Such discretion is not only appropriate as a part of the implementation of the death penalty, the Court concluded, but constitutionally required.

The post-*Furman* death penalty opinions thus illustrate the uneasy relationship between discretion and racial equality. On the one hand, in *Woodson* and *Roberts*, the Court emphasizes the importance of preserving discretion, so that mitigating circumstances can be taken into consideration in administering individualized justice. On the other hand, *Gregg* follows *Furman* in implicitly recognizing the dangers that may arise from such discretion — including the possibility that racial bias will creep into the process — while at the same time expressing

278. 428 U.S. 325 (1976).

279. 428 U.S. 280 (1976).

280. *Woodson*, 428 U.S. at 302.

281. *Id.* at 304; *see Roberts*, 428 U.S. at 333 (finding the vice of a mandatory death-sentence statute to be a "lack of focus on the circumstances of the particular offense and the character and propensities of the offender").

confidence that guidelines crafted to cabin such discretion can control such improper factors.[282]

The Court's attempt to balance the competing objectives of equality and discretion in the administration of the death penalty was short-lived. In *Lockett v. Ohio*,[283] the balance tilted decisively in the direction of affording discretion to sentencing authorities, even if it meant sacrificing regularity. *Lockett* rejected an Ohio law that limited the mitigating factors that a jury could consider in deciding whether to withhold the death penalty. While asserting the necessity of maintaining a "proper balance between clear guidelines that assure relative equality of treatment and discretion to consider individual factors," the *Lockett* decision privileges the latter over the former.[284] *Lockett* places greater value on the individualized justice that may result from discretion than on the need to ensure equality.

Lockett set the stage for *McCleskey v. Kemp*,[285] a decision that brings together the heightened concern for discretion evident in the post-*Furman* Eighth Amendment cases and the high standards for proving discriminatory intent evident in equal protection cases such as *Washington v. Davis* and *Arlington Heights*. In *McCleskey*, the Court was presented with the most thorough study ever developed of racial inequalities in the administration of the death penalty. The Baldus study, introduced by McCleskey's attorneys, provided strong evidence that (1) those murdering whites were far more likely to receive the death penalty than those murdering blacks, and that (2) black murderers were more likely to receive the death penalty than white murderers.[286]

In *McCleskey*, the Court's prioritization of discretion over equality, implicit in *Lockett*, becomes even more prominent. Justice Powell's

282. Patterson accurately sums up the uneasy balance embodied in the 1976 decisions as follows: "[T]he Court tried to strike a balance between discretion, which yields individualized treatment, and standards that guide or channel discretion and prevent arbitrariness or discrimination." Patterson, *supra* note 41, at 65-66.

283. 438 U.S. 586 (1978).

284. *Lockett*, 438 U.S. at 620. This caused some to read the Supreme Court's opinion as indicating that it was getting "out of the business of telling the states how to administer the death penalty." Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 305 (1984); *see* Jeremy Rabkin, *Justice and Judicial Hand-Wringing: The Death Penalty Since* Gregg, 4 CRIM. JUST. ETHICS 18 (1985). Although this proved to be an overstatement, *Lockett* indeed signaled that a higher premium would be placed on giving sentencing bodies some discretion in deciding whether to impose a death sentence, even if it meant that some inequalities would have to be tolerated. *See* Patterson, *supra* note 41, at 69 ("*Lockett* marks the turning point where the Court began to favor individualization over equality.").

285. 481 U.S. 279 (1987).

286. *McCleskey*, 481 U.S. at 286-87. Baldus and his colleagues found that those who murdered whites were 4.3 times as likely as those who murdered blacks to receive the death penalty, even after accounting for 230 nonracial variables. *Id.* at 287. The study found that black defendants were 1.1 times as likely to receive the death penalty as nonblack defendants. *Id.*

opinion for the *McCleskey* majority emphasized that discretion is an integral component of the criminal justice system.[287] Through a rigorous application of the discriminatory intent requirement, the Court concluded that no violation of equal protection had been shown, either by the jury that determined McCleskey's sentence or by the state legislature that maintained the death penalty in the face of its alleged discriminatory effects.[288] The Court decisively rejected McCleskey's argument that the racially disparate impact shown in the Baldus study demonstrated a "constitutionally significant risk of racial bias affecting the Georgia capital sentencing process."[289]

The most illuminating portion of the *McCleskey* opinion is its remark that the defendant's claim "taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system."[290] For if the Court were to accept McCleskey's proposition that racial bias infected the state's system for imposing the death penalty, it would cast doubt upon the constitutionality of the discretion vested in actors throughout every aspect of the criminal justice system, from cops on the beat to prosecutors to judges and juries.[291] Justice Brennan's dissent summed up this concern as a fear of "too much justice."[292] The Court's holding in *McCleskey* may be construed somewhat more charitably as an acknowledgment that racial inequalities are the price to be paid for the discretion the Court believed essential to the criminal justice system to function.[293]

McCleskey marks the effective end of the Court's attempts to balance discretion and racial equality in the administration of capital punishment. It would, however, be inaccurate to regard the *McCleskey* majority as blind to the existence of racial disparities in the administration of the death penalty. The majority all but admits that some racial bias may creep into decisions about whether to impose the death

287. *Id.* at 297.

288. *Id.* at 292-99.

289. *Id.* at 313.

290. *Id.* at 314-15.

291. *See* Rosenbaum & Tokaji, *supra* note 256, at 1955-57 (discussing the *McCleskey* majority's view that the eradication of the disparities documented in the Baldus study was beyond its legitimate reach).

292. *McCleskey*, 481 U.S. at 339 (Brennan, J., dissenting).

293. *See* Ortiz, *supra* note 240, at 1145 ("Discretion in this context, far from being a reason to distrust decisionmaking, is a reason to insulate it from attack."). An internal memorandum from Justice Scalia following oral argument in *McCleskey* even more clearly articulates his recognition of and resignation to the fact that this discretion makes racial discrimination inevitable: "Since it is my view that the unconscious operation of irrational sympathies and antipathies, including racial, upon jury decisions and (hence) prosecutorial decisions is real, acknowledged in the decisions of this court, and ineradicable, I cannot honestly say that all I need is more proof." EDWARD LAZARUS, CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLE INSIDE THE SUPREME COURT 211 (1998).

penalty, but maintains that the elimination of all such bias is simply beyond the institutional capacities of courts.[294] There are, moreover, some things that courts can do even after *McCleskey* to reduce the impact of such bias on the sentencing process. For example, as the Court held just a year before *McCleskey*, the discretion inherent in the death penalty cases requires that a criminal defendant be permitted to question prospective jurors in voir dire about possible racial bias in a case where race may be an issue.[295] And as will be discussed at greater length below, the Court has imposed stringent limitations to prevent peremptory strikes from being exercised in a racially biased manner.[296] Yet the *McCleskey* majority appears to concede the point that, notwithstanding these protections, some racial bias will inevitably enter the process. *McCleskey* thus provides perhaps the most explicit acknowledgment that toleration of some racial discrimination is required in order to preserve discretion.[297]

C. *Explaining Conventional Equal Protection*

The areas analyzed above are just two of those in which the Court has adopted a more tolerant approach to official discretion, even where it may result in racial inequality. As Mark Rosenbaum and I have argued, this approach understands the role of the courts as limited to the detection of individual bad actors.[298] The dominant paradigm therefore focuses on identifying "bad apples" rather than examining whether the tree is poisoned by more widespread discrimination within discretionary systems.[299] One example is the problem of racial discrimination in police practices. In general, the Court has sought to preserve police discretion to determine whom to stop and arrest, notwithstanding the risk of racially discriminatory enforcement.[300] The difficulties of making a discrimination claim arise not

294. *McCleskey*, 481 U.S. at 313 n.37; *see also* Rosenbaum & Tokaji, *supra* note 256, at 1956-57 (describing *McCleskey*'s core message that "[e]ven if systemic discrimination within our criminal justice processes exists, the Court must leave it untouched — as though the Constitution itself demanded that such discrimination remain invisible, or, at the very least, be defined as something other than discrimination").

295. Turner v. Murray, 476 U.S. 28, 35 (1986).

296. *See infra* Part IV.A.

297. *See* Robert A. Burt, *Disorder in the Court: The Death Penalty and the Constitution*, 85 MICH. L. REV. 1741, 1797-98 (1987) (suggesting that such a conclusion was necessary for the Court to uphold the death penalty).

298. *See* Rosenbaum & Tokaji, *supra* note 256, at 1957.

299. *Id.* at 1949.

300. Recent examples of this tolerance include *Whren v. United States*, 517 U.S. 806 (1996) (holding that traffic stops are permissible when there is probable cause to believe a traffic-code violation has occurred), and *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (holding that an arrest may occur for traffic violations). The dangers of racial discrimination furnish the backdrop for the Court's analysis of the Fourth Amendment issue before it. *See*

only from the exacting intent standard, but also because of the high bar that must be met to establish one's standing to seek equitable relief[301] and the difficulties in obtaining evidence needed to show an equal protection violation.[302] The result is that it is extremely difficult to obtain relief in those cases where discretion shrouds covert discrimination.

What explains the very different balance struck between official discretion in the Conventional Equal Protection cases as compared to the First Amendment Equal Protection cases? Three possibilities warrant consideration.

1. *Trust*

One possibility is that the Court simply may not believe that official decisionmakers today — be they local school officials, prosecutors, jurors, or police officers — are as likely to engage in intentional racial discrimination. The Court may feel more comfortable vesting discretion in official decisionmakers in race cases (at least in these contexts) than in speech cases, because there is a lesser likelihood of that discretion being exercised in a constitutionally impermissible manner. Put another way, the Court may simply be less distrustful of officials misusing their discretion to discriminate based upon race than on viewpoint, at least in the circumstances presented by these cases.

2. *Capacity*

The second possible explanation for the differences between First Amendment Equal Protection and Conventional Equal Protection is that, as a practical matter, it is less difficult to create mechanisms by which to curb discretion in the realm of speech. After all, it is fairly

id. at 372 (O'Connor, J., dissenting) ("[A]s the recent debate over racial profiling demonstrates all too clearly, a relatively minor traffic infraction may often serve as an excuse for stopping and harassing an individual."). Defenders of such tolerance might be expected to respond to such concerns by noting that intentional racial discrimination may still be challenged under the Equal Protection Clause. It is certainly true that those who believe that they are victims of racial discrimination may still assert equal protection claims. What this response does not, however, adequately grapple with is just how difficult it is as a practical matter to successfully make such a challenge. *See also* Chavez v. Illinois State Police, 251 F.3d 612 (7th Cir. 2001) (rejecting an equal protection challenge to an alleged practice of stopping motorists based on race, on the ground that the plaintiffs' proof of discriminatory intent was inadequate).

301. *See* City of Los Angeles v. Lyons, 461 U.S. 95 (1983) (holding that an African-American man seeking to challenge the LAPD's use of chokehold lacked standing because there was no immediate threat that this tactic would be used upon him again).

302. *See* United States v. Armstrong, 517 U.S. 456, 469 (2003) (holding that to show discriminatory effect, a defendant seeking discovery must adduce "some evidence that similarly situated defendants of other races could have been prosecuted, but were not"). For a discussion of how *Whren* and *Armstrong* combine to make it more difficult to prove selective enforcement, see Hall, *supra* note 53.

easy for public entities to adopt specific rules for issuance of a permit to speak in a public park. It is much more difficult to prescribe precise and rigid standards to curb racial discrimination by juries administering the death penalty or police officers deciding whom to stop. Similarly, the Court may feel that it is beyond the institutional capacity of courts to check possible racial discrimination arising from the exercise of official discretion.[303]

3. *Valuation*

A third explanation is that the Court may value discretion and inequality differently. It may believe that discretion is of greater importance in the areas of public education, administration of criminal punishment, and law enforcement than in areas involving speech. Alternatively, it may believe that intentional expressive discrimination is a greater evil than intentional race discrimination (at least in the contexts described above). The valuation explanation suggests that it is more important to stop government from discriminating based on message or ideas — even if it requires curbing official discretion — than to stop it from discriminating based on race. Put simply, the Court may value expressive equality more highly than racial equality, or place a lower value on discretion where speech is at issue than where group-based discrimination is alleged.

* * * *

Each of these three explanations undoubtedly has something to do with the enhanced skepticism that the Court has applied to discretion in the First Amendment as opposed to Conventional Equal Protection cases. To understand the relative importance of these factors, I now turn to lines of precedent that — though decided under the Equal Protection Clause — bear some similarities to the First Amendment Equal Protection cases. These cases show that the Court has been especially sensitive when considering threats to racial equality in the realm of political participation. They therefore suggest that a concern with political equality underlies the difference between First Amendment and Conventional Equal Protection. These Unconventional Equal Protection cases provide evidence that valuation — as in particular the high value attached to equality in the

303. A related practical concern is the burden on courts charged with policing discretion, especially in the criminal-justice system. *Cf.* Chief Justice William H. Rehnquist, *Seen in a Glass Darkly: The Future of the Federal Courts*, 1993 WIS. L. REV. 1; William H. Rehnquist, *The 1998 Year-End Report on the Federal Judiciary*, THIRD BRANCH, Jan. 1999, at 1, 2 ("The number of cases brought to the federal courts is one of the most serious problems facing them today.").

realm of political participation — plays a substantial role in determining how much discretion official decisionmakers will be afforded.

IV. DISCRETION AND PARTICIPATION: UNCONVENTIONAL EQUAL PROTECTION

In assessing the differences between First Amendment Equal Protection's and Conventional Equal Protection's treatment of discretion, it is helpful to examine three areas of equal protection inquiry that depart from the norm. These areas, which I collectively refer to as "Unconventional Equal Protection" involve: (1) racial discrimination in the selection of jurors, (2) restructuring of the political process to the disadvantage of minorities, and (3) the principle of one person, one vote.

The overriding questions to be considered in examining these cases are why the Supreme Court has chosen to depart from its Conventional Equal Protection rules, and whether that departure bears any relationship to the reasons underlying the First Amendment Equal Protection cases' skepticism of official discretion. My answer is that the approach that the Court has taken in each of these areas can be understood as motivated by concerns similar to those which underlie the First Amendment Equal Protection cases. For each of these areas involves government activities that bear critically upon political participation. The more intense skepticism that the Court has applied to official discretion in each of these areas is grounded in the concern — prominent in at least some of the First Amendment Equal Protection cases[304] — that government discretion will be subtly exercised to deny equality in areas of democratic participation.

A. *Jury Exclusion*

The first area in which the Supreme Court has departed from its Conventional Equal Protection rules is in cases involving racial discrimination in the selection of jurors. There the Court has adopted a rule that allows a prima facie case to be made on something less than the ordinary showing.[305] In striking down such discriminatory devices

304. *See, e.g.*, *supra* notes 101-104, 135-177 and accompanying text.

305. For more detailed discussions of the development of equal protection law in the area of juror selection, see Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 207-10 (1995); Swift, *supra* note 23, at 300-38; Michael A. Cressler, Note, Powers v. Ohio*: The Death Knell for the Peremptory Challenge?*, 28 IDAHO L. REV. 349 (1991-92); Michael A. Desmond, Note, *Limiting a Defendant's Peremptory Challenges:* Georgia v. McCollum *and the Problematic Extension of Equal Protection*, 42 CATH. U. L. REV. 389, 400-06 (1993); Melissa C. Hinton, Note, Edmonson v. Leesville Concrete Co.*: Has* Batson *Been Stretched Too Far?*, 57 MO. L. REV. 569, 571-77 (1992); Bradley R. Kirk, Note, *Milking the New Sacred Cow: The Supreme Court Limits the Peremptory Challenge on Racial Grounds in* Powers v. Ohio *and* Edmonson v. Leesville Concrete Co., 19

as the "key man" system and, more recently, in proscribing discrimination in the exercise of peremptory challenges, the Court has exhibited a greater suspicion of discretion than is evident in other areas of equal protection law.[306]

That the Equal Protection Clause prohibits racial discrimination in the selection of grand and petit juries has been settled since three cases decided in 1879: *Strauder v. West Virginia*,[307] *Virginia v. Rives*,[308] and *Ex Parte Virginia*.[309] These early cases, however, reveal the difficulties in ferreting out intentional discrimination in the selection of juries — and the problems inherent in cabining the discretion of state officials when it comes to jury selection. *Strauder* involved an express prohibition against blacks serving on either grand or petit juries, a prohibition the Court held to violate the Equal Protection Clause.[310] *Rives*, however, held that cases may be removed to federal court only where state law *expressly* prohibited blacks from serving as jurors.[311] The third case, *Ex Parte Virginia*, affirmed the power of the federal courts to intervene even in the absence of an express racial classification, where such intentional discrimination could be proven. The Court rejected a constitutional challenge to a federal prohibition against discrimination in the selection of jurors.[312] While providing some federal check on the discriminatory misuse of state officials' discretion in the area of juror selection, *Ex Parte Virginia* leaves open the question of how to prove intentional discrimination.

The first case to address this question was *Neal v. Delaware*,[313] decided the following year. *Neal* rejected the defendant's claim that the case should have been removed to federal court, where there was no express exclusion of blacks prescribed by state law.[314] *Neal* reversed

PEPP. L. REV. 691, 697-712 (1992); and Robert T. Prior, Comment, *The Peremptory Challenge: A Lost Cause?*, 44 MERCER L. REV. 579, 583-89 (1993).

306. Amar, *supra* note 305, at 207 (describing these as first- and second-generation jury-exclusion cases); Ortiz, *supra* note 240, at 1119-20 (describing the "venire selection and panel selection tests").

307. 100 U.S. 303 (1879) (striking down a law excluding blacks from juries and allowing the case to be removed to federal court).

308. 100 U.S. 313 (1879) (limiting removal to cases where there was an express prohibition against blacks serving on juries).

309. 100 U.S. 339 (1879) (holding that a federal criminal prohibition against discrimination in selection of juries was a valid exercise of authority under Section 5 of the Fourteenth Amendment).

310. *Strauder*, 100 U.S. at 304, 308.

311. *Rives*, 100 U.S. at 321-22.

312. *Ex Parte Virginia*, 100 U.S. at 344.

313. 103 U.S. 370 (1880).

314. *Neal*, 103 U.S. at 393. In *Neal*, the Supreme Court applied a "conclusive" presumption that the state's law complied with the Fourteenth Amendment's nondiscrimination requirement — and therefore an irrebuttable presumption against the propriety of removal

the conviction, however, on the ground that the defendant should have been permitted to make an evidentiary showing to support his claim that blacks had nevertheless been systematically excluded from jury pools. In particular, the defendant had introduced evidence showing that no blacks, from a population of over 20,000, had ever been summoned as jurors — a factual showing that, six years before *Yick Wo*, the Court held sufficient to make out a prima facie case.[315]

Notwithstanding *Neal*, a series of turn-of-the-century cases denied relief to criminal defendants who alleged or showed a pattern of excluding African Americans from juries.[316] But in *Carter v. Texas*,[317] the Court found an equal protection violation where the defendant alleged that jury commissioners had selected no black grand jurors for several years, even though blacks constituted one-fourth of registered voters.[318] *Carter* distinguished prior cases on the ground that the defendant in the case before it had never been given the opportunity to introduce evidence in support of his discrimination claim, even though he stood ready to call witnesses.[319] The Court's opinion suggests that statistically significant variations from the population at large, occurring within a system that provides an opportunity for officials to discriminate, creates a presumption that equal protection has

— where state courts had struck down a state-law requirement of exclusion and the legislature had not attempted to reenact it. *Id.* at 389-90. Given the absence of an express prohibition requiring exclusion, a defendant would be required to prove discrimination in the state court's actions. The Court applied and extended this presumption in *Bush v. Kentucky*, 107 U.S. 110 (1883), to a state whose legislature had twice reenacted laws requiring exclusion even after a state-court holding that such discrimination violated the Fourteenth Amendment as interpreted in *Strauder*. This presumption did not, however, apply to an indictment handed down by grand jurors selected before the state court struck down the exclusionary law. *Bush*, 107 U.S. at 122; *see* Swift, *supra* note 23, at 302-03 (describing the presumption applied in *Rives*, *Neal*, and *Bush*).

315. *Neal*, 103 U.S. at 397.

316. These included cases in which defendants provided affidavits asserting that no blacks had been selected as grand or petit jurors in their counties. Tarrance v. Florida 188 U.S. 519, 520-21 (1903) (applying *Smith* to reject a defendant's motion to quash venire and panels of grand and petit jurors, based on an affidavit alleging that for many years none of some 1400 African American men in the county had been selected); Brownfield v. South Carolina, 189 U.S. 426, 427 (1903) (rejecting a challenge based on allegations that the grand jury was composed solely of whites in a county in which blacks constituted four-fifths of registered voters); Smith v. Mississippi, 162 U.S. 592, 600-01 (1896) (concluding that competent evidence of race-based exclusion was lacking where the defendant had submitted affidavit asserting that none of the some 1300 black registered voters in the county had been selected as grand jurors).

317. 177 U.S. 442 (1900).

318. *Carter*, 177 U.S. at 448.

319. *Id.* at 447-49.

been denied.[320] Put simply, disparity plus discretion would equal (a prima facie case of) discrimination.[321]

Although the practice of excluding blacks from juries continued unchallenged for decades,[322] the Court reinvigorated the *Carter* formula starting in the mid-1930s. In *Norris v. Alabama*,[323] the Court struck down the state's key man system. State law gave jury commissioners discretion to select men "generally reputed to be honest and intelligent" as jurors, and no black had been called for grand or petit jury service in decades.[324] The Court held this sufficient to make out a prima facie case[325] and rejected the suggestion that it should simply defer to the state court's finding that there was insufficient evidence of purposeful discrimination.[326] After a careful weighing of the evidence adduced below, it concluded that no reasonable explanation but intentional discrimination against blacks could be provided for the statistical disparity demonstrated.[327]

Norris marks an important turn in the development of equal protection doctrine in the area of jury selection, not only because of its application of the "discretion plus disparity equals discrimination" formula, but also because of its willingness carefully to scrutinize the state's explanations for the disparities shown. Over the next several decades, the Court would apply this analytic framework to strike down the juror-selection practices of numerous states.[328]

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320. *See* Swift, *supra* note 23, at 308 (stating that *Carter* establishes the elements of a prima facie case of race discrimination in jury selection).

321. *See* Ortiz, *supra* note 240, at 1127 ("[T]he jury cases require a showing of disparate impact plus a showing that the jury selection procedure was susceptible to abuse . . . .").

322. *See* Swift, *supra* note 23, at 308 ("[T]otal exclusion of African-Americans from jury eligibility appears to have continued for over a generation in some states without further challenge.").

323. 294 U.S. 587 (1935).

324. *Norris*, 294 U.S. at 590-91. The evidence showed that 666 of 8801 male residents of the county over twenty-one were black. *Id.* at 590.

325. *Id.* at 591.

326. *Id.* at 590 ("[W]henever a conclusion of law of a state court as to a federal right and findings of fact are so intermingled that the latter control the former, it is incumbent upon us to analyze the facts in order that the appropriate enforcement of the federal right may be assured.").

327. *Id.* at 592-98.

328. *See, e.g.*, Whitus v. Georgia, 385 U.S. 545, 550-51 (1967) (finding a prima facie case of intentional discrimination based on the statistical disparity in jury composition under a system in which jury lists were composed from tax digests separating white and black voters); Sims v. Georgia, 389 U.S. 404, 407-08 (1967) (same); Jones v. Georgia, 389 U.S. 24, 24-25 (1967) (same); Avery v. Georgia, 345 U.S. 559, 561-62 (1953) (finding a prima facie case based on the statistical disparity in jury composition under a system in which names of black and white potential jurors were printed on differently colored tickets); Patton v. Mississippi, 332 U.S. 463, 466-69 (1947) (holding that the absence of blacks on grand and petit juries for thirty years, under a system that gave commissioners discretion to decide who was qualified to serve, proved purposeful discrimination); Hill v. Texas, 316 U.S. 400, 402-06 (1942)

The jury exclusion cases thus apply a less deferential standard than is characteristic of Conventional Equal Protection analysis. Even after *Washington v. Davis*[329] and *Arlington Heights* clarified that (in the absence of an express racial classification) discriminatory intent must be shown to establish an equal protection violation, the Court has adhered to the "discretion plus disparity equals discrimination" formula in its jury selection cases. In *Castaneda v. Partida*, the Court relied on the statistically significant underrepresentation of Mexican Americans on grand juries, along with evidence of "a selection procedure that is susceptible of abuse or is not racially neutral," to hold that a denial of equal protection had been established.[330] While expressly recognizing that the holdings of *Washington v. Davis* and *Arlington Heights* required something more than disparate impact, the subjectivity of Texas's system combined with the evidence of disparate impact was held sufficient to make out a prima facie case, if only in this area.[331] The Court proceeded to undertake a thorough examina-

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(holding that the absence of blacks on a grand jury list, where there were qualified blacks but jury commissioners had discretion to choose acquaintances that they believed qualified, made a prima facie case); Smith v. Texas, 311 U.S. 128 (1940) (finding an equal protection violation based on statistical evidence showing underrepresentation of blacks on county grand juries, plus a discretionary system whereby commissioners limited selection to their personal acquaintances); Pierre v. Louisiana, 306 U.S. 354, 359-62 (1939) (holding that the absence of blacks from venire, in a system that gave commissioners power to exclude based on character and community standing, made a prima facie case of discrimination); Hale v. Kentucky, 303 U.S. 613, 614-15 (1938) (holding that a fifty-year exclusion of blacks from grand-jury service, coupled with evidence that only white persons' names had been put on the jury wheel, made a case of discrimination).

Especially illuminating is the opinion in *Turner v. Fouche*, 396 U.S. 346, 348 (1970), which challenged the manner in which grand juries were selected in many Georgia counties. Under Georgia law, state superior court judges selected six-person jury commissions in each county, which in turn selected grand juries, which in turn selected five-person boards of education. *Id.* The *Turner* plaintiffs argued both that this system was facially unconstitutional and that it was applied in a discriminatory manner. Despite the broad discretion vested in both state judges and grand juries, the Supreme Court rejected the facial challenge. *Id.* at 353-55. It accepted, however, plaintiffs' argument that discretion, in conjunction with evidence of a substantial statistical disparity within a county, made a prima facie case of jury discrimination. *Id.* at 360; *see also* Alexander v. Louisiana, 405 U.S. 625, 630-31 (1972) (holding that a significant statistical racial disparity in selection of grand jurors under a system providing for a racial designation on questionnaires presented a prima facie case of racial discrimination).

329. *Washington v. Davis*, 426 U.S. 229, 242 (1976), implicitly acknowledged that the jury selection cases allowed a less stringent disparate-impact test for assessing whether intentional discrimination has occurred, explaining this difference as follows:

> It is . . . not infrequently true that the discriminatory impact — in the jury cases for example, the total or seriously disproportionate exclusion of Negroes from jury venires — may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds.

Id. Left incompletely explained is what "circumstances" lead the Court to believe that discriminatory intent may be inferred from disparate impact in the jury selection context, but not others.

330. 430 U.S. 482, 494, 497 (1977).

331. *Castaneda*, 430 U.S. at 493, 495-97.

tion of the evidence on which the state relied to prove nondiscrimination, and despite the district court's finding to the contrary, concluded that the state had failed to meet its burden.[332]

More recently, the Court has grappled with the tension between racial equality and discretion in the exercise of peremptory challenges by prosecutors, criminal defendants, and civil litigants. The issue first arose in *Swain v. Alabama*,[333] in which the prosecutor used his peremptory strikes to eliminate all of the six blacks on the venire. The Court declined to undertake an inquiry into whether the prosecutor intentionally excluded all blacks (or any other group) because of their race, but created a "presumption" that peremptories were exercised for race-neutral reasons — a presumption that, under *Swain*, was all but irrebuttable.[334] For although the defendant alleged that blacks had not served on any county jury for years, the Court held such evidence insufficient to rebut the presumption because it could not be shown that the absence of blacks was (except in the immediate instance) the result of prosecutorial action alone.[335] As a practical matter, this made it impossible to prove intentional discrimination in the exercise of peremptory challenges.[336]

In sharp contrast to the cases involving grand and petit jury venires, *Swain* represented a strong inclination to preserve prosecutors' discretion with respect to peremptories, even in the face of compelling evidence of intentional race discrimination. Over twenty years later in *Batson v. Kentucky*,[337] the Court decisively reversed course, overruling *Swain* by holding that an inference of discrimination could be drawn in similar circumstances.

Batson attempted to adapt the "disparity plus discretion equals discrimination" formula into a workable framework for reviewing claims of discrimination in the exercise of peremptories, one that would preserve discretion while ferreting out intentional discrimination, and that has since been expanded beyond prosecutors to criminal defendants[338] and civil litigants,[339] and beyond race discrimination to

332. *Id.* at 498-500. The district court found that there was a prima facie case of discrimination, but that it had been rebutted by evidence showing that Mexican Americans constituted a "governing majority" in the county. *Id.* at 491.

333. 380 U.S. 202, 210 (1965).

334. *Swain*, 380 U.S. at 222.

335. *Id.* at 224-25.

336. Justices Goldberg and Douglas dissented in *Swain*, believing the evidence of purposeful discrimination overwhelmingly clear from both the prosecutors' actions and the fact that no blacks had ever served as jurors in the county. *Id.* at 237.

337. 476 U.S. 79 (1986).

338. Georgia v. McCollum, 505 U.S. 42 (1992).

339. Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991).

sex discrimination.[340] Recognizing that *Swain* had imposed a "crippling burden of proof" on defendants seeking to prove discrimination,[341] *Batson* articulated a new test, under which a prima facie case could be made by showing membership in a cognizable racial group whose members were eliminated by the prosecutor's exercise of peremptories.[342] More nebulously, the defendant must also show that "relevant circumstances raise an inference" of intentional discrimination.[343] *Batson* thus leaves to trial judges the problem of deciding what should cause an inference of purposeful discrimination to be drawn.[344]

While the *Batson* Court blithely asserted that it was not "persuaded by the State's suggestion that our holding will create serious administrative difficulties,"[345] eliminating discrimination in the use of peremptory challenges *has* proven to be practically difficult — and threatens to overburden the capacity of courts now required to make case-by-case determinations whether discrimination exists.[346] Three issues that have arisen since *Batson* are of particular interest in deciphering the effort to balance the discretion inherent in the exercise of peremptory challenges against the imperative of racial equality.

The first pertains to the circumstances in which an inference of discrimination can be drawn from disparate impact. In contrast to allegations of systemic discrimination in jury composition, the exercise of peremptory challenges in a particular case turns on a very small sample. Is a prima facie case of disproportionate impact made out, for example, when a prosecutor or criminal defendant strikes two of three African American jurors, and only one of ten white jurors? Some courts have allowed such scant evidence of disparate impact to make

340. J.E.B. v. Alabama, 511 U.S. 127 (1994).

341. *Batson*, 476 U.S. at 92.

342. *Id.* at 96. This requirement was later modified in *Powers v. Ohio*, 499 U.S. 400 (1991), which held that criminal defendants may object to the use of peremptories to strike prospective jurors of other racial or ethnic groups.

343. *Batson*, 476 U.S. at 96.

344. In his *Batson* concurrence, Justice Marshall expressed the view that the Court's opinion did not go far enough to root out intentional race discrimination in the exercise of peremptory challenges, and that the only effective way would be to ban them entirely. *Id.* at 107 (Marshall, J., concurring). Some commentators have expressed agreement with Justice Marshall's position. Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 157 (1989); Brent J. Gurney, Note, *The Case for Abolishing Peremptory Challenges in Criminal Trials*, 21 HARV. C.R.-C.L. L. REV. 227 (1986); Clara L. Meek, Note, *The Use of Peremptory Challenges to Exclude Blacks from Petit Juries in Civil Actions: The Case for Striking Peremptory Strikes*, 4 REV. LITIG. 175 (1984).

345. *Batson*, 476 U.S. at 99.

346. *See* Alschuler, *supra* note 344, at 199.

out a claim, and to shift the burden to the party exercising the peremptory.[347]

The second issue is what kind of showing is required to rebut the prima facie case. In this area, the Supreme Court has issued two decisions of significance since *Batson*, both of which tilt the balance toward greater discretion for parties exercising peremptories. In *Hernandez v. New York*,[348] a prosecutor defended his decision to strike Latino jurors not because of their race but because of their ability to speak Spanish, which might make them reluctant to accept the official translation of the court's interpreter. The plurality held this explanation race-neutral. In *Purkett v. Elem*,[349] the Court accepted as race-neutral the prosecution's explanation for striking two black males, that he did not "like the way they looked" because of their goatees. The Court rejected the defendant's argument that the justification given must "make[] sense" in order to be accepted.[350] These decisions tilt the balance toward discretion at the expense of equality, allowing litigants to make up ostensibly race-neutral, yet pretextual justifications that courts are bound to accept.[351] On the other hand, some lower courts have rejected superficially race-neutral explanations that appear to be functioning as surrogates for race.[352]

The third issue pertains to the standing of those who may seek relief for alleged discrimination in the exercise of peremptory challenges — a question that necessarily implicates the broader question of whose equality rights *Batson* and its progeny protect. This issue was resolved by cases that rejected a defendant's Sixth Amendment claim based on the exclusion of jurors of a different race,[353] but allowed an equal protection claim to be brought based on such exclu-

347. Some of the lower courts have answered this question in the affirmative. *See, e.g.*, United States v. Lorenzo, 995 F.2d 1448, 1453-54 (9th Cir. 1993) (holding that a prima facie case was made where three of nine Hawaiian jurors were struck); United States v. Alvarado, 923 F.2d 253, 255 (2d Cir. 1991) (holding that a prima facie case was made where a prosecutor struck four of seven minorities on the venire).

348. 500 U.S. 352 (1991).

349. 514 U.S. 765, 766 (1995).

350. *Purkett*, 514 U.S. at 768-69.

351. *See* Charles J. Ogletree, *Just Say No!: A Proposal to Eliminate Racially Discriminatory Uses of Peremptory Challenges*, 31 AM. CRIM. L. REV. 1099 (1994); Swift, *supra* note 23, at 329-30 (suggesting that *Hernandez* and *Purkett* "could effectively undo *Batson* by permitting attorneys to stockpile rote justifications known to be acceptable as race neutral to particular judges").

352. *See, e.g.*, United States v. Bishop, 959 F.2d 820, 821 (9th Cir. 1992) (rejecting a prosecutor's explanation that jurors were struck because of residency in low-income, black neighborhood and therefore likely to believe that police "pick on black people"); People v. Turner, 109 Cal. Rptr. 2d 138 (Ct. App. 2001) (rejecting an explanation that black jurors were struck not because of race but because they were from Inglewood, in which blacks comprise 49.9% of voting-age population).

353. Holland v. Illinois, 493 U.S. 474 (1990).

sion.[354] Citing the opportunity that jury service provides for citizens to "participate in the democratic process,"[355] the Court upheld a defendant's standing to challenge the exclusion of those of a different race.[356] Over the vigorous dissent of Justice Scalia, the majority proceeded to hold that litigants have third-party standing to challenge the exclusion of different-race jurors. Although Justice Scalia focuses on the injury-in-fact prong of the test for third-party standing, what is most remarkable about the Court's opinion is its finding the requisite "close relation" between the litigant and juror to lie in their "common interest" in eliminating discrimination.[357] If this were enough to satisfy the third-party standing requirement, then a litigant in almost any case could meet this prong, simply by claiming a desire to remedy to constitutional wrong suffered by the person whose right was allegedly violated.[358]

Whether or not the juror-selection cases have achieved a salubrious balance between the values of discretion and equality, there can be no question that they have created an analytic framework that significantly departs from Conventional Equal Protection. Without renouncing the requirement of discriminatory intent, the Court has allowed intent to be presumed where a disparate impact is produced by a discretionary system. It has adopted an analysis that requires careful scrutiny of the evidence, even at the risk of second guessing the judgments of prosecutors and even trial courts. While affirming that jurors' equality interests underlie the insistence on eradicating intentional race discrimination from the process of selecting juries, the Court has been generous in according third-party standing to ensure that such discrimination is addressed. It thus shares at least some of the characteristics of First Amendment Equal Protection.

B. *Political Restructuring*

As explained in Part III, the Supreme Court has generally been reluctant to find an equal protection violation in the absence of a facial classification or a showing of intentional discrimination. There is, however, a series of cases that does not seem to fit into either of these categories. In *Hunter v. Erickson*,[359] *Washington v. Seattle School*

354. Powers v. Ohio, 499 U.S. 400 (1991).

355. *Id.* at 407.

356. *Id.* at 408. The Court relied in part on *Peters v. Kiff*, 407 U.S. 493 (1972), a decision that, without a majority opinion, allowed a white defendant to challenge the exclusion of African Americans from juries.

357. *Powers*, 499 U.S. at 413.

358. *See* Kirk, *supra* note 305, at 709.

359. 393 U.S. 385 (1969).

District No. 1,[360] and *Romer v. Evans*,[361] which I collectively refer to as the "political restructuring" cases,[362] the Court struck down laws deemed to impose unequal burdens on the ability of certain groups to participate in the political process.[363]

These cases are difficult to explain in light of traditional equal protection jurisprudence since they do not involve laws that expressly target a particular racial group, nor do they involve the typical showing of intentional discrimination.[364] It is therefore easy to view these cases as constitutional oddballs, difficult or impossible to explain in light of accepted equal protection principles.[365] Viewing these cases alongside the juror selection cases, however, reveals their shared concern with the danger of prejudice subtly denying equal participation. More to the point, they share a concern that — absent a more stringent test for determining whether equal protection has been denied — intentional discrimination on the part of the polity may escape detection.

Of these three cases, *Hunter* is perhaps most easily understood in light of traditional equal protection doctrine. *Hunter* struck down an Akron charter amendment which prohibited implementation of any ordinance prohibiting housing discrimination absent approval of a majority of the city's voters.[366] Enacted by the Akron electorate, the charter amendment not only effected a repeal of existing fair housing ordinances, but also required approval of voters before any *future* ordinance could be implemented.[367] The Court struck down Akron's charter amendment.

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360. 458 U.S. 457 (1982).

361. 517 U.S. 620 (1996).

362. *See also* Reitman v. Mulkey, 387 U.S. 369 (1967) (striking down an amendment to the California Constitution prohibiting state or local entities from enacting laws limiting discrimination by private landlords).

363. Mark Rosenbaum and I have elsewhere explored the principle of equal access to the political process that, we claim, lies at the heart of these cases. Daniel P. Tokaji & Mark D. Rosenbaum, *Promoting Equality by Protecting Local Power: A Neo-Federalist Challenge to State Affirmative Action Bans*, 10 STAN. L. & POL'Y REV. 129, 136 (1999) ("It might be tempting to view *Hunter* and *Seattle School District* as anomalies . . . in light of the Supreme Court's general insistence that only facially or intentionally discriminatory laws violate the Equal Protection Clause.").

364. Amar & Caminker, *supra* note 20, at 1024-29.

365. *See, e.g., id.* at 1022-29 (contrasting ordinary equal protection analysis with the doctrine applied in *Hunter* and *Seattle School District*); David J. Barron, *The Promise of Cooley's Cities: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 560-61 (1999) (characterizing *Seattle School District* and *Romer* as "jurisprudential enigmas"); Tokaji & Rosenbaum, *supra* note 363, at 136 ("It might be tempting to view *Hunter* and *Seattle School District* as anomalies . . . in light of the Supreme Court's general insistence that only facially or intentionally discriminatory laws violate the Equal Protection Clause.").

366. Hunter v. Erickson, 393 U.S. 385, 386 (1969).

367. *Id.* at 389-90.

While intentional discrimination on the part of the electorate might well have been inferred from the circumstances, the Court did not expressly make a finding of discriminatory intent on the part of Akron's voters.[368] Instead, the Court reasoned that the charter amendment required racial minorities to run a special legislative gauntlet that no other groups were required to run.[369] In particular, it drew "a distinction between those groups who sought the law's protection against racial, religious, or ancestral discriminations in the sale and rental of real estate and those who sought to regulate real property transactions in the pursuit of other ends."[370] Although the charter amendment on its face treated all racial and religious groups the same — e.g., it did not distinguish blacks from whites, or Christians from Jews — the Court recognized that minorities would bear the brunt of this law's impact.[371] After the charter amendment, only racial and religious minorities would have to obtain the approval of the Akron electorate to enact favorable legislation. By precluding them from approaching the city council on the same terms as others, the charter amendment "place[d] special burdens on racial minorities within the governmental process," something that the Court viewed as "no more permissible than denying them the vote, on an equal basis with others."[372] The Court therefore treated Akron's law as a race-based distinction, subject to strict scrutiny.[373]

Hunter may plausibly be understood as only a slight departure from traditional equal protection doctrine, since the Akron charter amendment was apparently driven by a desire to insulate private racial discrimination from government interference. It is therefore easy to understand it as involving intentional discrimination, difficult to miss yet hard to prove under the equal protection test subsequently articulated in *Washington v. Davis.*

Somewhat more difficult to understand in these terms is *Washington v. Seattle School District No. 1*,[374] a case decided after *Washington v. Davis.* In *Seattle School District*, the Court broadened the rule of *Hunter* to strike down a statewide initiative that had the practical effect of barring school boards from adopting race-conscious desegregation programs.[375] Like the *Hunter* charter amendment, the Washington initiative "subtly distort[ed] governmental processes in such a way

368. Amar & Caminker, *supra* note 20, at 1024.

369. *Hunter*, 393 U.S. at 390.

370. *Id.*

371. *Id.* at 391.

372. *Id.*

373. *Id.* at 392-93.

374. 458 U.S. 457 (1982).

375. *Seattle Sch. Dist.*, 458 U.S. at 463.

as to place special burdens on the ability of minority groups to achieve beneficial legislation."[376] In particular, after enactment of the Washington initiative, only proponents of race-conscious desegregation were precluded from going to their local school boards to seek favorable legislation. Because racial minorities were deemed to be the ones benefiting most from race-conscious busing, the Court held that the law placed special burdens on minorities' access to the political process, in violation of the *Hunter* principle.[377] As in *Hunter*, it did not require evidence of intentional racial discrimination on the part of the electorate in making its decision.[378]

The Court's opinion does nevertheless suggest a concern that hard-to-prove racial discrimination may partly explain the result. Near the outset of the opinion, for example, the Court notes the district court's frank conclusion that it was practically impossible to ascertain the extent to which "racial bias" was a factor in the Washington electorate's enactment of the antibusing initiative.[379] Probing the intent of all the voters who supported the initiative is beyond the capacity of any court. Later in the opinion, the Court expressly agrees that "purposeful discrimination is 'the condition that offends the Constitution.' "[380] In attempting to reconcile its conclusion with *Washington v. Davis*'s requirement of intentional discrimination, the *Seattle School District* Court explains: "We have not insisted on a *particularized inquiry* into motivation in all equal protection cases."[381] Without abandoning the requirement of intentional discrimination, the Court held that laws that restructure the political process to the disadvantage of minorities would be deemed "inherently suspect."[382]

The Court does not deny that a concern with intentional discrimination underlies its holding. What it does deny is that a "particularized inquiry" into discriminatory intent is always required.[383] In *Seattle School District*, the Court was willing to infer discriminatory intent

376. *Id.* at 467.

377. *Id.* at 483-84.

378. *Id.* at 484-85; *see also* Amar & Caminker, *supra* note 20, at 1034-35.

379. *Seattle Sch. Dist.*, 458 U.S. at 465.

380. *Id.* at 484 (quoting Pers. Adm'r v. Feeney, 442 U.S. 256, 274 (1979)).

381. *Id.* at 485 (emphasis added).

382. *Id.*

383. The Court's recent opinion in *City of Cuyahoga Falls v. Buckeye Community Hope Foundation*, 538 U.S. 188 (2003), lends further support to my interpretation of *Hunter* and *Seattle School District* as "soft purpose" cases. *See supra* note 20. The *Cuyahoga* Court describes *Hunter* as among the cases "in which we have subjected enacted, discretionary measures to equal protection scrutiny and treated decisionmakers' statements as evidence of such intent." *Id.* at 1393. Later in the opinion, *Cuyahoga* cites *Seattle School District* for the proposition that "statements made by decisionmakers or referendum sponsors during deliberation over a referendum may constitute relevant evidence of discriminatory intent in a challenge to an ultimately enacted initiative." *Id.* at 1395.

from the fact that the Washington electorate chose to impose special burdens on minorities' ability to enact beneficial legislation. But the Court does not adequately explain *why* it should apply a different, less searching test for assessing discriminatory intent in this context than in others.

This question is magnified when *Seattle School District* is examined in conjunction with *Crawford v. Board of Education*,[384] decided the same day. In *Crawford*, the Court upheld an initiative that, at first glance, might seem indistinguishable from the one struck down in *Seattle School District*. At issue in *Crawford* was a California constitutional amendment, which prohibited California courts from requiring racial busing in circumstances where it was not required by the United States Constitution.[385] Both the *Seattle School District* and *Crawford* initiatives, then, made it more difficult for racial minorities to secure race-conscious busing programs. The critical difference, in the majority's view, was that the *Crawford* initiative in no way limited access to the political process. Instead, it represented a "mere repeal" of a constitutional provision that had been interpreted to extend protections over and above those provided by the Fourteenth Amendment: "[H]aving gone beyond the requirements of the Federal Constitution, the State was free to return in part to the standard prevailing generally throughout the United States."[386] Because the California initiative did not restrict access to the political process, but only limited the remedies available for de facto discrimination under state law, the Court applied its conventional test for assessing whether the law was "enacted with a discriminatory purpose."[387] In contrast to *Seattle School District*, where the "practical effect" of the initiative on minorities was deemed sufficient to show a prima facie equal protection violation, the *Crawford* Court insisted on a clear showing of discriminatory purpose.[388]

Read together, what is clear from *Crawford* and *Seattle School District* is that the critical question was whether the initiative limited access to a *political*, as opposed to a *judicial* forum. After enactment of the *Crawford* initiative, minorities in California were as free as they had been before to approach their local school boards, seeking racial busing programs to reduce de facto school segregation. After enactment of the *Seattle School District* initiative, by contrast, minorities in

384. 458 U.S. 527 (1982).

385. *Crawford*, 458 U.S. at 532.

386. *Id.* at 542.

387. *Id.* at 543-45.

388. *Id.* at 545 ("Even if we could assume that Proposition I had a disproportionate adverse effect on racial minorities, we see no reason to challenge the Court of Appeal's conclusion that the voters of the State were not motivated by a discriminatory purpose.").

Washington were no longer free to approach their local school boards, seeking desegregative busing for the same purpose.

What is less clear — and inadequately explained by the opinions in either case — is *why* a different standard should apply when a statewide initiative limits access to a political forum, rather than a judicial forum. *Seattle School District*'s suggestion that it is not abandoning the requirement of discriminatory intent, but merely applying a more searching test for intent in this context only magnifies the confusion. Was there any greater reason to believe that the Washington antibusing initiative sprang from discriminatory intent than the California antibusing initiative? Would it be any easier to develop evidence of intentional discrimination in one case than the other? In short, what calls for explanation is why courts should apply a different equal protection test when a law regulates access to political as opposed to judicial relief.

The most recent political-restructuring case, *Romer v. Evans*, relies on a logic similar to *Hunter* and *Seattle School District*, though it too fails to explain why access to the political process warrants special treatment. *Romer* struck down an amendment to the Colorado Constitution that prohibited local antidiscrimination protections for gays and lesbians.[389] While not expressly relying on *Hunter* or *Seattle School District*, and while addressing discrimination based on sexual orientation and not race, the *Romer* Court applied a nearly identical principle of equal political access to strike down the Colorado initiative: "Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance."[390] The Colorado initiative violated this prohibition, the Court concluded, by making it more difficult for gays and lesbians to enact protective legislation. To be sure, the *Romer* Court avoids express reliance on either *Hunter* or *Seattle School District*. More clearly than either of these cases, the *Romer* Court grounds its holding on discriminatory purpose, stating that "laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected."[391] But as in *Seattle School District*, the Court provides little explanation for why a presumption of discriminatory purpose should be drawn in this context but not others.

The questions raised by the political-restructuring cases thus parallel those raised by the jury-selection cases. In both areas, the

389. 517 U.S. 620, 624 (1996).

390. *Romer*, 517 U.S. at 633.

391. *Id.* at 634. For a discussion of the antigay animus behind Amendment Two, see ANDREW KOPPELMAN, THE GAY RIGHTS QUESTION IN CONTEMPORARY AMERICAN LAW 21-24 (2002).

Court has applied an unconventional rule of equal protection, which presumes a violation even without the direct evidence of intentional discrimination ordinarily required. While not abandoning the general rule that intentional discrimination must be shown, the Court applies a more sensitive test for assessing whether such intent exists. But at least on the surface, there appears to be an important difference: while the special rule applied in jury-selection cases arises from suspicion that official discretion may lead to covert intentional discrimination, the special rule applied in the political-restructuring cases may actually *promote* discretion.[392] In *Seattle School District*, for example, the Court refers approvingly to the power of local school districts to determine how best to meet students' needs, noting that such matters as student assignment had been "firmly committed to the local [school] board's discretion."[393] The problem with the *Seattle School District* initiative, then, was that it removed that discretion from local school boards.

A closer examination of the political-restructuring cases, however, shows that the problem with which they are concerned is not so much whether discretion exists, but where it is vested. In *Hunter*, *Seattle School District*, and *Romer*, discretion to adopt protective legislation was removed from the entities perceived to be more accessible to the burdened group, and placed at a more remote level of government. In *Hunter*, for example, the discretion to adopt fair housing laws was removed from the city council and vested in the electorate. In *Seattle School District*, the discretion to adopt desegregative busing was removed from local school boards and vested in the state legislature or statewide electorate.[394] Similarly, in *Romer*, the discretion to adopt antidiscrimination laws protecting gays and lesbians was removed from the local to the state level of government. Thus, while protecting discretion in one sense, these cases limit discretion in another. In particular, they limit the discretion of the electorate to create special rules of access to the political process that burden identifiable groups.

It is precisely this intrusion into the ability of the electorate to structure its government that the dissenting justices, in *Seattle School District* and in *Romer*, found so objectionable. Justice Powell's dissenting opinion in *Seattle School District* voices objection to the majority's "unprecedented intrusion into the structure of a state government."[395] Justice Powell proceeds to explain that the matter of how best to order the institutions of state and local government is for

392. David Barron makes this point, in emphasizing that *Seattle School District* and *Romer* are driven by a concern with "preserving local discretion" to adopt appropriate remedies for discrimination or segregation. Barron, *supra* note 365, at 579.

393. Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 479-80 (1982).

394. *Id.* at 474 ("Those favoring the elimination of *de facto* school segregation now must seek relief from the state legislature, or the statewide electorate.").

395. *Id.* at 489 (Powell, J., dissenting).

the people, and not the federal judiciary, to decide — each state's electorate should have the freedom to "structure the decisionmaking authority of its government" as it deems appropriate.[396] Justice Scalia's blistering dissent in *Romer* echoes these concerns, decrying the Court's intrusion into the State of Colorado's prerogative to determine how its government should be structured. In Justice Scalia's view, the Colorado initiative represented a legitimate effort by the electorate to "counter both the geographic concentration and the disproportionate political power of homosexuals."[397] Justice Scalia's view would thus leave to the discretion of the "majority of citizens" the decision whether a ban on gay-protective local laws are appropriate.

The dispute between the majority and the dissenters, in other words, is not over whether discretion exists, but over *where that discretion should lie*: in local elected officials or in the electorate. In *Hunter, Seattle School District*, and *Romer*, the Court limits the discretion of the electorate to determine the structure of its government, vesting that discretion in local entities perceived to be more responsive to minorities. The political-restructuring cases, of course, implicate a very different sort of discretion from that at issue in the jury-selection cases. While the jury-exclusion cases involve questions of whether a single individual's decisions (i.e., those of a prosecutor or defense attorney) are motivated by discriminatory intent, the political-restructuring cases implicate the discretion of a larger group (i.e., the electorate). But in both cases, the concern underlying the Court's especially searching inquiry is to guard against discrimination, where access to the democratic process is at stake.

The political restructuring cases thus share the First Amendment Equal Protection cases' concern with promoting a fair political discourse, one that minimizes the possibility that discrimination against disfavored groups will go undetected. And because they implicate participation in the political process, the Courts in *Hunter*, *Seattle School District*, and *Romer* found it necessary to strike down the laws denying equal access on their face. While none of the opinions explain the reasons for facial invalidation of the laws at issue, it is not difficult to perceive why: as in the First Amendment context, the mere existence of these laws is sufficient to chill — and indeed, entirely freeze out — the disadvantaged groups from fully participating in the political process. The only remedy that would suffice, accordingly, is facial invalidation.

The relationship to First Amendment Equal Protection also explains why the *Seattle School District* Court (again without explana-

396. *Id.* at 493.

397. Romer v. Evans, 517 U.S. 620, 647 (1996) (Scalia, J., dissenting).

tion) allowed a party whose standing was in question to proceed as plaintiff. The injury in *Seattle School District* was a denial of political participation, yet the challenge to Washington's initiative was brought *not* by a member of the group whose right to equal participation was denied (for example, one seeking to advance desegregative busing at the local level), but rather by the Seattle School District — the entity that had enacted one of the programs banned by the initiative. Without explaining its reasons, the *Seattle School District* Court grants third-party standing to the district to assert the rights of others not before it but whose rights to political participation would otherwise be denied. The high value attached to equality of political participation thus explains the Court's decision to constitutionalize limits on official discretion, in a way that departs from Conventional Equal Protection analysis.

C. *One Person, One Vote*

The third area in which the Court has departed from Conventional Equal Protection in order to guard against the distorting impact of excessive discretion is the "one person, one vote" line of cases. At first glance, grouping this line of cases with the juror-selection and political-restructuring cases might seem odd. For unlike the special rules developed in those cases, the one person, one vote rule was not designed — at least not expressly — to deal with race discrimination. A closer examination of the one person, one vote cases, however, reveals that the decisions are motivated by similar concerns, which bear a close resemblance to those underlying First Amendment Equal Protection jurisprudence. In particular, they arise from a concern that without clear rules by which to cabin official discretion over the electoral process, discrimination against politically disfavored groups might otherwise escape detection.

The one person, one vote cases arise against a backdrop of practices designed to diminish the voting strength of African Americans. After initially refusing to involve itself in the elimination of practices designed to prevent African Americans from voting,[398] the Supreme Court struck down devices such as the grandfather clause,[399] the all-white primary,[400] gerrymandered districts,[401] the interpretation test,[402] and the poll tax.[403] Though none rest on the First Amendment, the

398. *See, e.g.*, Giles v. Harris, 189 U.S. 475 (1903) (affirming the denial of equitable relief to black citizens disallowed from registering to vote).

399. Guinn v. United States, 238 U.S. 347 (1915).

400. Terry v. Adams, 345 U.S. 461 (1953); Nixon v. Herndon, 273 U.S. 536 (1927).

401. Gomillion v. Lightfoot, 364 U.S. 339 (1960).

402. Louisiana v. United States, 380 U.S. 145, 150 (1965).

403. Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

decisions striking such practices — like the rule requiring clear rules in the regulation as speech — serve as a prophylactic against decision-makers acting based on venal motives. *Louisiana v. United States*, for example, concluded that the state's test requiring interpretation of the Constitution was susceptible to discriminatory application, because the test vested government officials with "a virtually uncontrolled discretion as to who should vote and who should not."[404] So too, in *Harper v. Virginia Board of Elections*, the Court struck down Virginia's poll tax, noting the dangers of discriminatory application against African Americans but finding that it was unnecessary to determine whether the poll tax served this purpose in order to hold it unconstitutional.[405]

The one person, one vote rule was not *expressly* justified by a desire to stop racial discrimination, but nevertheless shares with these cases an emphasis on the need to control the distorting effects of official discretion upon the electoral process.[406] In *Baker v. Carr*,[407] the Court reversed its previous holding that legislative reapportionment presented a nonjusticiable "political question" due to the impossibility of formulating judicially manageable standards.[408] One year later, in *Gray v. Sanders*, the Court held unconstitutional a "county unit" system for counting votes, under which votes in rural counties were weighted more heavily than those cast in urban counties.[409] And a year after that, in *Reynolds v. Sims*, the Court required that state legislative seats "must be apportioned on a population basis."[410] The rule was

404. *Louisiana*, 380 U.S. at 150; *see also* SAMUEL ISAACHAROFF ET AL., THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 95-102 (1988) (describing the demise of discretionary techniques used to suppress black vote).

405. *Harper*, 383 U.S. at 666 n.3. As Rich Hasen explains, the Court in *Harper* originally planned to issue a summary affirmance of the lower court opinion that had upheld the poll tax. RICHARD L. HASEN, THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM *BAKER V. CARR* TO *BUSH V. GORE* 36-37 (2003). The Court changed course, however, after Justice Goldberg circulated a proposed dissent to the per curiam affirmance. *Id.* at 37. The proposed dissent more expressly addressed the discriminatory purpose of the poll tax, noting that "the principal aim of this limitation was the disenfranchisement of the Negroes." *Id.* at 179.

406. *See* Andrew S. Marovitz, Note, *Casting a Meaningful Ballot: Applying One-Person, One-Vote to Judicial Elections Involving Racial Discrimination*, 98 YALE L.J. 1193, 1201 (1989) (describing the roots of the one person, one vote rule in cases involving race discrimination within the electoral process).

407. 369 U.S. 186 (1962).

408. Colesgrove v. Green, 328 U.S. 549, 556 (1946) (holding that courts should avoid entering the "political thicket" of malapportionment).

409. 372 U.S. 368, 379-80 (1963).

410. 377 U.S. 533, 568 (1964). Earlier that year, the Court had decided *Wesberry v. Sanders*, 376 U.S. 1 (1964), striking down unevenly apportioned *congressional* districts under Article I, § 2.

subsequently extended to require roughly equal districts in local as well as state elections.[411]

Like the First Amendment rule of precision, the one person, one vote rule may be understood as a device to prevent the playing field from being tilted for or against particular groups, including those defined by political party or race. The great virtue of the one person, one vote rule is its simplicity. As Spencer Overton puts it: "The one-person, one-vote rule promotes uniformity, consistency, fairness, and neutrality in decisions about apportionment by limiting judicial discretion to one simple question: Do all districts have the same number of residents?"[412] The rule thus provides a relatively clear and easily administrable standard.[413]

There are, however, both theoretical and practical difficulties with the standard. Voting rights scholars have criticized, for example, the "incompletely theorized" character of the one person, one vote rule.[414] While the opinions advert to general conceptions of political equality to support this rule,[415] they are less than specific about both the "parameters of this claimed right"[416] and the objective(s) it is supposed to serve.[417] On the practical side, the one person, one vote rule (perhaps because of its weak theoretical moorings) provides little

411. Bd. of Estimate v. Morris, 489 U.S. 688 (1989); Avery v. Midland County, 390 U.S. 474 (1968).

412. Overton, *supra* note 32, at 79.

413. As Professor Ely put it: "[A]dministrability is its long suit, and the more troublesome question is what else it has to recommend it." JOHN HART ELY, DEMOCRACY AND DISTRUST 121 (1980).

414. Heather K. Gerken, *The Costs and Causes of Minimalism in Voting Cases:* Baker v. Carr *and its Progeny*, 80 N.C. L. REV. 1411, 1419 (2002); *see also* Barbara Y. Phillips, *Reconsidering* Reynolds v. Sims*: The Relevance of Its Basic Standard of Equality to Other Vote Dilution Claims*, 38 HOW. L.J. 561 (1995) (criticizing the "simplistic and deceptive slogan, one person, one vote," and stating that subsequent difficulties in determining vote-dilution standard arise from "confusion created by the Court's initial failure to exercise theoretical and jurisprudential fortitude").

415. *Reynolds*, 377 U.S. at 567 ("To the extent that a citizen's right to vote is debased, he is that much less a citizen."); Gray v. Sanders, 372 U.S. 368, 381 (1963) ("The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing — one person, one vote.").

416. Samuel Isaacaroff, *Political Judgments*, 68 U. CHI. L. REV. 637, 649 (2001); *see also* TRIBE, *supra* note 74, § 13-3, at 1065 ("The *Reynolds* opinion did little to illuminate the specific scope and content of the one person, one vote rule.").

417. Professor Gerken notes several possible theories, including (1) preventing an entrenched group from preventing others from sharing power, (2) guarding against racial and other group-based forms of animus, (3) making sure that all voters are effectively represented, and (4) preventing "expressive harm" to those treated less favorably. Gerken, *supra* note 414, at 1421-27; *see also* Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 MICH. L. REV. 483, 506-12 (1993) (assessing the notion that expressive harm is a cognizable constitutional injury).

defense against more sophisticated apportionments designed to diminish the power of out-of-power parties, nonincumbents, and racial minorities.[418]

The practical and theoretical insufficiencies of the one person, one vote rule thus led the Court to back away from cases asserting not only a right to quantitative equality (i.e., population equality) but also a right to qualitative equality (i.e., equal voting strength).[419] Specifically, in *Mobile v. Bolden*,[420] the Court insisted upon the conventional showing of discriminatory purpose in a claim challenging a scheme alleged to diminish minority voting strength.[421] The problem with application of Conventional Equal Protection standards is that requiring voting districts of equal size may not get at all the cases in which lines have been drawn with the intent to diminish the voting strength of a particular racial group.

Notwithstanding the theoretical and practical limitations of the one person, one vote doctrine, there can be no question that it represents a departure from Conventional Equal Protection. Like the jury-selection cases, the one person, one vote cases seek to reduce opportunities for discrimination by placing limits on discretion. Like the political-restructuring cases, the one person, one vote cases seek to advance some conception of political equality.[422] And like the First Amendment Equal Protection cases, the one person, one vote cases aim to eliminate inequality through objective bright-line rules.

The Unconventional Equal Protection decisions share a willingness to find an equal protection violation on something less than the ordinary showing of discriminatory intent, adopting a rule that is designed at least in part to prevent illicit motives from seeping into a discretionary decisionmaking process — and to avoid the inherent difficulties that courts would otherwise face in determining whether

418. *See* Overton, *supra* note 32, at 81 ("Under the one-person, one-vote rule, shrewd and calculating legislators have the ability to game the system by drawing districts of equal population that minimize the political strength of rival political groups . . . .").

419. *See* Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Claims*, 24 HARV. C.R.-C.L. L. REV. 173, 176 (1989) (distinguishing qualitative and quantitative vote-dilution claims).

420. 446 U.S. 55 (1980).

421. After *Mobile v. Bolden*, Congress amended § 2 of the Voting Rights Act, 42 U.S.C. § 1973, to clarify that discriminatory intent is not required. *See* Heather Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1674 (2001) (citing S. Rep. No. 97-417, at 2, 16-34 (1982)).

422. Indeed, *Hunter v. Erickson* (and therefore, by implication, *Seattle School District* and *Romer*) expressly rely on the one person, one vote rule in formulating the rule prohibiting laws that restructure the political process to disadvantage the interests of a racial minority. 393 U.S. 385, 392-93 (1969) ("[T]he State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size.") (citing Reynolds v. Sims, 377 U.S. 533 (1964)).

intentional discrimination has entered into the decisionmaking process.[423] Yet they also share a failure, in the end, to explain their reasons for this departure from Conventional Equal Protection.

D. Bush v. Gore

The one person, one vote cases form the ostensible basis for what is arguably the *most* unconventional of Unconventional Equal Protection cases, and certainly the one that has generated the most public and scholarly criticism.[424] This decision is also the equal protection case whose reasoning most closely resembles that applied in the First Amendment Equal Protection cases.[425]

At least four aspects of the Court's decision in *Bush v. Gore* are remarkable, both for their departure from Conventional Equal Protection analysis and their similarity to First Amendment Equal Protection: (1) the holding that the absence of specific standards for recounting violated equal protection, (2) the assumption that candidates Bush and Cheney had standing to assert the equal protection rights of voters,[426] (3) the remedy ordered, which suggests treatment of the equal protection argument as a facial challenge rather than an as applied challenge, and (4) the willingness to second-guess both public officials charged with counting votes and the Florida Supreme Court.

Although it is risky to read any great shifts in legal doctrine into *Bush v. Gore*, given the circumstances under which it was written[427] and the Court's explicit attempt to cabin its ruling,[428] its action on each

423. *See Reynolds*, 377 U.S. at 560-61 (stating the "fundamental principle ... of equal representation for equal numbers of people, without regard to race, sex, economic status, or place or residence within a State").

424. *See, e.g.*, VINCENT BUGLIOSI, THE BETRAYAL OF AMERICA: HOW THE SUPREME COURT UNDERMINED THE CONSTITUTION AND CHOSE OUR PRESIDENT (2001) (characterizing *Bush v. Gore* as criminal); Laurence H. Tribe, *eroG v. husB and Its Disguises: Freeing* Bush v. Gore *from Its Hall of Mirrors*, 115 HARV. L. REV. 170 (2001) (characterizing the Court's analysis as a shell game); Bruce Ackerman, *Anatomy of a Constitutional Coup*, LONDON REV. BOOKS, Feb. 8, 2001, at 3 (characterizing the Court's action as a "constitutional coup").

425. *See* Daniel P. Tokaji, *Political Equality After* Bush v. Gore*: A First Amendment Approach to Voting Rights*, *in* FINAL ARBITER: THE CONSEQUENCES OF *BUSH V. GORE* FOR LAW AND POLITICS (forthcoming 2004) (discussing *Bush v. Gore*'s relationship to First Amendment doctrine).

426. Erwin Chemerinsky, Bush v. Gore *Was Not Justiciable*, 76 NOTRE DAME L. REV. 1093, 1094 (2001) (arguing that Bush lacked standing and that the Court improperly treated his equal protection argument as a facial rather than as an as-applied challenge).

427. JEFFREY TOOBIN, TOO CLOSE TO CALL 264-65 (2001) (reporting that the writing of what would become the majority opinion took place in the morning of December 12, 2000, the day it was issued).

428. Bush v. Gore, 531 U.S. 98, 109 (2000) ("Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities."). For an explication of reasons for doubting that *Bush v. Gore* will have

of these points suggests a connection to First Amendment Equal Protection that is worthy of exploration. In silently borrowing from these cases, the Court exhibits a suspicion of discretion — not only of public officials but also of state judges including those at the appellate level — characteristic of First Amendment Equal Protection.[429] The real progenitors of *Bush v. Gore*, then, are not the one person, one vote cases like *Reynolds v. Sims* that the majority cites, but First Amendment Equal Protection cases such as *Shuttlesworth v. Birmingham* that it does not mention.

1. *The Equal Protection Holding*

The Court concluded that the absence of sufficiently precise rules for determining which undervotes should be counted violated equal protection. The principle upon which the Court purports to rely is: "Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another."[430] The recount procedure in Florida violated this principle, the Court explained, because of the "absence of specific standards to ensure its equal application."[431]

The Florida Supreme Court *had* of course articulated the standard according to which ballots should be evaluated: the intent of the voter. This standard, however, was deemed insufficient to rein in the discretion of the canvassing boards responsible for conducting the recounts; instead what was required were "specific rules designed to ensure uniform treatment."[432] In other words, what was wanting was a definition of which ballot markings should count as votes (e.g., "hanging chads" count as votes if and only if at least two corners are detached) that would eliminate subjective judgments. Because of the absence of such a clear rule, the Court notes, vote-counters in different counties (and sometimes even within a county) were applying different rules for determining which votes would count.[433]

As authority for its equal protection holding, the majority cites four cases: *Harper v. Virginia Board of Elections*,[434] which struck down

significant precedential value, see Richard L. Hasen, Bush v. Gore *and the Future of Equal Protection Law in Elections*, 29 FLA. ST. U. L. REV. 377, 386-92 (2001).

429. *See* David A. Strauss, Bush v. Gore*: What Were They Thinking?*, 68 U. CHI. L. REV. 737, 750 (2001) (arguing that the decision may be understood to rest on principle that "at least where the right to vote is concerned, the states may not use discretionary standards if it is practicable to formulate rules that will limit discretion").

430. *Bush*, 531 U.S. at 104-05.

431. *Id.* at 106.

432. *Id.*

433. *Id.*

434. 383 U.S. 663 (1966).

the poll tax, and three of the early one person, one vote cases — *Gray v. Sanders*, *Reynolds v. Sims*, and *Moore v. Ogilvie*[435]. These cases cannot by themselves justify the decision the Court reaches. As an initial matter, each of the four cases upon which the majority relies rested upon a disparate impact upon an identifiable *class* of voters.[436] In *Harper*, for example, voters of limited means were the ones dis-advantaged by the poll tax requirement.[437] And in *Reynolds*, *Moore*, and *Gray*, voters in larger urban counties were treated less favorably than voters in smaller urban counties.[438] Thus, while the *Bush v. Gore* majority cites a concern that the absence of any standards will result in "arbitrary" treatment, the cases upon which it relies have to do with disfavored treatment of an identifiable group of voters. In particular, they focus on the differential treatment afforded to voters of a particular class, definable by lack of wealth (in *Harper*) and place of residence (in the one person, one vote cases).[439]

In fairness to the majority, there is a sense in which the problem that it characterized as "arbitrary and disparate treatment" resembles the one person, one vote cases. As the Court notes, different counties were applying different standards for determining which votes should be counted,[440] leading to a risk that the voting strength of certain counties was diminished in comparison to others. Yet the comparison to these cases remains strained, since none of them held that the absence of sufficiently clear and specific standards — without any evidence of a disparate impact upon a particular group of voters — violated equal protection. Rather, in each of those cases, the evidence before the Court demonstrated that voters in certain counties were *quantifiably* denied equal voting strength. In *Gray*, for example, the

435. 394 U.S. 814 (1969).

436. *See* Frank I. Michelman, *Suspicion, or the New Prince*, 68 U. CHI. L. REV. 679, 684 (2001) (noting the absence of an ex ante race, party, residence, or wealth based classification in Florida's recount scheme); Tribe, *supra* note 424, at 225 (noting that the cases cited by the majority each involved schemes that "had the purpose and effect of granting greater voting power to a particular class").

437. *Harper*, 383 U.S. at 666.

438. *Moore*, 394 U.S. at 819; Reynolds v. Sims, 377 U.S. 533, 545-51 (1964); Gray v. Sanders, 372 U.S. 368, 379 (1963).

439. There is at least one case in which the Supreme Court has allowed an equal protection case to proceed, notwithstanding the absence of any claim that the plaintiff was treated unfavorably as the result of her membership in a definable class. In *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000), the Court reversed the dismissal of an equal protection claim alleging "irrational and wholly arbitrary" denial of an easement, even though the plaintiff "did not allege membership in a class or group." *Id.* at 564. With little explanation, the Court allowed her to state a claim based on her allegation that she had been treated less favorably than others similarly situated without any rational basis. *Id.* But in *Willowbrook*, unlike *Bush v. Gore*, an identified plaintiff alleged that she was subjected to *intentional* differential treatment. *Id.*

440. Bush v. Gore, 531 U.S. 98, 107 (stating that "each of the counties used varying standards to determine what was a legal vote").

county-unit system gave each resident of the least populous Georgia county influence equal to that of 99 residents of Fulton County.[441] None of the one person, one vote cases invalidated an electoral scheme based solely upon the absence of "clear and specific standards."[442]

The one person, one vote cases therefore are not sufficient to justify the conclusion that the Court reached. The more apt comparison would have been to speech cases like *Shuttlesworth*, *City of Lakewood*, and *Forsyth County*, in which the Court held that insufficiently precise standards for determining who may speak violate the First Amendment.[443] *City of Lakewood*, for example, rests its requirement of precise standards on the recognition that it is otherwise too easy for decisionmakers to disfavor certain speakers and get away with it, by relying on "post hoc" explanations for its decisions.[444] In a similar vein, *Forsyth County* condemned the "overly broad licensing discretion" arising from the absence of sufficiently clear and specific standards.[445] In both cases, the real concern is that loose standards provide too much opportunity for decisionmakers to exercise the discretion in a less than evenhanded fashion — a concern present in *Bush v. Gore* with respect to the Florida Supreme Court.

Unfortunately, *Bush v. Gore* does not even mention the First Amendment Equal Protection cases upon which it implicitly relies. Of course, if the Court had cited cases like *Shuttlesworth*, *Forsyth County*, and *City of Lakewood*, it would have been required to explain its reasons for importing speech doctrine into an equal protection case, in light of its prior refusal to treat voting as an activity protected by the First Amendment.[446] Accordingly, if the Court's implicit reliance on First Amendment doctrine is to be justified, some additional explanation of the link between voting and speech is required.

441. *Gray*, 372 U.S. at 371. The only evidence the *Bush v. Gore* Court cites that would appear analogous is that Broward County "uncovered almost three times as many new votes" as Palm Beach County, "a result markedly disproportionate to the difference in population between the counties." 531 U.S. at 107. The majority's opinion, however, did not simply deal with the discrepancy between these two counties, but instead with the perceived *statewide* problem arising from the lack of adequate vote-counting rules.

442. Cass Sunstein, *Order Without Law*, 68 U. CHI. L. REV. 757, 764 (2001).

443. *See* ABNER GREENE, UNDERSTANDING THE 2000 ELECTION: A GUIDE TO THE LEGAL BATTLES THAT DECIDED THE PRESIDENCY 132-33 (2001) (suggesting that *Bush v. Gore*'s holding may best be understood in light of First Amendment cases).

444. City of Lakewood v. Plain Dealer Publ'g. Co., 486 U.S. 750, 758 (1988)

445. Forsyth County v. Nationalist Movement, 505 U.S. 123, 123 (1992).

446. *See* Burdick v. Takushi, 504 U.S. 428 (1992) (rejecting the argument that a challenge to write-in voting stated a First Amendment claim); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 665 (1966) (striking down a poll tax while avoiding the question whether the First Amendment protects the right to vote).

2. *The Assumption of Justiciability*

The second aspect of *Bush v. Gore* that warrants scrutiny is its unexplained assumption that candidates Bush and Cheney had standing to assert the equal protection violations suffered by the voters harmed. According to the Court, the injury caused by the absence of a clear vote-counting rule was "the equal dignity owed to each voter."[447] But if it was the rights of the *voters* that were being violated, what conferred standing upon the *candidates*?

As Professor Chemerinsky has explained, the general rule is that "plaintiffs only have standing to raise their own claims and cannot present the injuries suffered by third parties not before the Court."[448] While there are exceptions to this general rule — where, for example, there are obstacles to third parties coming forward to assert their rights or where there is a special relationship between the plaintiff and the third party — it is not self-evident that those conditions existed in *Bush v. Gore*.[449] The standing of candidates Bush and Cheney is especially dubious given that they could not show that the absence of specific standards actually injured them or subjected them to any greater harm than their opponents.[450]

Here again, the Court's assumption of standing would make sense — *if* this were a First Amendment case. For in those cases, the Court has allowed litigants to challenge the constitutionality of schemes, the implementation of which threatens to deny expressive equality, *without* showing that they were treated less favorably than other speakers. Those whose rights are not violated may challenge laws that "delegate[] overly broad discretion to the decisionmaker," and therefore impinge upon the protected speech of others not before the court.[451] Moreover, First Amendment plaintiffs are not required to show that the rightholders cannot press their claims on their own,[452] nor to demonstrate a close relationship to the third-party rightholders.

447. *Bush v. Gore*, 531 U.S. at 104.

448. Chemerinsky, *supra* note 426, at 1099.

449. *Id.* at 1101. *But see* Tribe, *supra* note 424, at 229-30 & n.232 (arguing that Bush met the requirements for third-party standing).

450. *See* Pamela S. Karlan, *The Newest Equal Protection: Regressive Doctrine on a Changeable Court*, *in* THE VOTE: BUSH, GORE, AND THE SUPREME COURT 77, 85 (Cass R. Sunstein & Richard A. Epstein eds., 2001) (arguing that Bush lacked third-party standing unless his "supporters [were] disproportionately likely not to have their votes counted under the prescribed process"); Michael W. McConnell, *Two-and-a-Half Cheers for* Bush v Gore, 68 U. CHI. L. REV. 657, 676 (2001) (observing that if recount had proceeded, Bush might have won "by a wider margin").

451. Forsyth County v. Nationalist Movement, 505 U.S. 123, 129 (1992); Freedman v. Maryland, 380 U.S. 51, 56 (1965).

452. Sec'y of State v. Joseph H. Munson Co., 467 U.S. 947, 957 (1984).

One might object to the importation of standing rules derived from prior restraint cases, on the ground that these cases rest on the "chilling effect" upon others not before the Court.[453] But while the "chilling effect" metaphor may not easily translate from the speech to the voting context, a similar problem exists: without a broad standing rule, the rights of others — either to have their voices heard or to have their votes counted — will be denied.

3. *The Remedy*

The most problematic aspect of *Bush v. Gore* is the remedy ordered — namely, issuance of a stay order that immediately stopped the manual recounts and, three days later, an opinion that prevented them from restarting.[454] If the equal protection problem was the lack of a sufficiently definite standard for counting votes, then why not remand for the Florida Supreme Court to articulate such a standard? Justice Souter's dissent makes this point.[455] The majority's explanation was that the recounts had to be completed by December 12, the day the Court issued its opinion.[456] Commentators have almost uniformly found that reason unconvincing since it was a matter of state law whether Florida wished to avail itself of the "safe harbor" provision requiring the choice of electors by that date.[457]

While the critics are correct that this aspect of *Bush v. Gore* is difficult to justify, there is a better explanation that might be offered for the decision to stop the Florida recounting process. In declaring the recount process invalid altogether and ordering that it be put to a halt, the Court acted as though it were considering a *facial* challenge to the Florida manual-recount scheme.[458] Such a challenge may

453. *Forsyth County*, 505 U.S. at 129.

454. For a critical analysis of the prophylactic remedy issued in *Bush v. Gore*, see Tracy A. Thomas, *Understanding Prophylactic Remedies Through the Looking Glass of* Bush v. Gore, 11 WM. & MARY BILL RTS. J. 343, 387 (2002) (describing the remedial aspect of *Bush v. Gore* as "unnecessary and inappropriately tailored under the Court's guiding standards for issuing such extraordinary relief.") Even some of those who defend other aspects of *Bush v. Gore* have criticized the remedy ordered. *See, e.g.*, McConnell, *supra* note 450, at 675 (giving the decision only two and one-half cheers because of its decision to halt recounts altogether instead of remanding); *see also* Sunstein, *supra* note 442, at 767-68 (concluding that the remedy ordered is the part of the opinion "most difficult to defend on conventional legal grounds").

455. Bush v. Gore, 531 U.S. 98, 132-33 (Souter, J., dissenting).

456. *Id.* at 110.

457. *Id.*; *see also* McConnell, *supra* note 450, at 675; Sunstein, *supra* note 442, at 767-68.

458. *See* Chemerinsky, *supra* note 426, at 1094 (criticizing the Court for "decid[ing] the case before the Florida law was applied," when Bush had raised only an as applied rather than a facial challenge to that law); Brief of Respondent Albert Gore, Jr., at 43-44, Bush v. Gore 531 U.S. 98 (2000) (No. 00-949) (stating that "the contention that the 'intent of the voter' standard violates equal protection . . . is nothing more than an argument that the con-

ordinarily be entertained only where there is "no set of circumstances" under which the law could validly be applied.[459] But even *Salerno*, which sets forth a stringent test for when a facial challenge may be maintained, acknowledges that a different rule for facial challenges applies in the First Amendment context.

If we see First Amendment Equal Protection cases as the progenitors of *Bush v. Gore*, we can make some sense even of the remedy that the Court ordered. As I have already explained, *Shuttlesworth* struck down on its face an ordinance conferring broad discretion on municipal decisionmakers to deny permission to demonstrate based on an amorphous health and welfare standard.[460] While the Court's invalidation of this portion of the ordinance simply followed precedent that had long been settled, what was remarkable about *Shuttlesworth* is that it reached this conclusion even *after* the Alabama Supreme Court had provided a narrowing construction aimed at curing the constitutional defect. What *Shuttlesworth* and its progeny thus require are not just narrow and definite standards, but clear standards *prescribed in advance.*[461] Allowing a state court to save the statute (and therefore Shuttlesworth's conviction) through a post hoc narrowing construction would defeat that purpose. For through such construction, the state court would accomplish what prior First Amendment cases forbade municipal officials from doing: tilting the expressive playing field against disfavored speakers through uneven application of vague standards.

Shuttlesworth thus reflects distrust of municipal and *judicial* decisionmakers. More specifically, the decision suggests a concern that without clear standards set forth by law in advance, state courts (including the state's highest court) might exercise their discretion to discriminate against disfavored speakers. This was not, of course, an implausible fear regarding the Alabama courts of the 1960s. Nor is it implausible to suppose that, at least in the eyes of the Supreme Court, there were reasons to distrust the Florida Supreme Court in 2000. The Court's refusal to remand for the state court to articulate a clear vote-counting rule may therefore be understood as reflecting its skepticism of that court's capacity to do so in an evenhanded manner. In the event of a remand, the Court might have feared, the state court could have chosen a standard for counting votes that would benefit its

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test and recount procedures of Florida's election code . . . are on their face unconstitutional").

459. United States v. Salerno, 481 U.S. 739, 745 (1989). *But see* Dorf, *supra* note 198, at 236 (arguing that *Salerno*'s statement of the facial-challenge rule is not consistent with what the Court has actually done).

460. Shuttlesworth v. City of Birmingham, 394 U.S. 147, 149 (1969).

461. *But see* TRIBE, *supra* note 74, § 12-32, at 1036-37 (noting an increased willingness of Court to allow saving constructions of facially invalid laws).

favored candidate. Hence the requirement of clear standards prescribed in advance amounted to a facial invalidation of a state law that failed to provide such standards.[462]

4. *Lack of Deference*

The final aspect of *Bush v. Gore* that bears consideration is the Court's willingness to second-guess the decisions of both administrative factfinders and the court below. This is evident in the Court's explicit distrust of the county canvassing boards conducting the recounts, and in its implicit but palpable distrust of the Florida Supreme Court.[463] The Court's mode of analysis reflects the "independent examination" of the facts reminiscent of First Amendment jurisprudence.

The Court digs deep into the record to note various defects in the manner in which votes were being counted, exposing what it undoubtedly perceived to be the dark underbelly of the vote-counting process. It implicitly rejects, moreover, Justice Stevens's suggestion that the Court should assume that the "single impartial magistrate" overseeing the recount process would have provided sufficient safeguards against unequal treatment of similarly marked ballots.[464] As Justice Stevens put it, the majority's conclusion can only rest upon "an unstated lack of confidence in the impartiality and capacity of the state judges who would make the critical decisions if the vote count were to proceed."[465] Finally, as already noted, the Court reversed and called the election instead of remanding, thereby refusing to leave to the Florida Supreme Court the decision whether Florida law required the vote counting to be completed by the "safe harbor" deadline. It is no stretch to believe that the *Bush v. Gore* Court's distrust of the deter-

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462. I do not here deal with what some might believe the most serious conceptual problem with the remedy ordered: the fact that it systematically disadvantaged those who cast their votes in counties using the *most* unreliable systems (the "hanging chad" punch cards) relative to those using more reliable systems. Thus, on this argument, even flawed manual recounts result in lesser inequality than no recounts at all. This argument was suggested in two footnotes within Gore's brief. Brief of Respondent Albert Gore, Jr., at 43 n.24, Bush v. Gore 531 U.S. 98 (2000) (No. 00-949) ("The manual recounts can ameliorate some of the disparity created by the use of different marking and counting equipment."); *id.* at 50 n.28 ("Counting *none* of the votes would be vote dilution with a vengeance."). If this argument is correct, however, it suggests not that the Court's remedy went too far, but that it did not go far enough. Rather than simply declaring only the recount scheme constitutionally invalid, this argument suggests, it should have declared the entire election violative of equal protection. *Cf.* Thomas, *supra* note 454, at 387-88 (arguing that the prophylactic remedy imposed in *Bush v. Gore* exacerbated harm to voters, by "den[ying] the fundamental right to vote of Florida voters who cast a legal vote not counted by the tabulation systems").

463. Bush v. Gore, 531 U.S. 98, 108-09 (2000).

464. *Id.* at 126 (Stevens, J., dissenting).

465. *Id.* at 128.

minations made by vote-counting officials and the state courts led it to choose this remedy.

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The aspects of *Bush v. Gore* discusssed above track the four key features of First Amendment Equal Protection: (1) the requirement of precision, (2) liberal rules of justiciability, (3) receptivity to facial challenges, and (4) independent examination of the evidence.[466] Of course, an account of *Bush v. Gore* that rests upon its connection to First Amendment Equal Protection is at odds with the Supreme Court's own explanation for its decision. The Court nowhere expressly references the First Amendment cases from which it silently borrows. Nor does this account *justify* the Court's smuggling First Amendment doctrines into a voting case, a step — or perhaps more accurately a leap — that the Court has heretofore refused to take.[467] If *Bush v. Gore* or any of the other Unconventional Equal Protection cases are to be understood in light of First Amendment doctrines, we must consider why such a leap might be appropriate.

V. A MORE PERFECT UNION: EQUAL POLITICAL PARTICIPATION AND THE FIRST AMENDMENT

The failure to acknowledge the relationship between the First Amendment and voting is not limited to *Bush v. Gore* but is characteristic of voting cases decided under the Equal Protection Clause. It can be traced directly to a case decided almost thirty-five years earlier, *Harper v. Virginia Board of Elections*, one of the four equal protection cases upon which *Bush v. Gore* relies. Justice Douglas's opinion in *Harper* raised, but explicitly failed to settle, the relationship between the First Amendment and the right to vote:

> It is argued that the right to vote in state elections is implicit, particularly by reason of the First Amendment and that it may not constitutionally be conditioned upon payment of a tax or fee. We do not stop to canvass the relation between voting and political expression. For it is enough to say that once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.[468]

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466. *See supra* Part II.B.

467. *See supra* note 446 and accompanying text.

468. Harper v. Virginia Bd. of Elections, 383 U.S. 663, 665 (1966) (citation omitted). For arguments that the First Amendment should be considered a source of the right to vote, see Justice Brennan's opinion in *Storer v. Brown*, 415 U.S. 724, 756 (1974), and Karst, *Equality in the First Amendment*, *supra* note 7, at 53-59.

Harper's avoidance of this question has hindered the recognition of the links between the First Amendment and the principle of equal participation. Had the Court addressed the question, it might have avoided the confusion evident in such cases over the proper relationship between First Amendment equality and equality in other areas of political participation ever since.[469]

Taken together, *Thomas v. Chicago Park District* and *Bush v. Gore* suggest a reconciliation of the divergent approaches to the problem of discretion and inequality. Although decided under the First Amendment, *Thomas* gestures toward Conventional Equal Protection analysis, in relaxing the general requirement of precision and in suggesting that same deference should be accorded to official decisionmakers. *Bush v. Gore*, on the other hand, moves equal protection doctrine in the area of voting closer to that which has traditionally been applied in the First Amendment context. This is evident not only in its quasi-First Amendment holding that the absence of sufficiently specific rules for vote counting creates a constitutional problem, but also in its careful scrutiny of the actions of state officials and judges, its assumption that Bush and Cheney had standing, and its willingness to entertain what amounted to facial challenge of Florida's scheme. Put differently, *Thomas* moves in the direction of greater toleration for discretion characteristic of Conventional Equal Protection (thereby risking expressive inequality), while *Bush v. Gore* moves in the direction of lesser toleration for discretion characteristic of First Amendment Equal Protection (to further equality in the electoral process).

It remains to be seen whether these cases are simply blips on the radar, or harbingers of a more lasting change. While it is not my objective here to soothsay, it is worth asking whether there is any justification for this convergence. This Part argues that there is, and suggests the directions in which the law of expressive and electoral equality might productively move from its recognition. In particular, such recognition might move us toward a clearer understanding of the special dangers to equality that may arise from official discretion to grant or withhold access to channels of political participation. It would thereby promote a more perfect union of the discordant doctrines of discretion that predominate under the First Amendment and the Equal Protection Clause. More importantly, it would further the constitutional vision of a more perfect union by enhancing the opportunity of all citizens to participate in the conversations of democracy.

469. Professor Hasen notes that, at the time of *Harper*, the Court viewed the First Amendment right of political association as "somewhat interchangeable" with the Fourteenth Amendment right to equal participation. HASEN, *supra* note 405, at 209 n.55. It was Chief Justice Warren's suggestion that the *Harper* opinion rely on equal protection rather than the First Amendment. *Id.*

A. *Lines of Convergence*

1. *Equal Participation*

At this point, it is helpful to recall the three factors identified at the conclusion of Part III to explain why the Court takes a harder look at discretion in some contexts than in others: (1) trust, (2) capacity, and (3) valuation. It is apparent that, to some extent, each of these factors plays a role in the approach taken to the relationship between equality and discretion in different circumstances. For example, in the civil rights era speech cases, such as *Shuttlesworth*, distrust of official decisionmakers appears most prominent. On the other hand, in Conventional Equal Protection cases, such as *McCleskey*, the Court seems more concerned with the institutional capacity of the judiciary to police discrimination that tends to accompany official discretion. It is not so much that the Court trusted jurors to act free from racial bias, as that it believed the courts are unable to stop such bias without stripping decisionmakers of necessary discretion.

There can be no denying that each of the explanatory factors I have identified plays some role in the doctrines developed. While it is difficult to gauge the impact of each of them — and while I certainly do not mean to underestimate the importance of the "trust" and "capacity" factors — the heightened value accorded to equality in the realm of political participation is vital to explaining the differences I have identified. This is the common thread running through the First Amendment and Unconventional Equal Protection cases.

The First Amendment Equal Protection cases from *Thornhill* to *Shuttlesworth* to *Forsyth County* share a preoccupation with government selectively regulating access to channels of communication — especially where core political speech is concerned — behind a veil of discretion. So too, the atypical equal protection rules applied in the jury-exclusion, political-restructuring, and one person, one vote cases stem, at least in part, from cognizance of the special dangers that exist where official or quasi-official misuse of discretion threatens to deny citizens an equal voice in democratic processes. In various contexts, these cases implement requirements of precision and relax ordinary rules regarding justiciability, facial challenges, and appellate factfinding. Adoption of these doctrines serve the overriding objective of promoting equality in the realm of political participation, and preventing official misuse of discretion from denying such equality. These concerns seem to take on special significance where *racial* bias threatens to distort the process of democratic decisionmaking, a recognition implicit in First Amendment cases like *Shuttlesworth* as well as Unconventional Equal Protection cases like *Washington v. Seattle School District* and *Reynolds v. Sims*.

Whatever one thinks of *Bush v. Gore*, its line of reasoning taps into an important insight: that the concerns arising from discretionary access to the political process are similar to those which arise from discretionary systems of regulating expression. There is a stronger and a weaker version of this claim. The stronger version asserts that the First Amendment itself extends to voting and other forms of political participation that have traditionally been examined under the lens of equal protection.[470] The weaker version asserts that such forms of political participation are important for reasons similar to those warranting heightened protection for speech equality — even though they are not protected by the First Amendment. The weaker version would justify the importation of First Amendment modes of analysis into Equal Protection Clause cases on the ground that the interests at stake in these cases, if not themselves First Amendment interests, are worthy of special protection from official discretion for similar reasons. Put another way, this view asserts that there is a common constitutional value underlying rights of speech and rights of political participation.

It is the weaker version of this claim that I seek to press here — namely, the incorporation of a First Amendment Equal Protection approach to inequalities in the realm of political participation is justified because the interests at stake are valuable for similar reasons. Acceptance of the First Amendment Equal Protection approach to political equality does not require belief that the vote itself falls within the scope of the First Amendment. This approach does, however, depend on acceptance of the proposition that rights of equal political participation bear a sufficient similarity to rights of equal expression such that the two should be examined under comparatively protective doctrines.

To see the relationship between speech interests and other interests of political participation, it is helpful to revisit the areas that depart from the Conventional Equal Protection model. The special attention paid to discretion in the jury-exclusion, political-restructuring, and one person, one vote cases arises at least in part from their shared concern with equality of political participation. This is self-evidently true of the political-restructuring cases and the one person, one vote cases. Each of these decisions are expressly concerned with leveling the political playing field. In *Hunter*, *Seattle*

470. Such an argument might draw support from Akhil Amar's contention that the very meaning of the First Amendment changed through its incorporation by way of the Fourteenth Amendment. *See* Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1277 (1992). *But see* Burdick v. Takushi, 504 U.S. 428 (1992) (rejecting a First Amendment challenge to a state prohibition on write-in voting). For an argument that the First Amendment should be construed to extend to voting rights, see Michele Logan, Note, *The Right to Write-In: Voting Rights and the First Amendment*, 44 HASTINGS L.J. 727 (1993).

School District, and *Romer* this means removing barriers to a numerical minority's access to local government. The right to seek "beneficial legislation" from one's government on equal terms with all other citizens, if not itself protected by the First Amendment, bears a conspicuous resemblance to interests protected by the speech and petition clauses. In both cases, there is an interest in being able to approach one's government on equal terms as all other citizens. The political-participation cases protect against exclusion from the political conversation because of one's race (or, in the case of *Romer*, sexual orientation) by adopting a more sensitive test for assessing whether a discriminatory purpose exists.

So too, the one person, one vote cases hinge upon a conception of equal political participation, albeit one that may be incompletely developed. In particular, the one person, one vote cases do not explain what sort of inequality they are guarding against (for example, schemes that skew the process to the advantage of a political party, a racial group, or incumbents). What *is* clear from the one person, one vote cases, however, is that they are rooted in a conception of the "equal dignity owed to each voter." In *Bush v. Gore*, for example, the Court notes that the states might chose to take away from their citizens the right to cast votes for the President entirely. What the state may not do is to selectively disenfranchise its citizens. The greater power to deny political participation entirely does not include the lesser power to do so on an unequal basis.

The role that juries play as instruments of democratic self-government can likewise help explain the connection between the jury-selection cases, the political-restructuring cases, and the one person, one vote cases. The jury, from the Founding on, has served not only as a factfinder but also as a fundamental component of the American democracy.[471] Alexis de Tocqueville famously remarked that "the jury is above all a political institution," taking the position that "it is essential that the jury lists should expand or shrink with the lists of voters."[472] The post-*Batson* jury-selection cases likewise rely on the central place of the jury as a forum for democratic participation, a role distinct from its function as a mechanism by which to educate the

471. Amar, *supra* note 305, at 218-21 ("[T]he jury was an essential democratic institution because it was a means by which citizens could engage in self-government.").

472. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 250-51 (J.P. Mayer & Max Lerner eds., George Lawrence trans., Harper & Row 1966) (1848). Another European expatriate, German philosopher Frances Lieber, made a similar point about the American jury system: "Self-government, to be of a penetrative character . . . consists in the presenting grand jury, in the petty jury, in the fact that much which is called on the European continent the administrative branch is left to the people." FRANCIS LIEBER, ON CIVIL LIBERTY AND SELF-GOVERNMENT 321 (Theodore D. Woolsey ed., 3d ed., rev., Philadelphia, J.B. Lippincott & Co. 1891).

citizenry.[473] For example, in extending third-party standing to criminal defendants challenging peremptory strikes of other-race jurors, *Powers v. Ohio* expressly stated: "The opportunity for ordinary citizens to participate in the administration of justice has long been recognized as one of the principal justifications for retaining the jury system."[474] Jury service, *Powers* proceeds to explain, "preserves the democratic element of the law."[475] It *is* democracy in action. For this reason, mechanisms that deny equal participation on juries warrant especially rigorous review.

Understanding the jury box as a forum for political participation on par with the ballot box not only helps explain the special scrutiny accorded to race-based peremptories in cases such as *Batson*; it also helps explain the apparently divergent approaches to juror decisionmaking evident in Conventional Equal Protection cases like *McCleskey* and First Amendment Equal Protection cases like *Herndon* and *New York Times v. Sullivan.* In particular, *McCleskey* suggests an unwillingness to limit the discretion of juries, since doing so would effectively restrict their ability to participate in this forum for democratic conversation. While the Court properly views juror decisionmaking (at least sometimes) as the exercise of rights of political participation, it is willing to take power away from these institutions of democracy in cases where the political expression of unpopular minorities is placed at risk. This risk may be viewed as less acute in death penalty cases, because the jury is not regulating access to channels of political participation in these cases. Because the death penalty cases present no danger of distorting public discourse to the disadvantage of a locally unpopular minority, the Court may be unwilling to override jury decisionmaking in this area.

The Court's decision this past term in *Ring v. Arizona*,[476] requiring the jury to find the preconditions for imposition of a death sentence, supports this interpretation of *McCleskey. Ring* suggests that respect for the critical role that the jury plays in democratic self-government at least partly underlies the Court's unwillingness to override the jury's decisionmaking authority — absent a countervailing infringement on rights of political participation, as was present in cases such as *Herndon* and *New York Times v. Sullivan.*[477]

473. *See* Amar, *supra* note 305, at 221 (noting de Tocqueville's distinction between "actual self-government through juries" and "development of self-governance skills from jury service").

474. 499 U.S. 400, 406 (1991).

475. *Powers*, 499 U.S. at 407.

476. 536 U.S. 584 (2002).

477. 376 U.S. 254 (1964). One might still believe that *McCleskey* underestimates the dangers or undervalues the harms resulting from discriminatory implementation from the death penalty. Indeed, Mark Rosenbaum and I have taken such a position. *See* Rosenbaum & Tokaji, *supra* note 256, at 1965 (arguing for an approach that would take into considera-

To be sure, the special importance of equality in the realm of political participation is not the *only* factor supporting the special doctrines created to curb the distorting effects of discretion in the First Amendment and Unconventional Equal Protection cases. Concerns with the capacity of courts to create an administrable remedy and distrust of decisionmakers in particular contexts also play a role in shaping the legal doctrine. For example, the refusal of the *McCleskey* Court to interfere with juror decisionmaking — tainted as it may be with racial bias — arises in part from the difficulty of coming up with a suitable remedy, short of holding the death penalty unconstitutional in its entirety. And if the death penalty were entirely invalidated, the Court feared a slippery slope with respect to less severe forms of criminal punishment.[478] So too, the reluctance of the courts to enter the fray with respect to claims of racial discrimination by police departments might arise from remedial concerns.

It is noteworthy that the Supreme Court has not demonstrated the same reluctance to interfere where claims of race discrimination in the composition of juries are at issue. For example, despite the public attention devoted to issues of racial profiling in the enforcement of traffic laws, courts have so far been unwilling to adopt rules like that adopted in the jury-exclusion cases — i.e., the existence of discretion plus a statistical disparity equals a prima facie case of discrimination.[479] Even if the value attached to political participation is not the only reason for the heightened sensitivity accorded official discretion in First Amendment and Unconventional Equal Protection cases, it is an important part of the explanation.

2. *The Priority of Participation*

Still wanting, however, is a theoretical explanation for prioritization of equality in the realm of political participation. Why should equality in the realm of political participation be given greater protection from discretionary decisionmaking than equality in other areas?[480] Asserting that there is an expressive element to rights of political participation only partly explains these differences.

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tion the "interplay between McCleskey's Eighth Amendment and Fourteenth Amendment claims"). My argument here is not that *McCleskey* was correctly decided, but only that its holding can be reconciled with cases like *Herndon* and *New York Times* if we understand the Court to be *especially* concerned with racial bias creeping into jury decisionmaking when political expression is at issue.

478. *See id.* at 1956-57.

479. *Id.* at 1969-70.

480. For an argument that the right to political participation is among the core values of equal citizenship, see Kenneth L. Karst, *The Supreme Court 1976 Term — Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 8-9, 26-29 (1977).

In seeking such an explanation, it is instructive to revisit the competing theories of First Amendment equality discussed in Part I, one atomistic (focusing on the individual speaker's interest in autonomy) and the other systemic (focusing on a balanced public discourse that allows a diversity of groups to have their views aired). It has not up until now been necessary to adjudicate these views, at least for my purposes, because they share a concern with preventing the government from singling out particular speakers for disfavored treatment because of their messages or ideas. But having now reviewed the doctrines developed to resolve the tension between equality and discretion in various contexts, we may assess what theoretical justification might exist for these differences. In particular, we may consider whether either of these theories provides a satisfactory account of the different rules applied in the First Amendment Equal Protection, Conventional Equal Protection, and Unconventional Equal Protection cases. That is not to suggest that all of these cases have been correctly decided. It is certainly possible that some of these cases were incorrectly decided, and even that some of the doctrines that have developed are wrongheaded. But departures from our settled precedent should lead us at least to question the explanatory power of the predominant First Amendment theories.[481]

Such an examination reveals that neither the atomistic nor the systemic views of expressive equality provides a wholly satisfactory account of the different equal protection standards. An atomistic view of the First Amendment, predicated upon individual autonomy, has no convincing explanation for why rights of political participation should receive special protection, in comparison with other interests. It cannot, for example, explain why a prospective Latino juror has a more important interest in being free from racial discrimination on the part of a prosecutor, than does a Latino driver on Interstate 5 stopped by the California Highway Patrol for going five miles over the speed limit. It is not apparent that one's interest in individual autonomy is any less implicated by the former than the latter example. The contrary would instead appear to be the case. Nor is it immediately evident how a theory predicated on individual autonomy would explain the greater scrutiny accorded to victims of quantitative malapportionment, as opposed to those sentenced to death as a result of racial bias within the capital sentencing system.

481. *Cf.* RAWLS, A THEORY OF JUSTICE, *supra* note 61, at 42 (suggesting that theories of justice should be measured by how well they account for our "considered judgments" reached after due consideration). My suggestion draws upon Rawls, in suggesting that constitutional theories should be evaluated, at least in part, by how well they account for considered judgments reflected in settled case authority. As in Professor Rawls's work, this is not to suggest that such judgments are beyond revision. *Id.* But comparing our considered judgments to what various theories of free speech would appear to demand at least provides a starting point by which to evaluate the adequacy of those theories.

The special doctrines created to monitor inequalities in the political process also defy explanation under an atomistic theory premised on individual autonomy. This theory can perhaps explain a case like *Harper*, striking down the poll tax, on the ground that our right to be treated as equal citizens — and to exercise the most basic of roles as a citizen by casting a vote — should not be denied on account of limited means. But it is difficult to explain the rule developed in the one person, one vote cases on the ground that it is necessary to respect each individual's right to be treated as an "equal sovereign citizen."[482] The harm to individual autonomy arising from such deviations from the one person, one vote seems quite attenuated.[483] It is, for example, difficult to see how an individual voter's right to vote is denied by being placed in a voting district that is slightly larger than a neighboring district, to the extent that we view each voter atomistically. For each voter is still able to cast a vote for his or her preferred candidate, and thereby to realize his or her interest in self-representation. The real harm can only be judged by virtue of the impact of malapportionment upon the *groups* negatively affected by such malapportionment — for example, African Americans as a group, to the extent they are more likely to reside in larger voting districts, and therefore have their collective political power diminished.[484]

Indeed, the atomistic theory even has difficulty explaining some of the differences *within* First Amendment doctrine. Take, for example, the case of *National Endowment for the Arts v. Finley*,[485] which upheld a highly discretionary system of distributing public funds for artistic expression. The vague standard for allocation of federal funds in *Finley*, based on "artistic merit," allows and indeed requires public officials to evaluate the content of speech in determining how public monies are spent. Suppose, however, that a state legislature were to develop a scheme of publicly financing political-advocacy organizations that left a state commission discretion to award funds based upon "political merit." Such a scheme could not withstand constitutional scrutiny, allocating as it does vast discretion to public officials that very easily could be used to advance favored viewpoints and put disfavored viewpoints at a relative disadvantage. The atomistic view cannot, however, explain why political expression should be privileged over artistic expression.

482. Fried, *supra* note 82, at 233.

483. *But see* Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1072 (1980) (explaining the one person, one vote rule as "an expression of the equal respect in which we as a society aspire to hold each individual").

484. *See* Gerken, *supra* note 421, at 1682-84 (defining the right to an undiluted vote as an aggregate right, in part because it can only be understood by reference to an individual's relation to the group).

485. 524 U.S. 569 (1998).

At first glance, the systemic theory of the First Amendment based upon creation of a robust public discourse seems to do better. The First Amendment Equal Protection cases — especially those arising out of the civil rights era and those arising from dissident political speech — likewise appear to rest on some conception of a fair political discourse. The objective, after all, in these cases was to prevent unfriendly bureaucrats, juries, and judges from tilting the expressive playing field to the disadvantage of an insurgent political force.

The systemic theory also provides some explanation for the differences between First Amendment Equal Protection and Conventional Equal Protection, since the idea of a democracy that allows all segments of society to be heard — regardless of wealth, race, or political influence — underlies this theory.[486] A malapportioned state legislature, which leaves each voter in one county with ninety-nine times the voting strength of each voter in another county, would seem to violate this principle. So too, the systemic view would appear to do a better job at first glance of explaining the political-restructuring cases. In particular, these cases can be understood under this theory as dealing with the concern that hidden racial bias may distort the public debate, leaving the voices of certain disfavored segments of society unheard. It also does a good job of explaining the first generation of jury exclusion cases, which focused upon one segment of society — African Americans — being denied the opportunity to have their voices heard in one important facet of the democratic process. The greater skepticism with which courts view the exercise of official discretion when it impinges on expressive equality is of less importance when that discretion, although perhaps arising from racial bias, does not "skew" the democratic process.

A closer examination of the systemic view, however, reveals some serious problems. For one thing, a theory that focuses on systematic distortions of the public debate cannot explain the distinction between *Seattle School District* and *Crawford* very well. Recall that the distinction between the initiatives in the two cases was that one regulated access to the political process and the other access to a judicial remedy. It is not immediately apparent why one distorts public debate any more than the other — the only difference is the forum within which that debate takes place. But if the only goal is a fair public discourse, it is not immediately apparent why distortions of that discourse should be treated with less deference when they take place in a political rather than a judicial forum.

This theory also cannot explain a case like *Bush v. Gore*, since there was little evidence described in the Court's opinion that

486. Owen Fiss, for example, predicates his theory on the idea that the speech of some should not be permitted to "drown[] out the voices of others or systematically distort[] the public agenda." Fiss, *Why the State?*, *supra* note 98, at 786.

Florida's recounting procedure allowed the playing field to be tilted for or against anyone. It was not, for example, clear that urban dwellers were disadvantaged by the vote-counting procedures rather than rural dwellers, that Republicans were disadvantaged relative to Democrats, or that whites were disadvantaged relative to blacks. At best, the Court may have suspected that one group of citizens (those supporting Bush) might be placed at a relative disadvantage by Florida's manual-recount procedure. In all the other cases, there was proof that a class of voters was being disadvantaged. Finally, the systemic theory does a poor job of explaining the special scrutiny that the Court has accorded the exercise of peremptory challenges. For if *both* sides of a case have the opportunity to strike prospective jurors they disfavor — whether upon grounds of race, gender, age, or viewpoint — there would seem to be very little risk that the jury's dialogue would be "distorted."

What the systemic theory misses is the importance of equal *participation* in both the First Amendment Equal Protection and Unconventional Equal Protection cases. For theorists in the Meiklejohn tradition, "[w]hat is essential is not that everyone shall speak, but that everything worth saying shall be said."[487] But the focus on equal *participation* in the Unconventional Equal Protection cases belies the suggestion that the breadth of speech product available to listeners is all that matters — it also matters that each citizen have the opportunity to speak and to have her voice heard. Put another way, it is important for all citizens to have an equal opportunity to partake in the conversations of democracy.

This is closely related to a more fundamental objection that liberal scholars have raised to theories which rest upon some conception of a fair political process or rich public discourse. Any such theory must somehow explain what a just process would look like. As Professor Tribe puts it: "Deciding what *kind* of participation the Constitution demands requires analysis . . . of the character and importance of the interest at stake."[488] While proponents of democracy-based theories of the First Amendment refer to the ideal of a "rich public debate,"[489] determining what a fair public debate looks like requires some normative theory of rights — a vision of how the political system ought to

487. MEIKLEJOHN, POLITICAL FREEDOM, *supra* note 87, at 26; *see also* Barron, *supra* note 88, at 1653 (quoting Meiklejohn with approval). *But see* Karst, *Equality in the First Amendment*, *supra* note 7, at 39-41 (arguing that even if one accepts Meiklejohn's proposition, there is still a need to define public fora broadly "in order to ensure that all will be heard").

488. Tribe, *supra* note 483, at 1069; *see also* TRIBE, *supra* note 74, § 12-1, at 787 (noting that a conception of free speech that rests upon political participation must ultimately explain why these things are to be valued).

489. Fiss, *Free Speech and Social Structure*, *supra* note 88, at 1410.

function.[490] To speak of "distortions of public debate,"[491] as scholars who advocate a systemic conception of speech are wont to do, is therefore a bit of a cheat. Different observers are likely to have radically different views as to what a fair political process would look like, and therefore about what it means for the political process to be distorted or skewed, either in the area of expression or with respect to other areas of political participation. Relying on some vision of a fair political process therefore cannot allow us to escape normative judgments about how we value various political and civil rights, and which should be given priority in particular circumstances.[492]

The debate between the majority and the dissent in *Romer* brings this problem dramatically to light. Both sides try to explain their views in terms of some vision of a fair political process, yet arrive at diametrically opposed conclusions. The majority envisions a fair political process as one that is free from animus against a particular group of citizens, including antigay animus. In particular, a fair political process rests on two principles: (1) "that government and each of its parts remain open on impartial terms to all who seek its assistance," and (2) that the electorate may not close off such access based upon "animosity toward a class of persons."[493]

Justice Scalia's dissent sees the process problem quite differently. For him, the problem that the Colorado electorate was trying to address was that of a geographically concentrated and powerful cadre of citizens "capturing" a local government, thereby undermining the clearly expressed will of a majority of state voters. He characterizes the initiative as a "modest attempt by seemingly tolerant Coloradans to preserve sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws."[494] For Justice Scalia, the fact that the initiative may have been borne of hostility or animus towards gays was irrelevant.[495] In short, his dissent envisions a fair (or at least a constitutional) political process as one in which a majority of the state's electorate rules, even if it acts based upon animus toward a particular group.

The point here is not to debate whether the majority or dissent has the better argument. It is instead to emphasize that *both* of their

490. *See* Overton, *supra* note 32, at 83 (noting that "one's assumptions about how democracy works or should work" may explain the choice between rules and standards with respect to the democratic process).

491. Fiss, *Free Speech and Social Structure*, *supra* note 88, at 1413.

492. *See* Tribe, *supra* note 483, at 1069. Of course, Professor Ely's elaboration of a process-based theory of constitutional rights may be seen as an attempt to explain how such normative judgments should be made. *See generally* ELY, *supra* note 413.

493. Romer v. Evans, 517 U.S. 620, 633-34 (1996).

494. *Id.* at 636 (Scalia, J., dissenting).

495. *Id.* at 644.

arguments depend upon a vision of how politics should function. The systemic theory of speech thus cannot get around the sticky problem of defining what sort of democratic participation the Constitution requires. No theory of political participation, whether grounded in the First Amendment or the Equal Protection Clause, can escape these sorts of judgments.

While neither the atomistic nor the systemic theory provides a completely satisfactory account of the ideal of equal participation evident in the First Amendment Equal Protection and Unconventional Equal Protection cases, parts of both theories are essential to this ideal. The systemic view of the First Amendment properly recognizes that there is something special about *political* discourse that demands especially searching review of schemes that vest discretion to regulate in this area. The atomistic view captures the idea that it is not sufficient simply to have a range of ideas available to those interested in hearing them, but that it is also important to provide an opportunity for equal *participation* in the processes of democracy.

The approach I suggest is thus not exclusively atomistic or systemic, but instead carries elements of both. Professor Fallon's explanation for the special overbreadth rules applicable under the First Amendment nicely captures this duality: "The First Amendment, more even than any other constitutional provisions conferring fundamental rights, contributes vitally to the preservation of an open, democratic political regime, at the same time as it secures rights of high importance to particular individuals."[496] But First Amendment cases, as I have attempted to show, are not the only ones specially concerned with the twin goals of promoting an open democracy and protecting the individual's right to be treated as an equal sovereign citizen. That ideal is also implicit in the Unconventional Equal Protection cases looking with special skepticism upon discretion that implicates equal political participation, whether that discretion is wielded by police officers, bureaucrats, juries, judges, or the electorate. It is therefore worth exploring whether there are other areas of political participation that might benefit from closer examination, under the light cast by First Amendment Equal Protection cases.

B. *New Directions*

In *Snowden v. Hughes*, the Court stated that "the necessity of a showing of purposeful discrimination is no less in a case involving political rights than in any other."[497] As my discussion of the Unconventional Equal Protection cases shows, the Court has not consistently

496. Fallon, *Making Sense of Overbreadth*, *supra* note 203, at 884 n.192.

497. 321 U.S. 1, 11 (1944)

adhered to this rule. The truth is that the Court *has* embraced a different analysis for assessing purposeful discrimination in considering schemes that threaten equal political participation, just as it has adopted a different analysis in considering schemes that mask purposeful discrimination in the First Amendment context. Yet it has never expressly acknowledged the link between the line of reasoning applied in equal protection cases implicating access to the political process and in expressive equality cases decided under the First Amendment.

In each of these areas, the Court has adopted a version of what might be termed "front end" strict scrutiny. Traditional strict scrutiny only kicks in on the "back end," requiring the government to show narrow tailoring to a compelling interest only *after* a prima facie case has been shown (e.g., after intentional race discrimination or content-based classification has been shown). But if the plaintiff cannot show a facial classification or prove discriminatory purpose, then the government is never required to meet this burden.

The Unconventional Equal Protection cases on the other hand, apply a more searching test on the front end in determining whether a prima facie case is made. The jury-selection cases allow such a case to be made where a discretionary system has a disparate impact on a particular group. The political restructuring cases allow such a case to be made where the "practical effect" of a law enacted by the electorate is to make it more difficult for a particular minority group to secure beneficial legislation. The one person, one vote cases impose a presumption of unconstitutionality where there are significant disparities in the size of a voting district, without even a showing of disparate impact upon any particular racial group. They also evince a more relaxed approach to justiciability and facial challenges, as well as a willingness to examine more thoroughly the evidentiary record on appeal. Each of these doctrines indicates a searching form of up-front scrutiny arising from the special concern with potential inequalities that may affect political participation. This is comparable to what the Court has long done in First Amendment Equal Protection cases, striking down discretionary schemes on their face without requiring proof of actual content or viewpoint discrimination. The principal difference is that in the First Amendment Equal Protection cases, the presumption is irrebuttable. For instance, as in *Forsyth County* or *Shuttlesworth*, the government cannot win by showing that — despite the existence of a discretionary scheme that left its officials room within which to discriminate — it did not *really* discriminate. The *Bush v. Gore* Court, interestingly, appears to have applied a similar irrebuttable presumption.

One might object to importation of First Amendment Equal Protection doctrines into other areas implicating rights of political participation, on the ground that such rights, though they may bear a

resemblance to expression, are not *really* speech rights. Professor Tribe, for example, argues that voting "is not so much a matter of engaging in positive acts of speech . . . but of participating in a collective political enterprise."[498] To the extent that this observation suggests that the act of casting a vote is not *exclusively* an act of expressing one's views, he is surely correct. If voting is a sort of speech act, it is not only one that has a special sort of consequence but also one that has a special social meaning: it is the quintessential act of political participation. This, however, does not differentiate it from other sorts of speech acts for which the Court has adopted special protections through the First Amendment Equal Protection cases. For many of those cases, including *Shuttlesworth*, *New York Times*, and even *Forsyth County*, also implicated participation in a "collective political enterprise." Moreover, the fact that voting also implicates the value of political participation — perhaps even more directly than in First Amendment cases — cannot justify *less* searching review of discretionary election systems that threaten to deny equal protection. If anything, it suggests that judicial review of systems denying equality with respect to the voting process should be subject to *more* searching review.

The heightened value attaching to political participation, to be sure, is not the *only* factor motivating the heightened attention to official discretion in the First Amendment and Unconventional Equal Protection cases. Also of importance are the value that attaches to discretion in a particular context, the capacity of courts effectively to administer a legal rule that will rein in the harmful effects of discretion without destroying it, and the degree to which circumstances suggest that race or viewpoint based discrimination is likely under the circumstances presented.

The threat to equality of political participation is therefore not the *only* consideration motivating a shift away from Conventional Equal Protection. But it is, and should be, an important determinant in the development of doctrines designed to restrain official discretion where it bears upon the functioning of the political process. The problem of equality and discretion, then, is not one that is susceptible to an easy formulaic answer. Where it is necessary to balance equality and discretion as the Court has done in many contexts, my approach would require a thumb be placed on equality's side of the scale where rights of political participation are at stake — especially where race discrimination may be at work. Such an approach should cause us to think about some familiar problems in a different way.

I close with three areas of political equality that might appear differently if viewed through the lens of First Amendment Equal

498. Tribe, *supra* note 424, at 243.

Protection. The suggestions below are necessarily tentative. My objective here is not to present a full-blown argument that particular practices would be deemed unconstitutional, but rather to suggest how borrowing from the First Amendment Equal Protection cases' approach to official discretion might affect the constitutional analysis of such problems. Such an analysis is particularly salient, given that suspected but hard-to-prove racial discrimination lies in the background of each of these equal protection problems. In other words, the examples below present cases in which racial discrimination and viewpoint discrimination may at least partly overlap, making the sort of analysis applied in the First Amendment Equal Protection cases especially appropriate.

1. *Election Reform*

Disparities in the electoral process might seem the most obvious candidate for examining inequalities of political participation under the lens of First Amendment Equal Protection. Among the most pressing set of democracy-related questions is how the line of equal protection precedent culminating in *Bush v. Gore* will affect currently pending efforts at election reform. As explained below, the most important implications of First Amendment Equal Protection may lie not in the area of voting technology, which has heretofore attracted the most attention, but rather to other areas in which discretion may threaten equality of political participation.

In the wake of the November 2000 elections, several lawsuits were filed throughout the country challenging disparities in the systems used to cast and count votes.[499] In the months that followed, a raft of reports analyzed various problems plaguing our voting systems and potential solutions.[500] While these studies have not reached uniform

499. In the months following the November 2000 election, attorneys in Florida, Georgia, Illinois, and California brought lawsuits challenging their states' continuing reliance on punch-card voting systems. Common Cause v. Jones, No. 01-3470 (C.D. Cal. filed Apr. 17, 2001); Black v. McGuffage, No. 01-C-208 (N.D. Ill. filed Jan. 11, 2001); NAACP v. Harris, No. 01-CIV-120 (S.D. Fla. filed Jan. 10, 2001); Andrews v. Cox, No. 01-CV-0318 (N.D. Ga. filed Jan. 5, 2001). For selected pleadings and orders from these and other voting cases filed in the wake of the November 2000 elections, see Election 2000, *at* http://election2000.stanford.edu/ (last visited Oct. 3, 2003).

500. *See, e.g.*, CALTECH-MIT VOTING TECH. PROJECT, VOTING — WHAT IS, WHAT COULD BE (2001) [hereinafter CALTECH-MIT]; CONSTITUTION PROJECT, BUILDING CONSENSUS ON ELECTION REFORM (2001) [hereinafter CONSTITUTION PROJECT]; DEMOCRATIC CAUCUS SPECIAL COMM. ON ELECTION REFORM, REVITALIZING OUR NATION'S ELECTION SYSTEM (2001) [hereinafter DEMOCRATIC CAUCUS]; NAT'L TASK FORCE ON ELECTION REFORM, ELECTION CTR., ELECTION 2000: REVIEW AND RECOMMENDATIONS BY THE NATION'S ELECTIONS ADMINISTRATORS (2001) [hereinafter NAT'L TASK FORCE]; SURVEY RESEARCH CTR. & INST. OF GOVERNMENTAL STUDIES, UNIV. OF CAL., BERKELEY, COUNTING ALL THE VOTES: THE PERFORMANCE OF VOTING TECHNOLOGY IN THE UNITED STATES (2001) [hereinafter SURVEY RESEARCH CTR.]; TASK FORCE ON THE FED. ELECTION SYSTEM, NAT'L COMM'N ON FED. ELECTION REFORM, TO

conclusions, almost all suggest problems that go well beyond the mechanical devices used for voting, resulting in inequalities in whose votes actually gets counted.[501]

What these studies reveal is wide variations among counties in various aspects of the voting process, including machinery used to cast votes, registration systems, polling-place operations, provisional voting, and the use of sample ballots. The amount of discretion that states delegate to local election officials in the conduct of elections varies dramatically from state to state:

> State election codes and regulations may be very specific or very general. Moreover some states have mandated statewide election administration guidelines and procedures that foster uniformity in the way local jurisdictions conduct elections. Other states have guidelines that generally permit local election jurisdictions considerable autonomy and discretion in the way that they run elections.[502]

A "decentralized" approach to the conduct of elections predominates in most states, devolving responsibility for the conduct of elections to more than 10,000 counties, cities, and other local governmental entities.[503]

Problems with the methods by which votes are cast have attracted the most attention and, it appears, have been the subject of the most litigation thus far.[504] Studies of voting systems conducted in the wake of the November 2000 election have found significant disparities in the uncounted vote rate — that is, the combined "overvote" and "undervote" — arising from the use of different types of voting machines. According to a comprehensive study of data from the 2000 elections conducted by Professor Henry Brady and his colleagues at the University of California, Berkeley, Survey Research Center, punch-card systems result in significantly more uncounted votes than direct record electronic systems, lever machines, optical-scan systems, or paper

ASSURE PRIDE AND CONFIDENCE IN THE ELECTORAL PROCESS (2001) [hereinafter NAT'L COMM'N ON FED. ELECTION REFORM]; U.S. GEN. ACCOUNTING OFFICE, ELECTIONS: PERSPECTIVES ON ACTIVITIES AND CHALLENGES ACROSS THE NATION (2001) [hereinafter GAO PERSPECTIVES].

501. *See, e.g.*, CALTECH-MIT, *supra* note 500, at 21 (finding significant disparities in residual vote rate among voting systems); SURVEY RESEARCH CTR., *supra* note 500, at 2 (finding that punch card systems have significantly higher residual vote rates than other systems); U.S. GENERAL ACCOUNTING OFFICE, ELECTIONS: STATISTICAL ANALYSIS OF FACTORS THAT AFFECTED UNCOUNTED VOTES IN THE 2000 PRESIDENTIAL ELECTION (2001) [hereinafter GAO STATISTICAL ANALYSIS] (finding that uncounted votes varied in part based on type of equipment used).

502. GAO PERSPECTIVES, *supra* note 500, at 7.

503. CALTECH-MIT, *supra* note 500, at 13 ("Almost all states have given the authority for administering elections to local governments."); GAO PERSPECTIVES, *supra* note 500, at 30 n.7.

504. *See* cases cited *supra* note 499; Hasen, *supra* note 428, at 398-402 (describing the benefits and costs of requiring equality in the mechanics of elections).

ballots.[505] In some but not all states, people of color are particularly hard hit by the technology gap.[506]

These statistical disparities have resulted in litigation challenging states' continuing use of systems with differing uncounted-vote rates. The structure of the argument bears at least a superficial similarity to that embraced by the Court in *Bush v. Gore.* In *Bush v. Gore*, the problem complained of was the state's failure to set adequate standards for manual recounts, resulting in significant disparities among counties. In the punch-card litigation, the problem complained of is the states' failure to set adequate standards for voting systems, resulting in significant disparities among counties.[507]

Such a challenge is one that might conceivably have been raised even before *Bush v. Gore*, based on the one person, one vote line of cases. Indeed, in one sense, it presents a much easier case for application of settled equal protection principles than *Bush v. Gore.* For there was relatively little statistical evidence of intercounty disparities within Florida arising from the manual recount procedures used. By contrast, there is already a significant and growing body of evidence proving that disparities arise from the different systems used to cast votes.[508] This makes the voting-machine cases much more similar to traditional quantitative vote-dilution cases, in which it is possible to present empirical proof that the relative voting strength of different counties has been strengthened or diminished by the challenged practice.[509]

The voting-machine litigation thus presents a relatively clear case of inequalities in the opportunities for political participation arising

505. SURVEY RESEARCH CTR., *supra* note 500, at 4, 29; *see also* GAO STATISTICAL ANALYSIS, *supra* note 501, at 9 (finding that counties using punch card had a higher percentages of uncounted votes than those using electronic, paper, or optical scan systems).

506. *See* Stephen Knack & Martha Kropf, Who Uses Inferior Voting Technology?, *at* http://unofficial.umkc.edu/kropfm/inferior.pdf (Jan. 2001); *see also* Michael Tomz & Robert P. Van Houweling, How Does Voting Equipment Affect the Racial Gap in Voided Ballots?, at 18, *at* http://www.stanford.edu/~tomz/pubs/gap.pdf (June 12, 2002) (finding black-white disparity in voided ballots to be substantially lower on modern direct-record electronic systems than on punch cards and optical-scan systems).

507. *See* Common Cause v. Jones, 213 F.Supp.2d 1106, 1107 (C.D. Cal. 2001).

508. *See, e.g.*, SURVEY RESEARCH CTR., *supra* note 500; Tomz & Van Houweling, *supra* note 506.

509. On the other hand, there may be stronger justifications for using different voting systems than for using different recounting standards within a state. In particular, the increased costs of converting to more reliable systems, states have argued, distinguish the two scenarios. *See* Hasen, *supra* note 428, at 399 (stating that "the costs associated with upgrading voting equipment . . . will be considerable"). I do not here dwell on whether this argument might justify using voting systems of varying degrees of reliability within a state. However, to the extent that the one person, one vote cases are deemed applicable to voting system disparities, those cases require application of strict scrutiny to intercounty inequalities. *Id.* at 389 ("It is hornbook law that laws infringing on fundamental rights, including voting, must be judged under the standard of strict scrutiny . . . .") Under this level of scrutiny, the costs of remedying the claimed inequalities are not generally an adequate justification for allowing those inequalities to persist. *Id.* at 395.

from the discretion vested in local officials — in this case, the discretion to choose what type of voting machinery to use.

While the use of different kinds of voting machines may be the most visible electoral equality issue to emerge in the wake of the November 2000 elections, it is probably not the most significant, either in terms of its impact on the number of votes counted or its impact on equal protection doctrine. It is only one of the several areas in which the discretion delegated to local officials in the conduct of elections may result in inequalities among voters. One study, for example, estimates that approximately 4 to 6 million votes were lost in the November 2000 elections. Of those, approximately 1.5 to 2 million votes were lost due to voting equipment or confusing ballots, while an estimated 1.5 to 3 million were lost due to voter-registration problems and up to 1 million were lost due to problems in polling-place operations.[510] While these calculations are admittedly rough, they do suggest other areas in which the states have delegated discretion to local officials that may have a substantial impact upon electoral equality.

An approach to these problems that draws upon First Amendment Equal Protection doctrine would look with particular skepticism on decentralized election systems conferring significant discretion upon county officials — even where it is difficult to isolate any particular factor and empirically prove that any particular group has been disadvantaged as a result of that factor. Take, for example, the problems that several studies have found to exist in voter-registration systems. Most of the studies conducted after the November 2000 elections suggest that this is among the most serious existing problems with our voting system.[511] Only thirteen of the states have a statewide voter-registration system, resulting in wide variations across jurisdictions (and even within jurisdictions) in how voter registration is handled.[512] For example, voter-registration forms missing certain information (e.g., the last four digits of one's social security number) may be treated differently from county to county, or even within one county.[513] Aggravating the problems arising from the lack of statewide registration systems are the inconsistent practices by which voters' names are "purged" from the voting rolls.[514] Quantifying the number of votes lost as a result of the defects in registration systems — let alone determining whether particular groups are disproportionately

510. CALTECH-MIT, *supra* note 500, at 9.

511. *See, e.g.*, CALTECH-MIT, *supra* note 500, at 9, 26-31; DEMOCRATIC CAUCUS, *supra* note 500, at 37-43; GAO PERSPECTIVES, *supra* note 500, at 51-98; NAT'L COMM'N ON FED. ELECTION REFORM, *supra* note 500, at 26-33.

512. GAO PERSPECTIVES, *supra* note 500, at 72, 95.

513. *Id.* at 72.

514. CALTECH-MIT, *supra* note 500, at 29.

harmed — is extremely difficult.[515] Nevertheless, in at least one case, voters have claimed that Florida officials disproportionately purged African American voters from the rolls.[516]

Some of the post-2000 election studies recommend that all states implement statewide voter-registration systems, as a means to promote uniform treatment of voters across jurisdictions.[517] Such a system, if not a panacea, might reduce the degree of discretion exercised by local officials in determining how registrations should be handled and who should be purged. The question is whether one might challenge interjurisdictional disparities in voter registration within a state, without evidence of either discriminatory intent or disparate impact as to any particular racial or ethnic group. Under traditional equal protection analysis, and even under the one person, one vote doctrine, such a challenge would seem unlikely. Conventional Equal Protection analysis would require a showing of discriminatory intent, while the one person, one vote cases would at the very least require some statistical proof of quantitative vote dilution.

On the other hand, the analysis applied in *Bush v. Gore* — and borrowed from the First Amendment Equal Protection cases — might allow such disparate practices to be held unconstitutional even without proof of discriminatory intent or disparate impact. For in these cases, the delegation of broad discretion to government officials, even without proof that a particular group has been disadvantaged, has sufficed to make out a violation. It is thus in areas like voter registration, rather than voting machinery, where *Bush v. Gore*'s incorporation of First Amendment Equal Protection analysis may ultimately prove most significant. Borrowing from the jury-selection cases, one might require at least *some* empirical evidence of disparate impact or treatment, in addition to the presence of discretion, to make out a prima facie case of discrimination. Courts might adopt a similar approach to analysis of other problems that the election-reform reports have identified, including intrastate disparities in provisional voting,[518] distribution of sample ballots in advance of the election,[519] and poll-worker

515. *Id.* at 8-9 (making a rough estimate of number of votes lost due to registration mix-ups).

516. NAACP v. Harris, No. 01-CIV-120 (S.D. Fla. filed Jan. 10, 2001).

517. *See, e.g.*, DEMOCRATIC CAUCUS, *supra* note 500, at 40; NAT'L COMM'N ON FED. ELECTION REFORM, *supra* note 500, at 29.

518. *See* NAT'L COMM'N ON FED. ELECTION REFORM, *supra* note 500, at 36 (recommending that every state adopt a provisional voting system); NAT'L TASK FORCE, *supra* note 500, at 44 (noting that more than half the states do not have a system for provisional voting).

519. CONSTITUTION PROJECT, *supra* note 500, at 1-2 (advocating distribution of sample ballots to all voters); DEMOCRATIC CAUCUS, *supra* note 500, at 50-51 (noting variations in state practices for distributing voting guides, including sample ballots); GAO PERSPECTIVES, *supra* note 500, at 176 (noting variations in distribution of sample ballots among jurisdictions); Peter Brien, *Voter Pamphlets: The Next Best Step In Election Reform*, 28 J. LEGIS. 87 (2002).

recruitment, training, and pay.[520] Each of these practices may have a disparate impact upon particular groups, albeit one that is very difficult to prove.

I do not mean to underestimate the difficulties of developing judicially manageable standards to disparities in any of these areas. What I am suggesting is that courts should look more closely than they previously have at decentralized electoral systems that confer broad discretion upon local officials, where the nature of that discretion makes it difficult to determine whether particular groups are disadvantaged. The problem here is comparable to that identified by the *City of Lakewood* Court: the absence of precise, uniform standards prescribed in advance makes it very easy for officials to discriminate behind a veil of discretion.[521] "Without these guideposts, *post hoc* rationalizations by the [official] and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether the [official] is permitting favorable, and suppressing unfavorable, expression."[522] The kernel of equal protection wisdom buried in *Bush v. Gore* is that this danger should be taken just as seriously in the voting process as it is in the speech context.

2. *Incumbent Gerrymandering*

The voting process is not the only area that might stand to benefit were it to borrow from the First Amendment Equal Protection cases. Another area that may warrant more searching up-front analysis is the redrawing of district boundaries to prevent serious challenges to incumbents from being mounted. Here too, First Amendment cases could inform the analysis of a problem that, to this point, has not been understood to present serious equal protection concerns.

A notorious recent example of this practice of incumbent protection is the redrawing of California's congressional legislative districts in the wake of the 2000 census. District lines were redrawn in a transparent effort to create "safe seats" for virtually all state and federal legislators — a package to which, unsurprisingly, state legislators of both parties almost unanimously agreed. As a result of the post-2000 California congressional redistricting, the number of competitive seats decreased from 14 of 52 in 1990, to only 1 of 53.[523] Some commentators

520. DEMOCRATIC CAUCUS, *supra* note 500, at 94-99 (noting variations in how jurisdictions handle poll-worker issues, and problems that result from inadequacies); GAO PERSPECTIVES, *supra* note 500, at 158 (identifying training and recruitment of poll workers as a "major problem").

521. City of Lakewood v. Plain Dealer Publ'g. Co., 486 U.S. 750 (1988).

522. *Id.* at 758.

523. *Where the Lines Fall*, CAL. J., Jan. 2002, at 36, 36-37.

have understandably labeled the 2000 California redistricting an "incumbent protection plan."[524]

Under traditional equal protection analysis, this sort of redistricting presents no constitutional problem, but is left to the discretion of those who draw district lines, whether or not they stand to benefit. Although the Court once stated that districting plans adopted "to minimize or cancel out the voting strength of racial or political elements of the population"[525] violate equal protection, it has not held to this formulation. In *Gaffney v. Cummings*, for example, the Court held that districting plans may be drawn to "achieve a rough approximation of the statewide political strengths of the Democratic and Republican parties," rejecting the contention that such a "political gerrymander" violates equal protection.[526] In the Court's view, consideration of the partisan political consequences of drawing districts were "unavoidable."[527] Since then, the Court has held that it is permissible for district lines to be drawn for political reasons, so long as they are not drawn for "predominantly racial" reasons.[528] Thus, drawing districts in order to create a "safe Republican" or "safe Democratic" district is permissible, so long as race is not the " 'predominant factor' motivating the legislature's redistricting decision."[529]

The current standard thus does not allow any inquiry into whether Democrats and Republicans have colluded to protect incumbents, as occurred in the most recent round of California redistricting. All the Equal Protection Clause has been held to forbid is the use of race as a "predominant factor." Civil rights plaintiffs challenging the constitutionality of such plans must therefore show intentional race discrimination, an argument that the Mexican-American Legal Defense Fund ("MALDEF") unsuccessfully attempted to make with respect to the California plan.[530] Such arguments provide the only realistic vehicle for challenging a redistricting plan on constitutional grounds.

Even if one agrees with the race-discrimination arguments pressed by MALDEF in that case, those arguments only capture a sliver of the problem with California's redistricting plan. While racial gerrymandering may or may not have been one aspect of the line-drawing process, it is only part of the larger picture — namely, the self-dealing

524. Lisa Plendl, *Are Voters Dissed by Redistricting?*, CAL. J., Jan. 2002, at 12.

525. Fortson v. Dorsey, 379 U.S. 433, 439 (1965).

526. 412 U.S. 735, 752 (1973).

527. *Gaffney*, 412 U.S. at 753.

528. Easley v. Cromartie, 532 U.S. 234, 249 (2001).

529. Hunt v. Cromartie, 526 U.S. 541, 547 (1999).

530. *See* Cano v. Davis, 211 F. Supp. 2d 1208 (C.D. Cal. 2002), *aff'd*, 537 U.S. 1100 (2003). MALDEF also argued that the redistricting had a disparate impact upon Latinos in violation of § 2 of the Voting Rights Act, an argument that the district court also rejected.

by legislators of both parties designed to prevent challengers from being elected. To the extent one embraces any sort of process-based theory of constitutional rights, such self-dealing is especially pernicious. It is one of the prime areas in which the political branches cannot be expected to police themselves. The risk of self-dealing thus presents a strong argument for entering the "political thicket."[531] And if *racial* gerrymandering also plays a role in the drawing of district lines, as was arguably the case in California, it only strengthens the argument for judicial intervention.

Notwithstanding the appearance of unfairness arising from incumbent gerrymandering, one might still question the propriety of judicial intervention on both theoretical and practical grounds. On a theoretical level, it is not entirely clear whose rights are violated by an incumbency-protective redistricting. Those of the voters? Those of would-be challengers? More to the point, it is not immediately apparent what the equality right being violated might be. For surely there can be no constitutional right to live in a competitive district. And if there is some constitutional right, it is unclear who would have standing to raise it. On a practical level, a fundamental problem is the inherent difficulty in developing judicially manageable standards by which to measure incumbent gerrymandering. It may be readily apparent that California's district lines were drawn with the protection of incumbents in mind. But going down this road might present a difficult problem of line drawing, especially given the inherent difficulties of probing legislative intent. For example, how much of a shift in the number of safe seats should be required to make out a prima facie case of incumbent gerrymandering? And is *all* incumbent gerrymandering to be forbidden? Or only in cases where protection of incumbents is the predominant consideration of the line-drawing body?

Here again, borrowing from First Amendment Equal Protection cases may provide some guidance. Particularly illuminating is *Service Employees International Union v. Fair Political Practices Commission*,[532] in which the Ninth Circuit considered a First Amendment challenge to Proposition 73, a California campaign finance reform measure enacted through the initiative process. The basis for the constitutional challenge was that the measure put challengers at a competitive disadvantage relative to incumbents by limiting the amount that contributors may give during each fiscal year, as opposed to each election cycle.[533] Plaintiffs argued that this scheme violated the

531. For arguments that courts should intervene with respect to incumbent gerrymandering, see Sally Dworak-Fisher, Note, *Drawing the Line on Incumbency Protection*, 2 MICH. J. RACE & L. 131 (1996); Kristen L. Silverberg, Note, *The Illegitimacy of the Incumbent Gerrymander*, 74 TEXAS L. REV. 913 (1996).

532. 955 F.2d 1312 (9th Cir. 1992).

533. *SEIU*, 955 F.2d. at 1314-15.

First Amendment and produced evidence that incumbents had a much easier time raising money in off years.[534] The restrictions were, however, "viewpoint and content neutral," and did not *facially* advantage either incumbents or challengers.[535] Moreover, as the dissent pointed out (and the majority did not dispute), there was no evidence of purposeful discrimination against challengers as a class.[536] The Ninth Circuit nevertheless struck down Proposition 73, concluding that the "discriminatory impact" on challengers was sufficient to violate the First Amendment.[537]

The *SEIU* court's mode of First Amendment analysis has much to recommend it with respect not only to campaign finance schemes, but also to redistricting schemes like California's. As is typical of First Amendment analysis, the *SEIU* court looked beyond facial neutrality and evidence of intentional discrimination, implicitly recognizing the difficulty of coming up with direct evidence of such intent. The dangers of tilting the political balance in favor of incumbents, the court's opinion suggests, justifies a more searching brand of equal protection analysis.

Could such an analysis be applied to a redistricting scheme that tilts the competitive balance sharply in favor of incumbents, like the post-2000 California congressional redistricting? The sharp decrease in the number of competitive districts, from 14 to just 1, would seem to constitute compelling evidence that the scheme was indeed drawn systematically to favor the interests of incumbents. One could certainly imagine a legal test (not unlike that constructed in the post-*Batson* peremptory-strike cases) in which such evidence were held sufficient to make out a prima facie case of discrimination in favor of incumbents. Moreover, if there is any area in which the discretion of incumbent legislators to act impartially might legitimately be questioned, it is in the drawing of district lines. Accordingly, to the extent one believes that a strong case for judicial intervention exists where the political branches cannot be trusted,[538] a redistricting plan that systematically advantages incumbents is a prime candidate for searching front-end review. Indeed, the arguments for judicial intervention for incumbent gerrymandering are even *stronger* than in *SEIU*, given that Proposition 73 was enacted by the voters whereas California's most recent redistricting plan is a product of sitting legislators, thus exacerbating the risk of self-dealing by entrenched interests.

534. *Id.* at 1315.

535. *Id.* at 1318, 1320.

536. *Id.* at 1324 (Wiggins, J., dissenting).

537. *Id.* at 1320.

538. *See* ELY, *supra* note 413, at 106 ("Courts must police inhibitions on expression and other political activity because we cannot trust elected officials to do so: ins have a way of wanting to make sure the outs stay out.").

The First Amendment prism through which the *SEIU* court viewed Proposition 73 also provides some guidance with respect to the question of *whose* rights are violated by a redistricting scheme skewed to the advantage of incumbents, as well as the concomitant question of who might have standing to raise such a challenge. Although none of those who sued to enjoin Proposition 73 were prospective political challengers, the court held that groups which alleged an interest in contributing to challengers had standing to sue, viewing the making of such contributions as an act of political association. Thus, the *SEIU* court viewed both challengers and their supporters to have a cognizable interest in challenging a campaign finance scheme tilted to the advantage of incumbents. Extending this analysis to the area of redistricting, either those voters who would seek to support a challenger or prospective challenger should also have standing to challenge a redistricting scheme tilted to the disadvantage of all challengers. As in the campaign finance context, it ought not be necessary for any particular voter or challenger to meet the practically insuperable burden of showing that his or her district would have been competitive *but for* the incumbent-skewed redistricting. For it is the collective interests of all voters throughout the state who would seek to support challengers — as well as the would-be challengers themselves — whose interests are violated by a redistricting plan designed to protect all incumbents.

There are of course practical difficulties in piercing the veil of discretion in redistricting cases, a judicial exercise that has proven to be fraught with peril in the most recent series of racial-gerrymandering cases.[539] There is certainly a strong counterargument that judicial policing of incumbent gerrymandering is an area in which judicially manageable standards would be so difficult to fashion that courts should stay out entirely. The difficulties of determining whether a scheme benefits incumbents did not, however, stop the *SEIU* court from taking a hard look at Proposition 73. It is not immediately clear that policing redistricting schemes drawn to systematically advantage incumbents presents practical difficulties on a different order of magnitude from those faced by the *SEIU* court. At the very least, an approach to incumbent gerrymandering that borrows from First Amendment equality cases like *SEIU* warrants further consideration.

3. *Peremptory Challenges*

A final area in which First Amendment Equal Protection might inform assessment of inequalities in the realm of political participation concerns the exercise of peremptory challenges to exclude from juries those with disfavored viewpoints. Courts and scholars have heretofore assumed that, whatever other forms of discrimination litigants are pre-

539. *See* Gerken, *supra* note 414.

cluded from acting upon in the exercise of peremptory challenges, it is perfectly appropriate for such challenges to be exercised against those who harbor certain viewpoints, political or otherwise. For example, prosecutors may not exclude all blacks from a jury trial involving a black defendant, but can certainly choose their peremptories to exclude the most liberal members of the venire. So too, defense attorneys may not exercise their peremptories to exclude whites, but are free to exercise their peremptories against the most conservative members of the venire. Where such a scenario plays out, the net effect is to exclude the polar ideological extremes from the jury ultimately selected.

If we simply view the jury as nothing more than an objective fact-finder, then such exclusion does not appear especially problematic so long as both sides are allowed an equal number of challenges. Indeed, excluding people at the extremes from juries is likely to increase the likelihood of reaching a decision, especially where unanimity is required, by decreasing the possibility that there will be one or two holdouts. If, however, we view jury service as an opportunity for democratic participation comparable to voting, then such exclusion raises serious concerns.

Consideration of Vik Amar's analysis of jury service as a form of political participation brings this problem to light. Tracing the historical pedigree of the jury, Professor Amar persuasively argues that jury service should be treated as a form of political participation, subject to the same protections from discrimination as that of the franchise.[540] Linking jury service to voting, he suggests, provides a limiting principle upon the antidiscrimination rule that the Court has articulated in the *Batson* line of cases. If the exercise of peremptories is subject to the same antidiscrimination limitations to which the vote is subject and only to those limitations, Professor Amar argues, then litigants would be precluded from striking jurors based upon race, sex, economic class, and age.[541] Because such classifications are also prohibited bases for denying the right to vote, they should also be prohibited bases for denying the right to participate on juries.

Professor Amar is quite right to align jury service with voting. But if we follow his line of analysis, it seems doubtful that constitutional limitations on the exercise of peremptories can ultimately avoid the "slippery slope" problem — that is, the concern that if race, age, and gender are impermissible bases for exercising peremptory challenges, then other forms of group status should also be forbidden bases. As he notes with respect to the jurisprudence of jury exclusion, "slippery slope problems have plagued courts because the doctrine at present is

540. Amar, *supra* note 305, at 217-54.

541. *Id.* at 251-52.

not informed by a workable theory to identify protected groups."[542] As stated by one circuit court: "[I]f the age classification is adopted, surely blue-collar workers, yuppies, Rotarians, Eagle Scouts, and an endless variety of other classifications will be entitled to similar treatment."[543] The slippery-slope problem becomes even more pronounced if we examine First Amendment limitations upon whom may be excluded from voting.

This becomes evident by considering a hypothetical scheme allowing election officials to deny the franchise to those with political views at the ideological extremes. Suppose, for example, that the government had discretion to prevent (or keep from having their votes counted) "Naderites" with views to the left of the Democratic Party and "Buchananites" with views to the right of the Republican Party from voting in the presidential election. Or, to draw a closer analogy, suppose that Republican and Democratic party leaders in each precinct were allowed to strike from voter rolls one hundred individuals whose political views they found most objectionable. This is analogous to what prosecutors, defense attorneys, and civil attorneys do all the time when exercising their peremptories to exclude prospective jurors with political views they believe to be against their client. Such denial of the vote, however, would surely fail constitutional scrutiny even if applied in such a way as to exclude equal numbers of Naderites and Buchananites. Thus, if we apply the same test to exclusions from the jury box that we apply to exclusions from the voting booth, then the present system according to which peremptory strikes are exercised is patently unconstitutional, for viewpoint-based exclusions would clearly be impermissible in the voting context.

These dangers are magnified in the area of juror exclusion, given the overlap between racial and viewpoint discrimination. As noted above, the Court since *Batson* has counted as a "race-neutral" justification for striking black jurors the fact that the prosecutor "did not like the way they looked."[544] As it stands, then, litigants may strike jurors for ostensibly nonracial reasons that shroud hidden racial bias. Take, for example, a black juror's articulation of skepticism about whether police officers are generally truthful during voir dire, or, conversely, a white juror's articulation of the view that police officers are generally more honest than the average person. It is impermissible to strike jurors because of their race, but perfectly acceptable to strike them because of expressed viewpoints. But to the extent that such views tend to predominate among one racial group or another, viewpoints may easily serve as a surrogate for race discrimination in the exercise of peremptories.

542. *Id.* at 215-16.

543. Barber v. Ponte, 772 F.2d 982, 999 (1st Cir. 1985).

544. Purkett v. Elem, 514 U.S. 765, 766 (1995).

If the same protections from discrimination that apply to voting also apply to jury service, then viewpoint discrimination must be added to the list. This would seem to leave us with no choice but (in Professor Amar's words) to ride the slippery slope to the bottom and abolish the peremptory challenge altogether.[545] For it is virtually impossible to imagine any system in which a court could possibly hope to prevent litigants from exercising peremptory challenges based upon a prospective juror's political or other viewpoints. Accordingly, if we apply the teachings of First Amendment Equal Protection to the exercise of peremptory challenges, it would appear to leave no choice but to eliminate discretion in this area by getting rid of peremptories entirely.

An obvious criticism of this argument is that it proves too much. It is, however, at least worth considering how First Amendment Equal Protection analysis might play out, if we think of jury service as a form of political participation, as both the First Amendment Equal Protection and Unconventional Equal Protection cases would seem to suggest. If jury service is understood as a form of political participation, it would provide further ammunition to the argument made by Justice Marshall and others for eliminating peremptory challenges entirely.[546] The post-*Batson* cases have demonstrated just how difficult it is to police racial discrimination in the exercise of peremptory challenges. As in the case of incumbent gerrymandering, the overlap between issues of race discrimination and viewpoint discrimination would seem to call for particular skepticism of official discretion in this area of democratic participation.

CONCLUSION

For too long, we have failed to acknowledge the relationship between the First Amendment and rights of political participation traditionally examined under the lens of the Equal Protection Clause. The special First Amendment doctrines regarding precision, standing, justiciability, facial challenges, and appellate factfinding provide mechanisms designed to prevent government decisionmakers from suppressing disfavored viewpoints and disfavored speakers behind a veil of discretion. It is no accident that some of the most important First Amendment equality cases arose during the civil rights movement, against a backdrop of racial discrimination, for it is where racial

545. *See* Amar, *supra* note 305, at 215 n.81 ("One response to the slippery slopes would be to ride them to the bottom, eliminating key persons and peremptories, leaving only random selection from recently refilled juror wheels and challenges for cause based upon an individual juror's demonstrated incompetence or bias.").

546. *See* Batson v. Kentucky, 476 U.S. 79, 107 (1986) (Marshall, J., concurring); Alschuler, *supra* note 344, at 209.

bias threatens to distort the proper functioning of the political process that the dangers of discretion are most pronounced.

The approach taken in the First Amendment Equal Protection cases stands in stark contrast to that taken in Conventional Equal Protection cases. By requiring rigorous proof of intentional discrimination, the latter cases make it relatively easy for official discrimination to go undetected. There is no simple answer to the question why the Supreme Court has adopted a more sensitive approach to the equality problems posed by official discretion in some contexts than in others. But at least part of the explanation lies in the special importance attached to preventing inequality in political participation.

The Unconventional Equal Protection cases represent a third approach to reconciling the values of equality and discretion — one that is a sort of hybrid between First Amendment Equal Protection and Conventional Equal Protection — and help explain the differences between the standard doctrines. In its jury exclusion, political restructuring, and one person, one vote cases, the Court has adopted analytic frameworks that relax the traditional quantum of proof required to establish a violation. Like Conventional Equal Protection cases, the true focus of these cases is on preventing intentional discrimination against a disfavored group. But like the First Amendment Equal Protection cases, these cases exhibit a distrust of official discretion — and a willingness to find a violation without smoking-gun evidence of discriminatory intent. They also adopt special procedural rules and rules of justiciability that resemble those embraced in the First Amendment context.

Though thinly reasoned, the Court's recent decisions in *Thomas v. Chicago Park District* and *Bush v. Gore* suggest the possibility that these dissimilar approaches to the problem of equality and discretion might be harmonized. More specifically, they suggest how First Amendment Equal Protection doctrines might inform our approach to inequalities in the realm of political participation that have heretofore escaped notice. Where official discretion threatens to deny equality of political participation, courts should apply heightened front-end scrutiny comparable to that which has traditionally been applied in First Amendment equality cases.

Adoption of the approach I advocate would result in a markedly different treatment of issues that have not to this point been viewed as serious equal protection concerns. It should, for example, cause us to rethink such problems as intrastate inequalities in voting and registration systems; state redistricting schemes that tilt the competitive balance in favor of incumbents; and the exercise of peremptory challenges against those with disfavored viewpoints. Like the line of civil-rights-era speech cases culminating in *Shuttlesworth v. Birmingham*, these present problems are prime examples of situations where the First Amendment imperative against viewpoint discrimination and the

Equal Protection Clause imperative against race discrimination may overlap. For in each of these areas, there is a pronounced risk of covert race discrimination resulting in denial of equality in the realm of political participation. Even where it is impossible to prove discriminatory intent, courts should consider adopting legal rules that will prevent decisionmakers from denying equality in the realm of participation behind a veil of discretion.

What is still needed, and what I have only begun to suggest in this Article, is a better account of the relationship between the norms of equality in the realm of speech, race and participation than existing constitutional theories provide. To adequately make judgments about whether to sacrifice discretion in order to promote equality (or vice versa) in any given context, we must have a more refined conception of what sorts of interests are most worthy of protection. Only by developing such a theory can we hope to preserve official discretion where it is needed, and at the same time promote the constitutional vision of a more perfect union, one in which all citizens can participate as equals in the conversations of democracy.