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An Interpretive History of Modern Equal Protection

Michael Klarman
University of Virginia

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*Michael Klarman**

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* Assistant Professor of Law, University of Virginia. B.A. 1980, M.A. 1980, University of Pennsylvania; J.D. 1983, Stanford University; D. Phil. 1988, Oxford University — Ed. I am indebted to the following persons for their comments, in some cases quite extensive, on an earlier draft of this article: Lillian BeVier, Bill Cohen, Barry Cushman, John Jeffries, Pam Karlan, Herbert Klarman, Hal Krent, Dan Ortiz, Jeff Powell, George Rutherglen, Bill Stuntz, Peter Swire, and Ted White. I also have been the beneficiary of superb research assistance, supplied by Mike Betz, C.J. Blagg, and Barry Cushman. Finally, I would like to thank Justice William Brennan and Hugo Black, Jr., for granting me access to the William Brennan and Hugo Black papers, Professor Roy M. Mersky at the University of Texas Law Library for permission to quote from the Tom C. Clark collection, and William E. Jackson and Mary Jackson Craighill for permission to quote from the Robert Jackson papers.

INTRODUCTION

The Equal Protection Clause generates as much law today as any other constitutional provision, yet the history of its evolution from " 'the usual last resort of constitutional arguments' . . . [to] the Court's chief instrument for invalidating state laws" remains to be written.[1] The absence of such an account represents a significant gap in the constitutional literature, for it inhibits understanding of the dramatic changes that equal protection thought has undergone in the last half century. I note just two examples here, though this article contains many. First, we today are so accustomed to thinking in terms of an almost absolute constitutional bar on racial classifications (at least those disadvantaging racial minorities) that it may cause some surprise to discover that the Supreme Court failed genuinely to apply such a notion until 1964.[2] Prior to that date, the Court struggled to reconcile competing concerns: on the one hand, the Justices continued to understand equal protection as a simple rationality test and to abide by the intentions of the Fourteenth Amendment's drafters, which generally had *not* been to proscribe all racial classifications; on the other hand, their decisions manifested an intermittent intuition that racial classifications were objectionable even when not irrational. Second, a failure to think historically obfuscates the most dramatic development in equal protection thought over the last two decades: the Burger Court's resurrection of the traditional notion of equal protection rights

1. Zablocki v. Redhail, 434 U.S. 374, 395 (1978) (Stewart, J., concurring) (quoting Buck v. Bell, 274 U.S. 200, 208 (1927)).

2. *See* McLaughlin v. Florida, 379 U.S. 184 (1964).

as restrictions on deliberate governmental disadvantaging rather than — as the Warren Court was increasingly suggesting in a variety of contexts — as entitlements to particular substantive outcomes.

My enterprise here is to write a limited history of modern equal protection — one that will facilitate understanding of the important conceptual shifts that have occurred over time. By "modern" I mean the period following the switch-in-time in 1937 that signaled the demise of the *Lochner* era. By "limited" I mean an account that falls substantially short of a full-scale history of equal protection, which would, for example, necessarily encompass a good deal of political and social history.[3] My aim here, rather, is to tell a story about the evolution of equal protection as a legal concept; I shall, for lack of a better term, label this enterprise "conceptual" history.

I do not wish to claim that conceptual history is more valuable than its social, political, or economic counterparts in advancing our understanding of modern equal protection. Indeed, this sort of history cannot possibly account for many important developments. Thus, for example, even after the Supreme Court in the 1960s came to understand equal protection as a presumptive bar upon certain (i.e., racial) classifications, that conceptual shift permitted, but in no sense required, the inclusion of gender on the list of impermissible categories. Political and social history, not the sort of conceptual history that I have written here, explain why the liberal Warren Court never construed the Equal Protection Clause to provide significant protection against gender discrimination, while the more conservative Burger Court did, often with only minimal dissent.

I have chosen in this article, then, to undertake only one part of what would, in its entirety, constitute a massive project — the production of a full-scale history of modern equal protection. In emphasizing the limited focus of my project, though, I do not wish to minimize the explanatory force of the conceptual approach. While political and social history explain the extension of heightened scrutiny to gender classifications in the 1970s (rather than in the 1960s), conceptual history, I shall argue, generates a persuasive account of the apparently random outcomes in the Burger Court's early gender discrimination cases. Similarly, while my brand of history cannot fully explain the Court's failure until the 1960s to hold racial classifications presumptively unconstitutional, I believe it does account for the focus in *Brown*

3. For examples of such political history, see Mary L. Dudziak, *Desegregation as a Cold War Imperative,* 41 STAN. L. REV. 61 (1988); Irving F. Lefberg, *Chief Justice Vinson and the Politics of Desegregation,* 24 EMORY L.J. 243, 297-302 (1975) (explaining Brown v. Board of Education, 347 U.S. 483 (1954), and its predecessor antisegregation decisions in terms of the national government's Cold War effort to project a better image abroad).

v. Board of Education upon the importance of education, rather than the impermissibility of race-conscious governmental decisionmaking. Finally, to take a third example, I shall argue that conceptual history plausibly reconciles the Burger Court's aggressive expansion of individual rights protections both under due process and more specific Bill of Rights' provisions with its concomitant stultification of the fundamental rights strand of equal protection.

The Supreme Court's understanding of equal protection has, as already suggested, evolved significantly during the modern era. Prior to 1937, the Equal Protection Clause, construed solely as a rationality test, was invoked sporadically to strike down economic regulation. Part I of this article explores the tension inherent in the reconstituted Court's early efforts to reconcile a general rationality approach to equal protection with an intuition that racial classifications were objectionable regardless of their rationality. My argument is that, notwithstanding appealing rhetoric to the contrary in cases such as *Hirabayashi* and *Korematsu,* the Court at this time did not espouse a presumptive prohibition on racial classifications. Indeed I shall argue that this Court continued to abide by the dominant intention of the Fourteenth Amendment's drafters, which had been to protect blacks only in the exercise of certain fundamental rights, rather than wholly to proscribe race-conscious governmental decisionmaking (or even more narrowly, to forbid purposeful racial discrimination).[4] For the Justices to embrace a constitutional ban on racial classifications would have required them to transcend (or ignore, if one prefers) the framers' intentions; yet the Court had at its disposal a constitutional theory justifying precisely that move — the *Carolene Products* political process rationale.[5] One of my principal objectives in Part I is to explain why the Court, which was aggressively applying the insights of *Carolene Products* footnote four in other areas of constitutional law, failed to invoke that theory in support of a presumptive ban on racial classifications. Finally, Part I explores the ramifications of the Justices' failure to incorporate the insights of political process theory into their equal protection thought.

Part II considers what I have somewhat arbitrarily classified as the middle period of modern equal protection — from the momentous decision in *Brown v. Board of Education* to the end of the Warren era. This period witnessed, though not in *Brown,* the Court's first espousal

4. The difference between "race-conscious decisionmaking" and "purposeful racial discrimination" is explored *infra* text accompanying notes 55-58. On the original understanding of the Fourteenth Amendment, see *infra* note 95 and accompanying text.

5. United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938).

of the notion that racial classifications disadvantaging minorities are presumptively unconstitutional. The Court during these years also expanded equal protection to prohibit certain forms of wealth discrimination and infringements upon the franchise. Yet the most striking phenomenon of this era was the Court's incipient transformation of equal protection from a check against deliberate governmental disadvantaging into an entitlement to particular government-guaranteed outcomes. This fundamental shift in equal protection thought was manifested across a variety of doctrinal settings, the most notable of which were the equation of disparate wealth effects with purposeful wealth discrimination, the evisceration of the state action requirement in race discrimination cases, and (somewhat more tentatively) the transformation of *Brown* from a prohibition on deliberate governmental segregation into a mandate for racially integrated schools.

Part III takes to the present the story of modern equal protection. There I account for most of the principal equal protection developments of the last two decades — the emasculation of the fundamental rights strand of equal protection; the rejection of suspect classification status for wealth; the contraction of the concept of discrimination in *Washington v. Davis* and progeny; the confusion underlying the Burger Court gender discrimination cases; and, finally, the recent doctrinal assimilation of affirmative action to malign racial discrimination. Several of these developments, I think, are best understood as manifestations of the Burger Court's commitment to an understanding of equal protection rights as checks upon deliberate governmental disadvantaging rather than entitlements to particular substantive outcomes. This traditional conceptualization of equal protection rights, often carrying the more familiar appellation, "process theory,"[6] explains both the Burger Court's hostility towards fundamental rights equal protection and its epochal decision in *Washington v. Davis.* The rejection of suspect classification status for wealth can be understood as a judicial overreaction to what many regarded as the dangerously open-ended potential of the fundamental rights strand of equal protection. The Burger Court's seemingly chaotic gender discrimination cases, moreover, fall into a tidy pattern when considered in terms of the Justices' gradual sophistication in process theory. Finally, as to affirmative action, I shall argue that this vexing issue has required the Court for the

6. It is crucial for my purposes to distinguish between "political process" and "process" theory. The former identifies particular subject matter areas as appropriate for judicial intervention owing to the likelihood of distortions in the political process. The latter, independently of subject matter area, focuses judicial review upon purging legislative decisionmaking of certain considerations rather than protecting against particular outcomes. For further discussion of this distinction, see *infra* text following note 327.

first time to choose between competing theories of equal protection, and that the Court apparently has rejected the political process model as its guide.

It bears emphasis that this article aims to "interpret" the development of modern equal protection. I, like anyone inhabiting the constitutional law field, have acquired *normative* views as to the legitimacy of particular exercises of the judicial review power.[7] Yet I choose here to offer a purely *descriptive,* though interpretive, account of modern equal protection. And while most historians readily would concede that interpretation is not an objective enterprise, this is a far cry from equating it with prescription.[8]

My final preliminary point is methodological. I, like the vast majority of constitutional law scholars, take as my primary data base decisions of the U.S. Supreme Court. Yet because this project is a version of intellectual history, I thought it worthwhile to consult the Justices' court papers for additional illumination of their equal protection thought.[9] These archival materials have been, both surprisingly and lamentably, ignored by most constitutional law scholars and historians; one rarely finds a reference to internal Court documents in the law review literature.[10] This artificial limitation on the source materials of constitutional law scholarship is puzzling given that one might reasonably have predicted considerable interest among scholars in any of the following little-known facts: that the *Roe v. Wade* opinion written after the initial argument was styled in vagueness rather than privacy terms; that *Griswold v. Connecticut* was first drafted as a freedom-

7. Those views are expressed in Michael J. Klarman, *The Puzzling Resistance to Political Process Theory,* 77 VA. L. REV. 747 (1991).

8. *See, e.g.,* Carl N. Degler, *What Crisis, Jon?,* 76 J. AM. HIST. 467, 469 (1989) (comment on Jonathan M. Wiener, *Radical Historians and the Crisis in American History, 1959-1980)*; James T. Kloppenberg, *Objectivity and Historicism: A Century of American Historical Writing,* 94 AM. HIST. REV. 1011, 1018, 1030 (1989); G. Edward White, *Truth and Interpretation in Legal History,* 79 MICH. L. REV. 594, 603, 614 (1981).

9. For purposes of this article I have extensively consulted the following Justices' collections, all housed at the Library of Congress: Black, Brennan, Douglas, Jackson, Stone, and Warren. I have also selectively consulted the Frankfurter papers, now available on microfilm, as well as, with the assistance of helpful librarians, the Harlan and Clark papers, located respectively at Princeton University and the University of Texas Law Library.

Readers may notice that my archival references are weighted towards the Douglas Papers. This collection, available for public use only since 1986, is by far the most valuable among those of recently sitting Justices. Most significantly, Justice Douglas maintained and preserved a complete set of detailed conference notes, which appear (judging both from their tone and from comparisons with other Justices' notes that I have consulted whenever available) to have been verbatim rather than interpretive, and thus constitute a reliable source for the legal historian.

10. Among the best exceptions are Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958,* 68 GEO. L.J. 1 (1979); Mark V. Tushnet, Brown v. Board of Education *and the Origins of Modern Judicial Review,* 92 COLUM. L. REV. (forthcoming 1991).

of-association rather than a "penumbral" decision; that *Baker v. Carr* was put over a term for reargument because Justice Stewart could not decide which way to push a Court evenly divided on the justiciability of equal protection challenges to malapportionment; and that *Terry v. Adams,* the last of the "white primary" cases, evolved from an initial five-to-four decision *rejecting* an equal protection challenge to a local political organization's exclusion of blacks from its candidate selection process to an eventual eight-to-one ruling in favor of the constitutional claim.[11] I believe, in sum, that my archival findings not only have enriched this history of modern equal protection, but also may prove of general interest to constitutional historians.

I. The Birth of Modern Equal Protection, 1937-1954

The *Lochner*[12] era abruptly ended in the late 1930s; the Court's dramatic *volte-face* in *West Coast Hotel v. Parrish*[13] and *NLRB v. Jones and Laughlin Steel Corp.*[14] was soon followed by a rapid succession of Roosevelt appointments. *Lochner*'s immediate legacy was the uncertain future of judicial review. The "Nine Old Men" had been subjected to a barrage of criticism — internal, academic, and political — for their systematic second-guessing of legislative policy judgments (mostly economic) without clear constitutional warrant. Judicial review in the future would require an underlying constitutional theory of greater justificatory force than had informed substantive due process. From this constitutional crisis emerged Justice Stone's famous *Carolene Products* footnote four,[15] which found normative justification for judicial review in the failure of legislative process. The normal presumption of constitutionality to which legislation was entitled possibly was inappropriate, Justice Stone postulated, not only when specific provisions of the Bill of Rights were plainly contravened, but also in situations where the ordinary operations of majoritarian institutions were distorted by artificial constraints on full political participation. This "political process" theory of constitutional interpretation was quickly invoked by the Court in a wide array of contexts, ranging from

11. *See* Blackmun draft opinion, *Roe v. Wade* (May 18, 1972) (Library of Congress [hereinafter LOC], Douglas Papers, Box 1588, case file nos. 70-18, 70-40); Douglas draft opinion, *Griswold v. Connecticut* (Apr. 23, 1965) (LOC, Douglas Papers, Box 1346, case file no. 496); *infra* note 209 and accompanying text *(Baker); infra* notes 266-68 and accompanying text *(Terry).*

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

13. 300 U.S. 379 (1937) (sustaining minimum wage law for women against substantive due process challenge).

14. 301 U.S. 1 (1937) (sustaining National Labor Relations Act against Commerce Clause challenge).

15. United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938).

First Amendment decisions striking down laws restricting solicitations and pamphleteering by Jehovah's Witnesses, to Justice Stone's powerful dissent in the first flag salute case,[16] to Dormant Commerce Clause and intergovernmental tax immunity rulings. Perhaps the most interesting feature of the first phase of modern equal protection was the somewhat mystifying failure of the Supreme Court to invoke the *Carolene Products* rationale in a single equal protection case. This failure to link equal protection with political process theory, I shall argue, disabled the Court from recognizing what we today take for granted — the presumptive invalidity of racial classifications.

Part I unfolds as follows: first, I shall briefly trace the demise of substantive due process in the late 1930s and the ensuing triumph of Justice Stone's *Carolene Products* theory of judicial review. I then shall seek to establish that the Court throughout the pre-*Brown*[17] era (and indeed until the mid-1960s) never espoused the notion that racial classifications were presumptively unconstitutional (hereinafter, a "racial classification rule"). This contention challenges the conventional wisdom that the World War II Japanese curfew and exclusion cases (*Hirabayashi v. United States*[18] and *Korematsu v. United States,*[19] respectively) adopted such an approach. I shall argue, to the contrary, that the Court's pre-*Brown* decisions generally adhered to the dominant intention of the Fourteenth Amendment's drafters, which had been to protect blacks in the exercise of certain fundamental rights, rather than to proscribe all racial classifications. Had the Court incorporated the insights of political process theory into its equal protection jurisprudence, one result might well have been a racial classification rule, for blacks at this time suffered both from extensive formal political disfranchisement and from deep-seated prejudice that inhibited proper functioning of the legislative process.

I next shall proffer three explanations for the Court's failure to embrace a racial classification rule. The first is wholly pragmatic; the Justices could not adopt such a rule until prepared to accept its logical implications, including invalidation of school segregation and miscegenation laws. The Court simply was not prepared to take such controversial steps until 1954 and 1967, respectively. Second, a racial classification rule, as already noted, would require significant departures from both Court precedent and the intentions of the Fourteenth Amendment's framers; Justices at that time were far more hesitant to

16. Minersville School Dist. v. Gobitis, 310 U.S. 568, 601 (1940) (Stone, J., dissenting).

17. Brown v. Board of Educ., 347 U.S. 483 (1954).

18. 320 U.S. 81 (1943).

19. 323 U.S. 214 (1944).

take such steps than were their successors, for whom *Brown v. Board of Education* represented a watershed in constitutional decisionmaking. Finally, espousal of a special rule for race would require bifurcating the Equal Protection Clause in a manner without parallel in constitutional history; a single constitutional provision would acquire entirely different meaning depending on the nature of the statute under attack.

Part I concludes with a discussion of two ramifications of the Court's failure during this period to link equal protection with political process theory, and thus to embrace a racial classification rule. First, the Court in *Brown* selected a rationale too narrow to justify invalidating segregation in areas of public life other than education. Second, an equal protection jurisprudence divorced from political process considerations risked spinning out of control, possibly even replicating *Lochner*-style abuses under a companion clause of the Fourteenth Amendment.

A. *The Demise of* Lochner *and the Triumph of* Carolene Products *Footnote Four*

The *Lochner* era, especially in its waning years, witnessed a Supreme Court run amok, striking down approximately 200 regulatory statutes on no apparent ground but the Justices' own policy preferences.[20] The most popular doctrinal vehicle for perpetrating this broad-scale assault upon democratic governance was the Due Process Clause.[21] Yet, it was not uncommon, Justice Holmes' famous dictum in *Buck v. Bell*[22] to the contrary notwithstanding, for the Court to employ the Equal Protection Clause to similar effect.[23] Indeed the

20. Recent studies have suggested that the Court during the *Lochner* period was not as regressive as the conventional wisdom would have it. *See, e.g.*, JOHN E. SEMONCHE, CHARTING THE FUTURE: THE SUPREME COURT RESPONDS TO A CHANGING SOCIETY, 1890-1920, at 115-16, 167-68 (1978); Melvin I. Urofsky, *Myth and Reality: The Supreme Court and Protective Legislation in the Progressive Era*, 1983 Y.B. OF THE SUP. CT. HIST. SOCY. 53, 55, 62, 69. There is no denying, though, that after 1920 the Court went on a rampage against economic regulation. *See generally* PAUL L. MURPHY, THE CONSTITUTION IN CRISIS TIMES, 1918-1969, at 41-67 (1972); GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 739-41 (1986); BENJAMIN F. WRIGHT, THE GROWTH OF AMERICAN CONSTITUTIONAL LAW 153-94 (1942).

21. *See, e.g.*, New State Ice Co. v. Liebmann, 285 U.S. 262 (1932); Adkins v. Children's Hosp., 261 U.S. 525 (1923); Coppage v. Kansas, 236 U.S. 1 (1915).

22. *See* 274 U.S. 200, 208 (1927) (calling underinclusiveness equal protection challenge "the usual last resort of constitutional arguments").

23. *See, e.g.*, Hartford Steam Boiler Inspection & Ins. Co. v. Harrison, 301 U.S. 459, 463 (1937); Mayflower Farms, Inc. v. Ten Eyck, 297 U.S. 266, 274 (1936). *See generally* CHARLES A. LOFGREN, THE *PLESSY* CASE: A LEGAL-HISTORICAL INTERPRETATION 89 (1987) ("[t]he line between due process and equal protection was indistinct"); Richard S. Kay, *The Equal Protection Clause in the Supreme Court, 1873-1903*, 29 BUFF. L. REV. 667, 668-69, 701 (1980) (same).

first such use of equal protection was attributable to the most important figure in the genesis of substantive due process, Justice Stephen J. Field; while performing circuit duty in the early 1880s, Field invoked equal protection to strike down differential taxation of individuals and corporations.[24]

The *Lochner* era abruptly ended in 1937 with the Court's dramatic turnabout on substantive due process and Commerce Clause issues, and the rapidly ensuing influx of Roosevelt appointees. No longer would economic regulation have to run the gauntlet of Supreme Court Justices regarding themselves as the last bulwark of laissez-faire. After 1937 the Court refused seriously to consider due process or equal protection challenges to economic regulation.[25] The new Justices, many of whom had participated in the assault on the old Court, successfully internalized the criticism to which their predecessors had been subjected for undermining legislative supremacy.[26] Once the Roosevelt appointees were ensconced on the Court, their opinions sustaining economic regulation from constitutional challenge exuded deference to legislative authority and trumpeted the Court's limited constitutional competence.[27] While *Lochner* was laid to rest doctrinally, however, its ghost has lived on, haunting the Court's constitutional conscience for the next fifty years. Most debatable instances of judicial review since 1937 have had to endure the criticism of reincarnating *Lochner* in a different guise.[28]

Edwards v. California[29] provides a nice illustration of the new Court's sensitivity to the charge of "*Lochner*izing." Involved in *Edwards* was a California statute criminalizing the knowing importation of indigents into the state. At conference the Justices voted to strike down the law under the Fourteenth Amendment's Privileges and Im-

24. County of Santa Clara v. Southern Pac. R.R., 18 F. 385, 398-99 (1883); Railroad Tax Cases, 13 F. 722, 733 (1882).

25. *See, e.g.*, WRIGHT, *supra* note 20, at 221-27; Louis Lusky, *Minority Rights and the Public Interest*, 52 YALE L.J. 1, 11 (1942).

26. On the new Justices' prior participation in the Court-packing plan, see, *e.g.*, LIVA BAKER, FELIX FRANKFURTER 183-86 (1969); HUGO L. BLACK & ELIZABETH BLACK, MR. JUSTICE AND MRS. BLACK 69 (1986); J. WOODFORD HOWARD, MR. JUSTICE MURPHY 231 (1968). For political and scholarly criticism of the New Deal Court, see, e.g., 2 LOUIS B. BOUDIN, GOVERNMENT BY JUDICIARY 316-551 (1932); FRANK FREIDEL, FRANKLIN D. ROOSEVELT: A RENDEZVOUS WITH DESTINY 162-63 (1990) (quoting from Roosevelt press conference); Walton H. Hamilton, *Affectation with a Public Interest*, 39 YALE L.J. 1089 (1930).

27. *See generally* Walton H. Hamilton & George D. Braden, *The Special Competence of the Supreme Court*, 50 YALE L.J. 1319, 1340-41 & n.82 (1941) (collecting cases).

28. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 174 (1973) (Rehnquist, J., dissenting); Griswold v. Connecticut, 381 U.S. 479, 511-16 (1965) (Black, J., dissenting); Robinson v. California, 370 U.S. 660, 689 (1962) (White, J., dissenting); *see also* Cass R. Sunstein, Lochner's *Legacy*, 87 COLUM. L. REV. 873, 873 (1987).

29. 314 U.S. 160 (1941).

munities Clause.[30] Yet that Clause had been functionally interred in the *Slaughter-House Cases* owing to concern that any broader construction would, as Justice Miller warned, "constitute this court a perpetual censor upon all legislation of the States . . . ."[31] In other words, the *Edwards* conference selected a doctrinal rationale that threatened to revive *Lochner* under a companion clause of the Fourteenth Amendment. Quick to appreciate the problem, Justices Frankfurter and Stone apparently dissuaded Byrnes, to whom the majority opinion had been assigned, from relying on that ground.[32] Invoking the ghost of substantive due process, Stone told Byrnes that

> [t]o bring such rights within the protection of the privileges and immunities clause . . . requires an extension of the clause in a way which, in the future, and with a changed complexion of the Court, might well expose our constitutional system to dangers to which it has been exposed in the last fifty years through the over-expansion and refinement of the due process and equal protection clauses.[33]

Edwards ultimately was decided on a much more limited Dormant Commerce Clause rationale.

Having consciously chosen to abandon aggressive review of economic regulation, then, the Justices were faced with the question of how far to extend their new-found deference to legislatures; the fate of judicial review hung in the balance.[34] From this rethinking of the Court's constitutional competence emerged Justice Stone's famous footnote four in *Carolene Products.* Stone quite consciously sought to fashion a theory of constitutional interpretation that would preserve judicial review while disavowing the grosser abuses of the *Lochner* era.[35] According to Stone's nascent formulation, the ordinary pre-

30. Douglas conference notes, *Edwards v. California* (Oct. 25, 1941) (LOC, Douglas Papers, Box 66, case file no. 17).

31. 83 U.S. (16 Wall.) 36, 78 (1873).

32. *See* Letter from Justice Stone to Justice Byrnes (Nov. 1, 1941) (LOC, Stone Papers, Box 74, 1941-42 correspondence with Justice Byrnes); Letter from Justice Frankfurter to Justice Jackson (Oct. 28, 1941) (LOC, Jackson Papers, Box 122, case file no. 17: *Edwards v. California*).

33. Letter from Justice Stone to Justice Byrnes, *supra* note 32, at 1-2.

34. *See, e.g.,* ALPHEUS T. MASON, THE SUPREME COURT: PALLADIUM OF FREEDOM 151 (1962); Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713, 714 (1985); Louis Lusky, *Footnote Redux: A* Carolene Products *Reminiscence,* 82 COLUM. L. REV. 1093, 1094-95 (1982).

35. *See* Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities,* 91 YALE L.J. 1287, 1307 (1982). That Stone and his colleagues took seriously the footnote is confirmed by internal Court correspondence. Letter from Chief Justice Hughes to Justice Stone (Apr. 18, 1938) (LOC, Stone Papers, Box 63, case file no. 640: *United States v. Carolene Products*) ("somewhat disturbed by your Note 4"); Letter from Justice Roberts to Justice Stone 1 (Apr. 19, 1938), *id.* ("should much prefer that the case be put on narrower ground"). I do not mean to suggest that Stone regarded footnote four as articulating a fully developed constitutional theory; he plainly saw it only as a provisional first step. *See* Lusky, *supra* note 34, at 1098-99; Lewis F. Powell, Jr., Carolene Products *Revisited,* 82 COLUM. L. REV. 1087, 1090 (1982).

sumption of constitutionality possibly was inappropriate where the law at issue "restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation," or involves "prejudice against discrete and insular minorities . . . which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities . . . ."[36]

Applying Stone's insight, the Court boldly intervened on behalf of freedom of expression just as it was abandoning the field of economic regulation. A series of decisions involving subject matters as diverse as labor picketing, sidewalk and door-to-door pamphleteering and solicitation, sound-truck speechmaking, and newspaper commentary upon pending judicial proceedings, illustrated the Court's enthusiasm for its new role; *Carolene Products*, or reasoning derived from its insights, frequently was invoked in justification of heightened judicial scrutiny for speech restrictions.[37] Underlying judicial solicitude for free expression was the notion that legislatures cannot be trusted to afford adequate scope to political speech owing to their vested interest in stifling criticism of the prevailing regime.[38] The Court implemented this insight doctrinally by according the First Amendment a "preferred position" and by withholding the ordinary presumption of constitutionality from laws impinging upon free expression.[39]

The flag salute cases provided another important occasion for elaboration of Stone's political process rationale. The issue in *Minersville School District v. Gobitis*[40] and *West Virginia State Board of Education v. Barnette*[41] was the constitutionality of compelling young Jehovah's Witnesses, upon threat of expulsion from school, to participate in the flag salute ceremony despite their religious objections. While the free

36. 304 U.S. 144, 152-53 n.4 (1938).

37. *E.g.*, Saia v. New York, 334 U.S. 558 (1948) (prior restraint on use of sound amplification device); Martin v. Struthers, 319 U.S. 141 (1943) (ban on door-to-door leaflet distribution); Bridges v. California, 314 U.S. 252 (1941) (contempt convictions for newspaper commentary on pending court proceedings); Thornhill v. Alabama, 310 U.S. 88 (1940) (ban on picketing); Schneider v. State, 308 U.S. 147 (1939) (ban on leaflet distribution).

38. *See* JOHN H. ELY, DEMOCRACY AND DISTRUST 106 (1980); Klarman, *supra* note 7, at 753-54; *cf.* Thornhill v. Alabama, 310 U.S. 88, 95 (1940) ("Abridgement of freedom of speech and of the press . . . impairs those opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government."); Stromberg v. California, 283 U.S. 359, 369 (1931) ("The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means . . . is a fundamental principle of our constitutional system.").

39. *E.g.*, Saia v. New York, 334 U.S. 558, 562 (1948); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943); Thornhill v. Alabama, 310 U.S. 88, 95-96 (1940); Schneider v. State, 308 U.S. 147, 161 (1939).

40. 310 U.S. 586 (1940).

41. 319 U.S. 624 (1943).

speech cases just mentioned involved application of the second paragraph of footnote four — restrictions on the political process — the flag salute cases were presented to the Court at least partially in terms of paragraph three — prejudice against discrete and insular minorities.[42] Justice Frankfurter wrote the majority opinion in the first case, *Gobitis,* rejecting the constitutional challenge. In a letter to Justice Stone, who had indicated he would dissent, Frankfurter explained that he endorsed paragraph two of the *Carolene Products* footnote, but that here the channels of free expression remained unobstructed. To strike down legislation under such circumstances, Frankfurter cautioned, would risk repeating "the mistake . . . made by those whom we criticized when dealing with the control of property."[43] Unpersuaded by Frankfurter's importuning, Stone filed a solitary dissent in *Gobitis,* citing footnote four and arguing that Jehovah's Witnesses constituted a discrete and insular minority in need of judicial protection from hostile legislatures.[44] The other noted liberals then on the Court — Justices Black, Douglas, and Murphy — joined Frankfurter, not Stone, probably overcompensating in their determination to avoid revisiting the abuses of the *Lochner* era.[45] Within two years, however, they too came to understand the free exercise guarantee as a political process protection for unpopular religious groups.[46]

One should note, moreover, that Stone's political process rationale also saw use outside of the "civil liberties" area. In *South Carolina Highway Department v. Barnwell Brothers, Inc.*,[47] one of the era's leading Dormant Commerce Clause decisions, Justice Stone relied upon *Carolene Products* to explain "that when the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects ad-

42. *See* DAVID R. MANWARING, RENDER UNTO CAESAR: THE FLAG-SALUTE CONTROVERSY 128, 220-21, 223 (1962).

43. Letter from Justice Frankfurter to Justice Stone 2 (May 27, 1940) (LOC, Stone Papers, Box 65, case file no. 690: *Minersville School Dist. v. Gobitis*); *see also Gobitis,* 310 U.S. at 600 ("Where all the effective means of inducing political changes are left free from interference, education in the abandonment of foolish legislation is itself a training in liberty.").

44. *Gobitis,* 310 U.S. at 606-07; *see also* Lusky, *supra* note 25, at 32-36 (discussing *Gobitis* in political process terms).

45. *See* Leon D. Epstein, *Justice Douglas and Civil Liberties,* 1951 WIS. L. REV. 125, 126 (1951); *cf.* WILLIAM O. DOUGLAS, THE COURT YEARS, 1939-1975, at 44-45 (1980) (Douglas attributing his vote in *Gobitis* to being overly impressed initially with Felix Frankfurter).

46. *See* Jones v. Opelika, 316 U.S. 584, 623-24 (1942) (Black, J., with Douglas and Murphy, JJ., dissenting) (recanting their *Gobitis* votes, and describing the Free Exercise Clause as a safeguard for unpopular minorities).

47. 303 U.S. 177, 184-85 n.2 (1938); *accord* McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33, 45-46 n.2 (1940).

versely some interests within the state." Similarly, in *Helvering v. Gerhardt,*[48] political process theory was invoked to justify constricting state immunity from federal taxation. The people of the states, the Court observed, were represented in Congress, and "[t]he very fact that when they are exercising [the national taxing power] they are taxing themselves, serves to guard against its abuse through the possibility of resort to the usual processes of political action . . . ."[49] Finally, an internal Court memorandum by Justice Jackson with regard to *Wickard v. Filburn,*[50] a decision taking substantial strides towards interring the Commerce Clause as a restraint on national power, evidences a strong commitment to political process theory. The Court, Jackson argued, should cease enforcing federalism restrictions upon Congress because "the people" elect both state and federal officers, and thus can ensure through the political process that the national government respects federalism limitations on its power.[51] Given the broad range of constitutional uses to which *Carolene Products* was put, then, its complete omission from equal protection decisions of the period poses something of a mystery.

B. *Early Equal Protection: The Failure To Adopt a Racial Classification Rule*

As the preceding section demonstrates, by 1940 the Court possessed a theory capable of justifying a presumptive rule against racial classifications. Blacks at that time qualified for special judicial protection not only under paragraph three of the *Carolene Products* footnote owing to their "discrete and insular" status, but also under paragraph two because of broad-scale disfranchisement, particularly in the South.[52] Indeed Justice Stone plainly had in mind protection for blacks, among others, when he penned footnote four. Not only did he cite the "white primary" cases there, but also the very next day Stone wrote to a judicial colleague of his concern "about the increasing racial and religious intolerance which seems to bedevil the world, and

48. 304 U.S. 405 (1938).

49. 304 U.S. at 416.

50. 317 U.S. 111 (1942).

51. Jackson memorandum 6-7, *Wickard v. Filburn* (June 6, 1942) (LOC, Jackson Papers, Box 125, case file no. 59).

52. *See, e.g.,* PAUL KLEPPNER, WHO VOTED? THE DYNAMICS OF ELECTORAL TURNOUT 1870-1980, at 116 (1982) (percentage of blacks eligible to vote in southern states was 4.5% in 1940, 12.5% in 1947, 20.7% in 1952, and 29.1% in 1960); *id.* at 117 (chart indicating dramatic disparities in black and white voter turnout in the South between 1952 and 1960, and smaller, though still substantial, racial disparities in the North).

which I greatly fear may be augmented in this country."[53]

Before attempting to explain the Court's failure during this period to link equal protection with political process theory or, relatedly, to espouse a racial classification rule, I first must demonstrate, in contravention of the received wisdom,[54] that the Court during the 1940s did not in fact understand the Equal Protection Clause as presumptively invalidating racial classifications. Equal protection cases in the pre-*Brown* era can be subdivided into two strands. One of these was comprised of racial classifications that facially disadvantaged nobody. More specifically, this category included segregation laws, miscegenation prohibitions, and judicial enforcement of racially restrictive covenants; while these instances of state action all embodied racial distinctions, none *formally* disadvantaged a particular racial group vis-à-vis others.[55] The second category of cases was comprised of racial *discrimination,* rather than segregation or equal application of race-conscious laws. More specifically, this category included exclusions of blacks from the franchise and jury participation,[56] discrimination against the Chinese in occupational pursuits,[57] and the World War II Japanese curfew and exclusion cases.[58] I shall argue that in neither category of cases did the Court adopt a racial classification rule. Because the issues raised by the two strands are somewhat different, I shall consider them separately.

As to the first category of cases, the Supreme Court's endorsement of the "separate-but-equal" rule in its segregation decisions obviously belies espousal of a presumptive rule against racial classifications. If all racial classifications were prima facie unconstitutional, cases like *Missouri ex rel. Gaines v. Canada,*[59] involving racial segregation in higher education, would not have posed serious constitutional questions. Thus the most one plausibly can claim, given the Court's sanc-

53. ALPHEUS THOMAS MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 515 (1956) (quoting from Stone letter to Judge Irving Lehman, Apr. 26, 1938).

54. *See, e.g.,* Shapiro v. Thompson, 394 U.S. 618, 658 (1969) (Harlan, J., dissenting); Loving v. Virginia, 388 U.S. 1, 11 (1967); Lawrence Gene Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent,* 21 STAN. L. REV. 767, 773 (1969).

55. *E.g.,* Shelley v. Kraemer, 334 U.S. 1 (1948) (racial covenants); Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938) (law school segregation); Plessy v. Ferguson, 163 U.S. 537 (1896) (transportation segregation); Pace v. Alabama, 106 U.S. 583 (1882) (criminal statute punishing more severely cohabitation by interracial, than intraracial, couples).

56. *E.g.,* Smith v. Allwright, 321 U.S. 649 (1944) (exclusion of blacks from Democratic Party primary); Norris v. Alabama, 294 U.S. 587 (1935) (exclusion of blacks from juries).

57. *E.g.,* Yick Wo v. Hopkins, 118 U.S. 356 (1886) (systematic denial of laundry permits to Chinese).

58. Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943).

59. 305 U.S. 337 (1938).

tioning of separate-but-equal, is that this era witnessed endorsement of a rule presumptively invalidating racial *discrimination,* rather than all racial *classifications.* I shall argue below that even this qualified version of the received wisdom is mistaken; for now, though, closer examination of this first category of cases will illuminate the Court's early equal protection thinking.

The Court's pre-*Brown* graduate school segregation cases, to take the most populous subcategory of this strand, make for somewhat peculiar reading. Both *Gaines* and its successors[60] simply assumed that racially segregated public facilities, to be constitutional, had to be equal. Analysis ended upon discovery of inequality, with the Court brusquely invalidating the segregation statute. That result, while perhaps plausible upon superficial consideration, proves troubling on closer scrutiny. The Equal Protection Clause does not, as the Court has so often announced, require universally equal treatment.[61] Nor could any practicable theory of equal protection do so, given that laws, by their very nature, seek to differentiate. Thus one reasonably might have expected a more sophisticated explanation from the Court in these pre-*Brown* segregation cases than simple identification of inequality in treatment. Missing from these decisions was an account of why inequality was conclusively (not even presumptively) objectionable with regard to racial classifications, when it was not as to any others.

The most appealing answer — that the Fourteenth Amendment was intended to prevent all deliberate disadvantaging of blacks — is simply wrong. We know that the Fourteenth Amendment's framers did not mean to proscribe all racial discrimination since, to take the most compelling counterexample, they did not understand exclusion of blacks from the franchise to be unconstitutional. Section Two of the Fourteenth Amendment plainly assumed the lawfulness of racial discrimination in voting;[62] it seems implausible that Section One, in

60. McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950); Sweatt v. Painter, 339 U.S. 629 (1950); Sipuel v. Board of Regents, 332 U.S. 631 (1948).

61. *See, e.g.,* Rinaldi v. Yeager, 384 U.S. 305, 309 (1966); Norvell v. Illinois, 373 U.S. 420, 423 (1963); *see also* Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws,* 37 CAL. L. REV. 341, 344 (1949) (equal protection requires only that those who are similarly situated *generally* be treated equally).

62. Section Two provides that states denying or abridging the right to vote of adult male citizens will suffer a corresponding reduction in the number of their congressional representatives. Underlying this peculiar provision was the Republican wish to pressure southern states into enfranchising their former slaves without directly mandating black suffrage, owing to its political unpopularity in northern states, only six of which at that time permitted blacks to vote. *See, e.g.,* CHARLES FAIRMAN, RECONSTRUCTION AND REUNION, 1864-88 pt. I, 1261-65 (Paul A. Freund ed. 1971); JOSEPH B. JAMES, THE RATIFICATION OF THE FOURTEENTH AMENDMENT 24, 43 (1984); William W. Van Alstyne, *The Fourteenth Amendment, the "Right" to Vote, and the Understanding of the Thirty-Ninth Congress,* 1965 SUP. CT. REV. 33, 70.

which the Equal Protection Clause resides, was intended to prohibit what its successor section unambiguously tolerated.[63] The question remains, then, why separate-and-*un*equal was conclusively unconstitutional, rather than subject to justification like any other sort of inequality.

The answer, which probably will surprise most constitutional lawyers, is that *Plessy v. Ferguson,*[64] the case first introducing separate-but-equal to the Supreme Court, apparently contemplated that unequal segregated facilities *would be* subject to justification just like any other sort of inequality. While modern courts and commentators generally have read *Plessy* as requiring that segregated facilities be equal to be constitutional,[65] a close reading suggests that the Justices probably understood their decision differently.[66] First, one must remember that the Louisiana segregation statute at issue in *Plessy* required, as did the common law of common carriers, that equal, though separate, facilities be supplied to blacks.[67] Thus the Court did not need to decide, in sustaining the exclusion of a black man from the white car of a train, whether equal facilities were *constitutionally* required. More importantly, the majority opinion implied that if equality was constitutionally required, it was only because *in this context,* no rational basis existed for inequality. In response to the argument that if a legislature constitutionally could segregate trains by race, so could it require that a separate car be established for red-haired persons or that blacks and whites paint their houses different colors, Justice Brown noted that every exercise of the police power must be reasonable.[68] Thus equality

63. *See, e.g.,* Reynolds v. Sims, 377 U.S. 533, 594 (1964) (Harlan, J., dissenting); RAOUL BERGER, GOVERNMENT BY JUDICIARY 64-68 (1977); *see also* Alexander M. Bickel, *The Original Understanding and the Segregation Decision,* 69 HARV. L. REV. 1, 12-13, 16-20, 42, 44, 51, 52-53, 56, 58 (1955) (summarizing evidence and concluding that majority in 39th Congress did not intend to confer right to black suffrage through Fourteenth Amendment). *But see* Van Alstyne, *supra* note 62, at 56-58 (arguing that the express penalty imposed by Section Two upon black disfranchisement does not logically require reading Section One as permitting such exclusions).

64. 163 U.S. 537 (1896).

65. *E.g.,* Brown v. Board of Educ., 347 U.S. 483, 488 (1954); J. HARVIE WILKINSON III, FROM *BROWN* TO *BAKKE* 19 (1979); Alfred H. Kelly, *The Fourteenth Amendment Reconsidered: The Segregation Question,* 54 MICH. L. REV. 1049, 1049 (1956).

66. The *most* that can be said for the conventional wisdom is that *Plessy* is ambiguous. Justice Brown's majority opinion declared that "[t]he object of the [fourteenth] amendment was undoubtedly to enforce the absolute equality of the two races before the law." 163 U.S. at 544. But he also stated that the Fourteenth Amendment was not intended to "enforce social, as distinguished from political, equality." 163 U.S. at 544. Justice Brown might have meant by these statements that with regard to social, but not political or civil, rights the Constitution permitted unequal legislation; or he might have meant that formal equality was required across-the-board, but that substantive equality was not constitutionally mandated, and indeed would be unlikely to result so long as "one race be inferior to the other." 163 U.S. at 552.

67. *See* LOFGREN, *supra* note 23, at 200.

68. 163 U.S. at 550-51.

was required in *Plessy,* if indeed it was required,[69] only because the Court could conceive of no rational explanation for a state's refusal to provide equal railway facilities for blacks. Racial classifications, in other words, were subjected to the same general rationality test which had come to govern equal protection review of economic regulation.[70]

This interpretation of *Plessy* becomes compelling, in my view, when considered in light of the Court's decision in *Cumming v. Richmond County Board of Education*[71] just three years later. *Cumming* involved a Georgia county's decision to conserve funds by closing its black high school in order to increase the number of black children receiving an elementary school education; white children in the county continued to receive a publicly funded high school education. Justice Harlan, the lone dissenter in *Plessy,* wrote for a unanimous Court rejecting the equal protection challenge, relying implicitly on the reasonableness of the county's decision to deprive older black children of secondary schooling in order to increase the number receiving primary education. A different case would have been presented, Harlan concluded, had the evidence revealed that racial hostility motivated the school board action.[72] The most plausible inference from conjoining *Plessy* and *Cumming,* then, is that the Constitution requires that separate be equal only when unequal would be unreasonable.

In the twentieth century, however, the separate-but-equal doctrine was rapidly detached from the reasonableness requirement that had informed its inception. Beginning in 1914 with *McCabe v. Atchison, Topeka & Santa Fe Railway Co.,*[73] the Court found constitutional violations in segregated facilities even where inequalities were quite reasonably justified.[74] Thus, for example, in the graduate school education and railway passenger contexts, it was not plainly unreasonable for the state to refuse to provide for blacks, respectively, a sepa-

69. Benno Schmidt argues that *Plessy* did not require equality at all because railroad seating was deemed to fall within "the domain of social relations rather than political rights," and the Court had declared that the Fourteenth Amendment was not intended to enforce social, as opposed to political and civil, equality. Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era, Part 1: The Heyday of Jim Crow,* 82 COLUM. L. REV. 444, 468 (1982).

70. *See, e.g.,* MARK V. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950, at 22 (1987); LOFGREN, *supra* note 23, at 190; Kay, *supra* note 23, at 719; Schmidt, *supra* note 69, at 469-70.

71. 175 U.S. 528 (1899).

72. *Cumming,* 175 U.S. at 544-45; *see also* Holden v. Hardy, 169 U.S. 366, 398 (1898) (suggesting that the issue in racial classification cases was whether the legislature had sought to oppress a racial minority or to further the common good, not whether unequal treatment was involved).

73. 235 U.S. 151 (1914).

74. The statement in text operates from the distasteful, though historically required, assumption that the underlying segregation was not itself constitutionally objectionable.

rate law school or an equal number of first class seats or dining car tables, given the substantially lower per capita black demand for such facilities.[75] Beginning with *McCabe,* though, the Court consistently dismissed such arguments with the rhetorically resonant, but analytically unsatisfying, maxim that the Equal Protection Clause guarantees "personal," not group, rights.[76] That unadorned explanation is unconvincing because the Equal Protection Clause generally does permit overbroad generalizations based on group characteristics. Thus, for example, the Court never would have invoked the "personal rights" notion to strike down a law requiring that persons be twenty-one years of age to vote or sit on a jury; yet such laws no more treated twenty-year-olds as individuals than did Missouri's refusal to establish a separate black law school to accommodate a single applicant treat blacks as individuals. In both instances, generalizations were based on group characteristics — respectively, the relative unsuitability for voting or jury service of younger adults and the lower per capita demand for professional training among blacks in the late 1930s. The Court began rejecting such generalizations in racial segregation cases without proffering any explanation. I would suggest that, by constitutionally requiring racially segregated facilities to provide equal treatment to individuals of different races vis-à-vis each other rather than vis-à-vis their racial group, the Justices laid the doctrinal groundwork for the demise of segregation, without appreciating what they were doing.[77] If equal protection rights truly are personal, as the Court was suggesting, then blacks should have the right, for example, to attend any state law school for which they are academically qualified, not just one established solely for blacks but providing equal facilities. In sum, I would suggest that the racial *segregation* cases reveal a Court intuiting that racial classifications were different from others, yet unable to articulate or fully comprehend why. The racial *discrimination* cases, to which we next turn our attention, illustrate precisely the same phenomenon.

The second strand of equal protection cases during this pre-*Brown* era was comprised, as noted earlier, of governmental action purpose-

75. *E.g.,* Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938); Henderson v. United States, 339 U.S. 816 (1950).

76. *McCabe,* 235 U.S. at 161; *accord* Shelley v. Kraemer, 334 U.S. 1, 22 (1948); Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337, 350-51 (1938); Buchanan v. Warley, 245 U.S. 60, 80 (1917).

77. That the Justices did not recognize the ramifications of their rhetoric is confirmed by their willingness to sustain segregation long after *McCabe* first articulated the "personal rights" notion. *See, e.g.,* Gong Lum v. Rice, 275 U.S. 78, 85-86 (1927) (strongly implying support for separate-but-equal doctrine in public education). Indeed, as late as *Shelley v. Kraemer* and the graduate school segregation cases, the Justices continued to invoke the rhetoric of personal rights, even though they had yet to conclude that segregation was unconstitutional.

fully disadvantaging a racial minority, rather than according formally equal treatment. Within this category exclusions of blacks from the franchise and from jury participation were the two most important subclasses. Because of the Fifteenth Amendment's unambiguous prohibition of racially motivated suffrage restrictions, cases raising that issue could rely simply upon the framers' intentions without engaging in general discussion of racial discrimination.[78] Racial exclusions from jury service generated similar analysis, though here reference was to the seminal decision invalidating such discrimination, *Strauder v. West Virginia,*[79] rather than to the framers' intentions, which were quite ambiguous as to whether jury service was one of the rights protected by the Fourteenth Amendment.[80] Not until the World War II Japanese curfew and exclusion cases (*Hirabayashi* and *Korematsu,* respectively) did the Supreme Court discourse generally upon the evils of racial discrimination.[81]

Hirabayashi and *Korematsu* undeniably employed language suggesting that racial classifications were presumptively objectionable and thus subject to the most rigorous judicial scrutiny. Yet in both cases, notwithstanding the grandiose rhetoric, the Court actually applied its most deferential brand of rationality review. Thus, for example, in *Hirabayashi,* just preceding the famous denunciation of racial classifications[82] appear the utterly deferential statements that "Congress may hit at a particular danger where it is seen, without providing for others which are not so evident or so urgent," and that the Court was unable to "reject as unfounded" the judgment of military authorities and Congress that some Japanese Americans were disloyal.[83]

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78. *See infra* notes 104-05 and accompanying text.

79. 100 U.S. 303 (1880).

80. *See infra* note 107 and accompanying text.

81. *Strauder* was an early exception, broadly condemning all racial discrimination, regardless of the sort of right involved. 100 U.S. at 307-08, 310.

82. *Hirabayashi,* 320 U.S. at 100 ("Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.").

83. 320 U.S. at 99-100; *see also* 320 U.S. at 101 ("reasonable basis"); 320 U.S. at 106 (Douglas, J., concurring) ("some relation"); 320 U.S. at 112-13 (Murphy, J., concurring) ("reasonably concluded"). Similarly, in *Korematsu* the Court's first articulation of a strict scrutiny approach towards racial classifications was effectively negated by its obeisance to the military judgment underpinning the exclusion and relocation order. *Compare Korematsu,* 323 U.S. 214, 216 (1944) ("all legal restrictions which curtail the civil rights of a single racial group are immediately suspect [and] . . . courts must subject them to the most rigid scrutiny") *with* 323 U.S. at 218 ("we cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population") (*quoting Hirabayashi,* 320 U.S. at 99); *see also* Letter from Justice Stone to Justice Black 1 (Nov. 9, 1944) (LOC, Douglas Papers, Box 112, case file no. 22: *Korematsu v. United States*) (asking Black to emphasize in his opinion that the Court would defer to the military determination of immediate danger unless there was "no ground" upon which it rested).

I do not wish, however, to rely heavily on the disparity between word and deed in *Hirabayashi* and *Korematsu,* since the Constitution frequently has swayed in the winds of war at the expense of civil liberties.[84] Of greater significance are the peacetime cases in which the Court, or individual Justices, stated a racial classification rule but immediately thereafter conflated it with the general rationality standard of equal protection. This phenomenon, repeated on numerous occasions, suggests that the Court was unable to incorporate into its equal protection thought the First Amendment insight that the ordinary presumption of a statute's constitutionality was inoperative under some circumstances.[85] Since my examples are duplicative, I will relegate all but one to a footnote.[86]

In *Oyama v. California*[87] the Court struck down a California statute presuming that transfers of real property from aliens ineligible for citizenship (i.e., Japanese) to their United States citizen children were attempts to circumvent the state's Alien Land Law rather than legitimate gifts. Justices Murphy and Rutledge, the Court's most vociferous critics of racial discrimination, concurred separately in the invalidation of the statute, preferring to rely on the unconstitutionality of the underlying prohibition on alien land ownership.[88] The most striking aspect of their concurrence for present purposes is the statement that because loyalty and industry are individual, not group, characteristics, California's use of a racial classification as a proxy for them was irrational.[89] This is simply wrong. Racial classifications are objectionable for a variety of reasons, but they are not invariably *irra-*

84. For a nice example, *compare Ex parte* Vallandigham, 68 U.S. (1 Wall.) 243 (1863) (declining during the Civil War to review a constitutional challenge to military tribunal trial of civilians owing to lack of statutory jurisdiction) *with Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866) (finding, after the war, a constitutional violation on similar facts); *see also* PAUL L. MURPHY, WORLD WAR I AND THE ORIGIN OF CIVIL LIBERTIES IN THE UNITED STATES ch. 4 (1979) (describing widespread civil liberties abuses during World War I which went unchecked by the courts).

85. *See supra* note 39 and accompanying text.

86. For other instances, see, *e.g.,* Bolling v. Sharpe, 347 U.S. 497, 499-500 (1954); Hernandez v. Texas, 347 U.S. 475, 478 (1954); Kotch v. Board of River Port Pilot Commrs., 330 U.S. 552, 556 (1947); Hirabayashi v. United States, 320 U.S. 81, 100-01 (1943); *see also* RICHARD KLUGER, SIMPLE JUSTICE 671-72, 674 (1976) (lawyers for both sides in *Brown* oral argument treated constitutionality of racial classifications as a reasonableness issue).

87. 332 U.S. 633 (1948).

88. 332 U.S. at 650 (Murphy, J., concurring). The majority assumed the constitutionality of California's prohibition on alien land ownership, yet nonetheless invalidated the property transfer statute on the ground that it discriminated on the basis of racial descent. 332 U.S. at 646-47.

89. 332 U.S. at 666 (Murphy, J., concurring). Murphy and Rutledge, as well as the majority, seemed to assume that the statute's alienage classification was tantamount to a racial one. 332 U.S. at 646, 666. That assumption was noncontroversial given that the Japanese were virtually the only nationality then qualifying as "aliens ineligible for naturalization" — the category of aliens covered by the challenged statute — and that California had a long history of virulent prejudice against the Japanese. *See* 332 U.S. at 650-62.

tional, in the sense of lacking any logical relationship to legitimate governmental objectives. For example, the eviction of Japanese Americans from their West Coast homes during World War II possibly should have been declared unconstitutional,[90] but it was not an irrational policy insofar as such persons were at least marginally more likely than the average American citizen to evince disloyalty to the war effort.[91]

At this point I can imagine a critic objecting that I place excessive weight on the rationality *language* employed by the Court in these decisions. Focus instead, this critic might suggest, on the actual holdings, which invariably invalidated the racial classification under review. After all, the last two decades of equal protection development are replete with instances in which the Court mouthed rationality language while surreptitiously substituting a heightened review standard, which sometimes was later openly espoused.[92] I have two responses to this line of criticism — a preliminary one to which I do not ascribe great weight, and a more substantial one that warrants further elaboration.

My first response to the charge that I focus unduly upon the Court's use of rationality language is that the Justices had at their disposal the doctrinal tools with which to accomplish the same results but by more convincing means; we should at least pause, then, to examine their failure to adopt the more compelling approach. Thus, the use of rationality language in Justice Murphy's *Oyama* concurrence is especially puzzling given that Justice Rutledge, the same year he joined that opinion, boldly inverted the ordinary presumption of constitutionality in a First Amendment case.[93] Since the Justices plainly were familiar with a more exacting standard of review, their failure to apply it to equal protection cannot be casually dismissed as a linguistic misstep.

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90. *See, e.g.,* Hirabayashi v. United States, 828 F.2d 591 (9th Cir. 1987); Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984) (granting coram nobis petitions to expunge criminal convictions of Japanese Americans on ground that previously concealed War Department report revealed that World War II curfew and evacuation programs were motivated by racial animus rather than military necessity).

91. *See, e.g.,* Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle,* 90 HARV. L. REV. 1, 6 (1976); Lusky, *supra* note 25, at 40; *cf.* ELY, *supra* note 38, at 31 ("the core case of racial discrimination cannot adequately be handled by a rational basis test").

92. *See, e.g.,* Reed v. Reed, 404 U.S. 71, 76 (1971) (ostensibly applying rationality test to invalidate a gender classification); Levy v. Louisiana, 391 U.S. 68, 71 (1968) (same with regard to a legitimacy classification); *see also* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 441-42 (1985) (striking down discrimination against the mentally retarded despite ostensibly rejecting heightened scrutiny); USDA v. Moreno, 413 U.S. 528, 533-38 (1973) (invalidating exclusion of unrelated households from food stamp program under purported minimum rationality test).

93. United States v. CIO, 335 U.S. 106, 140 (1948) (Rutledge, J., concurring) ("presumption . . . is against the legislative intrusion into [First Amendment] domains").

Second, and more substantially, I believe two points confirm that the Court in these early equal protection cases was not simply cloaking a racial classification rule in rationality language. First, both the language and the holding in several of these decisions are inconsistent with a presumptive rule against racial classifications. Second, the Court at this time still operated almost entirely[94] within the structure envisioned by most of the Fourteenth Amendment's drafters — that is, racial discrimination was impermissible with regard to certain fundamental rights, rather than across the board.[95] Thus the Court,

94. Skinner v. Oklahoma, 316 U.S. 535 (1942), is not to the contrary if viewed, as many modern scholars do, as a substantive due process decision parading in equal protection garb. Even if understood instead as the progenitor of the fundamental rights strand of equal protection, *see infra* note 329, *Skinner* is in tension with the Fourteenth Amendment's original understanding only in that it did not (facially, at least) involve racial discrimination; the Court's emphasis on the "fundamental" importance of procreation is consistent with the framers' view that not all rights were equally sheltered by the equal protection guarantee.

95. I recognize that some legal historians reject the view that the Fourteenth Amendment was intended to proscribe racial discrimination only with regard to certain fundamental rights — that is, essentially to constitutionalize the 1866 Civil Rights Act's guarantee to blacks of equal rights in property ownership, contract, court access, and legal protection of person and property. As with most issues concerning the intentions of the Fourteenth Amendment's drafters — for example, the controversies over "incorporation" of the Bill of Rights and over the state action requirement — legal historians have bitterly disagreed as to the scope of the antidiscrimination principle enshrined in the Equal Protection Clause. *Compare* Howard J. Graham, *Our "Declaratory" Fourteenth Amendment,* 7 STAN. L. REV. 3, 9-10, 17, 23, 37 (1954); Kelly, *supra* note 65, at 1054-85; *and* John P. Frank & Robert F. Munro, *The Original Understanding of "Equal Protection of the Laws,"* 1972 WASH. U. L.Q. 421, 442-43 (all arguing that the Fourteenth Amendment was intended to eradicate all racial distinctions) *with* BERGER, *supra* note 63, at 18-19, 22-23, 163-65, 169, 173, 239; MICHAEL LES BENEDICT, A COMPROMISE OF PRINCIPLE 170 (1975); *and* Bickel, *supra* note 63, at 12-13, 16-17, 46-47, 56-58 (arguing that the Fourteenth Amendment was principally intended to constitutionalize the 1866 Civil Rights Act and to prohibit racial discrimination with regard only to particular fundamental rights). For a recent summary of the existing scholarship, as well as the suggestion that scholars have pursued the wrong questions, see WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 2-3, 63, 123 (1988).

The explanation for these discordant interpretations of the historical record lies in the decision of different scholars to emphasize different congressional statements. While some of the Radical Republicans, most notably Charles Sumner and Thaddeus Stevens, undoubtedly would have preferred to eradicate all racial distinctions, at no point did they represent majority opinion in the 39th Congress; indeed Stevens conceded that he had lost the battle over this issue. *See* LES BENEDICT, *supra,* at 14, 27-40, 182; BERGER, *supra* note 63, at 237-38; Bickel, *supra* note 63, at 45-46, 54-55, 56-58. My view, as is evident from the text, is that those espousing the narrower interpretation of the framers' intentions have the better of the historical argument. Quite possibly, some of the historians embracing the broader view were inadvertently swayed by their commitment to racial justice. For example, both Jay Graham and Alfred Kelly, strong proponents of the broad interpretation, assisted the NAACP Legal Defense Fund in preparing its response to the Supreme Court's request in *Brown* for historical input from the parties. *See* KLUGER, *supra* note 86, at 625-26; *see also* Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair,* 1965 SUP. CT. REV. 119, 144 (conceding that NAACP brief in *Brown,* on which he worked, "manipulated history, in the best tradition of American advocacy, carefully marshaling every possible scrap of evidence in favor of the desired interpretation and just as carefully doctoring all the evidence to the contrary, either by suppressing it when that seemed plausible, or by distorting it when suppression was not possible").

In any event, it bears emphasis that *nothing* in my argument turns on this historiographical debate. I contend only that the Supreme Court during this early phase of modern equal protec-

while occasionally deploying rhetorical condemnations of all racial classifications, had not been called upon actually to depart from the more limited goals of the framers; when first presented with an appealing occasion upon which to do so — in *Brown v. Board of Education* — the Court demurred. For convenience of presentation, I will integrate these two analytically distinct points in the ensuing discussion.

Virtually all of the Court's pre-*Brown* race cases involved rights that were deemed fundamental by the Reconstruction Congress and thus were expressly protected by federal statute: the 1866 Civil Rights Act (reenacted in 1870) safeguarding the rights to property, contract, court access, and legal protection of person and property; the 1870 and 1871 Force Acts protecting voting rights; and the 1875 Civil Rights Act prohibiting race-based exclusions from jury participation.[96] Equal rights to property ownership for blacks had been guaranteed by the 1866 Civil Rights Act, largely in response to the practice enshrined in some post-Civil War southern black codes of restricting black property ownership in order to pressure blacks into agricultural labor.[97] In 1917 the Court struck down a law imposing residential segregation on the ground that the Fourteenth Amendment "entitle[d] a colored man to acquire property without state legislation discriminating against him solely because of color," while plainly expressing continued approval of segregation in transportation and education.[98] Thirty years later, *Hurd v. Hodge*,[99] *Shelley v. Kraemer*'s[100] companion case forbidding judicial enforcement of racially restrictive covenants in the District of Columbia, relied specifically on the 1866 Civil Rights Act,[101] while *Shelley* itself placed considerable emphasis on the involvement of *property* rights.[102] Similarly in *Oyama*, Justices Murphy and Rutledge intimated that equal protection coverage might be limited to certain important rights, of which land ownership clearly was one.[103]

Early decisions invalidating racial voting exclusions were also con-

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tion had not transcended the narrower view of the Fourteenth Amendment's purpose; whether or not that view was historically accurate is of no moment.

96. Act of Apr. 9, 1866, ch. 31, 14 Stat. 27 (reenacted by Act of May 31, 1870, ch. 114, § 18, 16 Stat. 140, 144); Act of May 31, 1870, ch. 114, 16 Stat. 140; Act of Apr. 20, 1871, ch. 22, 17 Stat. 13; Act of Mar. 1, 1875, ch. 114, 18 Stat. 336.

97. *See, e.g.*, ERIC FONER, RECONSTRUCTION, 1863-77, at 198-200 (1988); THEODORE B. WILSON, THE BLACK CODES OF THE SOUTH 66, 71, 79-80 (1965).

98. Buchanan v. Warley, 245 U.S. 60, 78-79, 81 (1917).

99. 334 U.S. 24 (1948).

100. 334 U.S. 1 (1948).

101. 334 U.S. at 30-31.

102. *Shelley*, 334 U.S. at 10, 21.

103. 332 U.S. 633, 663 (1948) (Murphy, J., concurring).

sistent with the original understanding of the Reconstruction amendments. The unambiguous purpose of the *Fifteenth* Amendment had been to forbid racially motivated governmental restrictions upon the franchise. Thus the vexing question in the early cases was not whether the framers had intended to forbid racial discrimination with regard to voting, but whether exclusion of blacks from Democratic Party primaries constituted state action.[104] Since race-based voting exclusions attributable to state action plainly contravened the Fifteenth Amendment, pronouncement of a broad racial classification rule was unnecessary to affording relief in these cases.[105]

Dissents by Justices Black and Douglas in two cases rejecting equal protection challenges to vote dilution (unrelated to race) confirm that even these liberal Justices were not yet thinking in terms of a racial classification rule. In *Colegrove v. Green* and *South v. Peters,* Justices Black and Douglas, respectively, contended that vote dilution through malapportionment and county unit weighting should constitute an equal protection violation; in support of their argument, they posited that intentional exclusion or dilution of black votes unquestionably would be a constitutional violation.[106] To invoke the race analogy in the context of nonracial vote dilution suggests (leaving aside the possibility of muddled thinking) that Black and Douglas did not conceive of racial classifications as presumptively unconstitutional. Had they done so, the analogy to racial vote dilution would have been singularly unpersuasive since that practice would have been, on their understanding, constitutionally objectionable simply because of its racial aspect. I would suggest, then, that these two Justices intuitively understood that racial discrimination was more problematic than

104. Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944); Grovey v. Townsend, 295 U.S. 45 (1935); Nixon v. Condon, 286 U.S. 73 (1932); Nixon v. Herndon, 273 U.S. 536 (1927).

105. However, the first two "white primary" cases problematically relied upon the Fourteenth Amendment. In *Nixon v. Herndon* the Court declared that a racial classification with regard to the right to vote in primaries was impermissible under the Fourteenth Amendment, 273 U.S. 536, 541 (1927), while in *Nixon v. Condon* broad language proscribing racial discrimination generally was employed. 286 U.S. 73, 89 (1932). Once the Court overcame its hesitation about holding party primaries to be part of the state electoral process, and began invoking the Fifteenth Amendment in these cases, there was no need to venture beyond voting into general discussion of the permissibility of racial classifications. *See* Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944); *see also* Reynolds v. Sims, 377 U.S. 533, 614 n.72 (1964) (Harlan, J., dissenting); STEVEN F. LAWSON, BLACK BALLOTS: VOTING RIGHTS IN THE SOUTH, 1944-1969, at 26-27 (1976) (noting that the NAACP argument in *Herndon* focused on the Fifteenth Amendment, but that the Court chose instead to rely on the Fourteenth, possibly owing to reluctance to overrule its recent holding in *Newberry* that congressional power to regulate federal elections did not extend to party primaries).

106. South v. Peters, 339 U.S. 276, 277 (1950) (Douglas, J., dissenting); Colegrove v. Green, 328 U.S. 549, 569 (1946) (Black, J., dissenting).

other sorts of legislative disadvantaging, but that their stance also was influenced by the importance of the franchise.

The point just made with regard to property and voting cases is corroborated by the Court's early jury exclusion decisions. It is unclear whether the Reconstruction amendments' drafters intended to prohibit racial discrimination in jury service, as they plainly did with regard to property ownership and voting; yet blacks' right to serve on juries quickly was guaranteed by the Reconstruction Congress and then was endorsed resoundingly by the Supreme Court in *Strauder v. West Virginia.*[107] *Strauder* aside, the jury exclusion cases, like their voting and property ownership counterparts, emphasized the right at issue rather than stating a broad ban on racial discrimination.[108]

Especially supportive of my thesis is Justice Jackson's majority opinion in *Fay v. New York,*[109] where the Court rejected an equal protection challenge (not primarily based on racial grounds) to New York's "blue ribbon" juries. According to Jackson, Court precedent intimated that the Constitution standing alone might not guarantee black jury participation; it was the 1875 Civil Rights Act, Jackson maintained, that authorized judicial invalidation of racial jury exclusions.[110] Thus Jackson's *Fay* opinion effectively undermines the notion that the Court then understood the Equal Protection Clause as a presumptive bar on racial classifications. Also debilitating to the received wisdom is *Akins v. Texas.*[111] There a narrowly divided Court refused to invalidate a Texas jury commissioners' practice of limiting blacks to one seat per grand jury. Bending over backwards to reject an equal protection entitlement to racial proportionality on juries, the majority opinion lost sight of the commissioners' unambiguously racial decisionmaking.[112] It is difficult to imagine a Court thinking in terms of a racial classification rule producing a decision like *Akins.*

Finally, the rationale of *Brown v. Board of Education* confirms the Court's commitment to the limited fundamental rights approach to

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107. 100 U.S. 303, 310 (1880); Act of Mar. 1, 1875, ch. 114, 18 Stat. 336. For persuasive argument that the framers of the Fourteenth Amendment did not intend to guarantee black jury participation, see, *e.g., Ex parte* Virginia, 100 U.S. 339, 364-68 (1880) (Field, J., dissenting); Bickel, *supra* note 63, at 21-22, 56, 64-65; Frank & Munro, *supra* note 95, at 447-48.

108. *Strauder,* 100 U.S. 313, 319; *see, e.g.,* Pierre v. Louisiana, 306 U.S. 354, 357 (1939); Norris v. Alabama, 294 U.S. 587, 589 (1935); Carter v. Texas, 177 U.S. 442, 446-47 (1900).

109. 332 U.S. 261 (1947).

110. 332 U.S. at 282-83 (relying upon *Ex parte* Virginia, 100 U.S. 339 (1880)).

111. 325 U.S. 398 (1945).

112. All three jury commissioners explicitly testified that they "had no intention of placing more than one negro on the panel." 325 U.S. at 406-07. Yet Justice Reed's majority opinion astonishingly declared that such testimony "leaves us unconvinced that the commissioners deliberately and intentionally limited the number of Negroes on the grand jury list." 325 U.S. at 407.

equal protection rather than to the racial classification rule ostensibly embraced in *Hirabayashi* and *Korematsu*. While the intentions of the Fourteenth Amendment's drafters regarding a wide array of issues are debatable, it is difficult to argue credibly that they sought to abolish public school segregation.[113] Accordingly, one reasonably might have expected a decision invalidating that practice — i.e., *Brown* — to propel the Court beyond the fundamental rights understanding of the Fourteenth Amendment's drafters towards a racial classification rule. Yet *Brown* took no such step. Chief Justice Warren's opinion chose instead to emphasize the importance of education, which, he noted, should be judged by contemporary standards rather than by those of 1868.[114] Warren intimated, in other words, that had the framers of the Fourteenth Amendment foreseen the role that public education would one day play in American society, they unhesitatingly would have included it on the list of rights deemed too fundamental to permit of abridgement by racial discrimination. Indeed, Warren's draft opinion in *Bolling v. Sharpe*,[115] *Brown*'s companion case in the District of Columbia, actually referred to education as a "fundamental" right; he ultimately deleted that reference, probably out of deference to Justices Black and Frankfurter, neither of whose judicial philosophy easily accommodated a prioritization of unenumerated constitutional rights.[116] My point, though, is that *Brown* as written, and *Bolling* even more plainly as initially drafted, relied heavily on the importance of education, thus implying that other less fundamental rights could be distributed unequally according to race without infringing the Constitution. *Brown* thus confirms that the Justices were not yet thinking in terms of a racial classification rule.

All that remains to be established is that I am not being ahistorical in dramatizing the Court's failure during this period to apply the insights of *Carolene Products* in support of a racial classification rule. The best confirmation of the plausibility of my posited alternative scenario is the embrace it received from scattered courts and commentators. Thus in *Perez v. Lippold*,[117] where the California Supreme Court became the first (and until the mid-1960s the only) appellate court to

113. *See infra* notes 179-82 and accompanying text.

114. 347 U.S. at 492-93.

115. 347 U.S. 497 (1954). The issue in *Bolling* was whether public school segregation violated the Due Process Clause of the Fifth Amendment, which, unlike the Fourteenth Amendment's Equal Protection Clause, is directly applicable to the federal government.

116. The Warren draft opinion is reproduced in Hutchinson, *supra* note 10, at 93-94. The evidence for the speculation that Frankfurter or Black influenced Warren's decision to delete the "fundamental rights" language from *Bolling* is convincingly marshaled in Hutchinson, *id.* at 46-50.

117. 198 P.2d 17 (Cal. 1948).

invalidate a miscegenation law, the decision conceptualized equal protection in terms of a racial classification rule linked doctrinally with the Supreme Court's First Amendment decisions. The majority opinion, authored by Justice Roger Traynor, denied that the miscegenation law met the exacting standard applicable to racial classifications — that the law be "designed to meet a clear and present peril arising out of an emergency."[118] A concurring opinion likewise employed a doctrinal innovation from the First Amendment context, declaring the general presumption of constitutionality inapplicable owing to the "suspicion which attaches to cases involving discrimination."[119] Law review commentary on *Perez* confirmed that application of the political process rationale to race cases provided a plausible, and for many an attractive, path towards understanding equal protection as a presumptive bar on racial classifications.[120] On other occasions as well, a handful of commentators suggested that equal protection be construed to impose a heavy burden of justification on racial classifications.[121]

I have argued in this section that a salient feature of the first phase of modern equal protection was the Supreme Court's failure to apply the insights of *Carolene Products* to equal protection, and its related failure to embrace a presumptive rule against racial classifications. The two logically subsequent questions are: (1) what explains these failures?; and (2) what difference, if any, did they make to the development of modern equal protection? These are the questions addressed in the following two sections.

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118. 198 P.2d at 20. It is noteworthy that immediately after questioning the validity of *all* racial classifications, the *Perez* court retreated to this constitutional formulation: absent an emergency, the state "cannot base a law impairing *fundamental rights* of individuals on general assumptions as to traits of racial groups." 198 P.2d at 20 (emphasis added). *Perez* thus confirms the extent to which equal protection thought during this era remained cabined by the fundamental rights orientation of the Fourteenth Amendment's drafters. Even a court that had reasoned its way to a racial classification rule was sufficiently ambivalent to backtrack quickly to the more familiar approach, elevating marriage to the status of a fundamental interest regarding which racial classifications were presumptively impermissible. 198 P.2d at 18-19.

119. 198 P.2d at 33 (Carter, J., concurring).

120. *E.g.*, Note, *Statutory Ban on Interracial Marriage Invalidated by Fourteenth Amendment*, 1 STAN. L. REV. 289 (1949); Note, *Constitutional Law: Equal Protection of the Laws: California Anti-Miscegenation Laws Declared Unconstitutional*, 37 CALIF. L. REV. 122, 125-26 (1949); Recent Cases, 62 HARV. L. REV. 307, 308-09 (1948).

121. *E.g.*, William G. Fennell, *The "Reconstructed Court" and Religious Freedom: The* Gobitis *Case in Retrospect*, 24 CONT. L. PAMPHLETS 1, 17 (1942); Tussman & tenBroek, *supra* note 61, at 353-56.

C. *Explanations for the Court's Failure To Adopt a Racial Classification Rule*

1. *Political Considerations*

Not until the Justices were prepared to strike down public school segregation and miscegenation bans, notwithstanding the outraged public response certain to greet such rulings,[122] could they contemplate adopting a presumptive rule against racial classifications. From our late twentieth-century vantage point, it is far too easy to regard *Brown v. Board of Education* as an inevitable decision.[123] Yet quite plainly it was not.[124] Justice Frankfurter probably spoke for a majority of the Justices when he subsequently recounted that had the school segregation challenge been forced upon him in the 1940s he would have felt compelled to reject it.[125] Indeed the NAACP's choice prior to 1950 to refrain from direct attacks on school segregation, instead pursuing an equalization strategy, was largely owing to that organization's perception that the sociopolitical environment was not yet conducive to a segregation challenge.[126] Nor did *Brown* ineluctably follow from the Court's apparent interment of graduate school segregation in its 1950 decision in *Sweatt v. Painter*.[127] Justice Clark, for

122. *See, e.g.*, Douglas conference notes, *Briggs v. Elliott* (Dec. 12, 1953) (LOC, Douglas Papers, Box 1149, case file: segregation cases) (Clark predicting that "violence will follow in south"); Jackson conference notes, segregation cases (Dec. 12, 1952) (LOC, Jackson Papers, Box 184, case file: segregation cases) (Black predicting "some violence"); TUSHNET, *supra* note 70, at 129, 130 (quoting dire forecasts of southern response to a Supreme Court decision invalidating public school segregation).

123. For the popular, though misconceived, notion that *Brown* was inevitable, see, *e.g.*, Edmond Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150, 150 (1955); Robert L. Carter, *The Warren Court and Desegregation*, 67 MICH. L. REV. 237, 237 (1968); Phil C. Neal, Baker v. Carr: *Politics in Search of Law*, 1962 SUP. CT. REV. 252, 253; William F. Swindler, *The Warren Court: Completion of a Constitutional Revolution*, 23 VAND. L. REV. 205, 209 (1970). For a more powerful, though to my mind still unsuccessful, defense of the view that "it was essentially unthinkable" that the Justices would fail to invalidate segregation when the issue was presented to them, see Tushnet, *supra* note 10.

124. If nothing else, the zeal with which the Court evaded resolution of race discrimination issues before *Brown* suggests that decision was far from inevitable. *See, e.g.*, Oyama v. California, 332 U.S. 633 (1948) (refusing to decide the constitutionality of state prohibition on alien land ownership, despite a majority of the Justices' preference to reach the issue); Morgan v. Virginia, 328 U.S. 373 (1946) (invalidating state-mandated segregation on motor carriers, as applied to interstate transport, on Dormant Commerce Clause rather than equal protection grounds); Frankfurter memorandum to conference (May 31, 1950) (LOC, Jackson papers, Box 160, case file no. 25: *Henderson v. United States*) (stating that it is "highly important" that Court's opinion in transportation segregation case "resolutely steer clear of implying" that segregation, as opposed to separate-and-*un*equal, is illegal under Interstate Commerce Act).

125. *See* Justice Douglas memorandum (Jan. 25, 1960), *reprinted in* MELVIN I. UROFSKY, THE DOUGLAS LETTERS 169 (1987) (noting Frankfurter's statement made at Court conference that in the 1940s he would have found "segregation in the schools . . . constitutional because 'public opinion had not then crystallized against it' ").

126. *See* TUSHNET, *supra* note 70, at 105-37.

127. 339 U.S. 629, 633-34 (1950) (noting that Texas' black law school cannot possibly provide an education of equal value to that of the University of Texas).

example, informed his colleagues in a *Sweatt* memorandum that he was not then prepared to invalidate primary and secondary school segregation.[128] Southern resistance to grade school desegregation, Clark warned, would be of a different order than to graduate school desegregation.[129] Thus it is not altogether surprising that when *Brown* was first argued in 1952, the Justices were closely divided; their own subsequent tabulations indicated a vote somewhere between five to four for sustaining school segregation and six to three for striking it down.[130] A racial classification rule would have mandated invalidation of public school segregation, and the Court simply was not prepared to render such a ruling until *Brown*.

A racial classification rule, moreover, would have interred miscegenation laws, a step the Court proved unwilling to take until 1967.[131]

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128. Justice Clark memorandum to the conference (Apr. 7, 1950), *reprinted in* Hutchinson, *supra* note 10, at 89-90 app. A.

129. *Id.* at 89; *see also* Alfred H. Kelly, *The School Desegregation Case, in* QUARRELS THAT HAVE SHAPED THE CONSTITUTION 307, 318 (rev. ed., 1987) ("Southern officials might be expected to resist graduate school integration with less emotional conviction than would be the case for lower-level schools."); Lefberg, *supra* note 3, at 279. Moreover, compliance with separate-but-equal at the grade school level did not pose the virtually insuperable obstacles of equalization in graduate school education. *See, e.g.*, Kelly, *supra*, at 321 (noting that all over the South, white-controlled school boards, seeing the writing on the wall after *Sweatt* and *McLaurin*, initiated crash building programs for black schools); Justice Frankfurter memorandum to conference, *supra* note 124, at 2-3 (noting the unique problems of complying with separate-but-equal in graduate education).

130. For these divergent tabulations, see, *e.g.*, Douglas Memorandum for the files 1 (May 17, 1954) (LOC, Douglas Papers, Box 1148, case file: segregation cases) (concluding that at original *Brown* conference the vote would have been five to four to sustain public school segregation); Douglas conference notes, *Brown v. Board of Educ.* (Apr. 16, 1955) (misdated as 1954) (LOC, Douglas Papers, Box 1149, case file: segregation cases) (Justice Frankfurter noting his "fear that the case would [have been] decided the other way under Vinson"); KLUGER, *supra* note 86, at 614 (noting that after initial conference Frankfurter thought the vote was five to four to invalidate school segregation, and Burton believed it was six to three). I have consulted the original conference notes of Douglas, Jackson, and Warren (the latter obviously only for the reargument conference), as well as the published version of Clark's notes, reproduced in Hutchinson, *supra* note 10, at 91-92 app. B. The various sets of conference notes display impressive internal consistency. The significant divergence in subsequent vote tabulations was attributable not to disagreement about what had been said at conference, but rather as to how particular statements would have translated into votes; at both their 1952 and 1953 conferences the Justices agreed not to take even a tentative head count on disposition. More specifically, the conference statements of Justices Jackson and Frankfurter left their bottom line positions very murky indeed. *See, e.g.*, Douglas conference notes, *Brown v. Board of Educ.* (Dec. 13, 1952) (LOC, Douglas Papers, Box 1149, case file: segregation cases) (Frankfurter: "has read all of [the Fourteenth Amendment's legislative] history and he can't say it meant to abolish segregation — . . . he can't say it's unconstitutional to treat a negro differently than a white — but he would put all the cases down for reargument"); *id.* (Jackson: "nothing in the text that says this is unconstitutional — nothing in the opinions of the courts that says it's unconstitutional — nothing in the history of the 14th amendment; on basis of precedent he would have to say segregation is OK — . . . he won't say it is unconstitutional to practice segregation tomorrow — but segregation is nearing an end — we should perhaps give them time to get rid of it and he would go along on that basis"). Professor Tushnet seeks to reconcile the Justices' split-vote tabulations with his claim that the *Brown* result was inevitable by arguing that "the Justices [at conference] were talking through their concerns about the course they knew they were going to follow." Tushnet, *supra* note 10.

131. *See* Loving v. Virginia, 388 U.S. 1 (1967).

After denying certiorari in one miscegenation case the same year as *Brown,*[132] the Court soon found itself backed into a corner when a similar case — *Naim v. Naim*[133] — materialized on its appeals docket. Review in *Naim* could be evaded only if the Justices were prepared to announce, disingenuously, that the constitutional challenge to miscegenation laws raised no substantial federal question.[134] Unwilling to engage in such blatant dishonesty, the Court, at Justice Frankfurter's behest, devised a more subtle avoidance stratagem. For Frankfurter, the miscegenation issue raised such "deep feeling" that the Court should avoid resolving it unless the need was "compelling."[135] To invalidate miscegenation statutes, Frankfurter warned, would have the effect of "thwarting or seriously handicapping the enforcement of [our] decision in the segregation cases."[136] Yielding to Frankfurter's importuning, the Court remanded *Naim* to the Virginia Supreme Court on the pretext that the parties' domicile stood in need of clarification.[137] After the state court belligerently refused to cooperate, the Justices narrowly voted to deny review, apparently preferring to permit an insolent state court to flout its authority than to stir up another hornets' nest in the immediate wake of *Brown.*[138]

In sum, the Justices probably resisted adopting a racial classification rule in the 1940s or 1950s largely because of its controversial political implications. While this article implicitly assumes that equal protection conceptualizations have practical import, it would be foolish to deny that political factors shape the universe of feasible conceptual alternatives.

2. *The Force of Precedent and Original Intent*

I would deny, though, that political considerations fully account for the Court's failure to adopt a racial classification rule; factors such as fealty to precedent and original understanding also played a role.

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132. Jackson v. Alabama, 72 So. 2d 114, *cert. denied,* 348 U.S. 888 (1954).

133. 350 U.S. 891 (1955).

134. *See* Hutchinson, *supra* note 10, at 63; Memorandum from law clerk, W.A.N. (William A. Norris), to Justice Douglas, *Naim v. Naim* 2 (undated) (LOC, Douglas Papers, Box 1164, case file: office memos nos. 350-399, case no. 366) ("Failure to decide the case would blur any distinction remaining between certiorari and appeal.").

135. Memorandum of Justice Frankfurter on *Naim v. Naim* (read at conference, Nov. 4, 1955), *reprinted in* Hutchinson, *supra* note 10, at 95-96.

136. *Id.* at 96.

137. 350 U.S. 891 (1955).

138. *Naim,* 350 U.S. 985 (1956). The state court opinion is at 90 S.E.2d 849 (Va. 1956) (refusing to remand case to trial court on grounds that record was not in need of clarification and that neither state law nor court rules permitted such a disposition). For the Court division, see Docket sheet, *Naim v. Naim* (LOC, Douglas Papers, Box 1162, file: administrative docket book 201-400, case no. 366) (noting a five-to-four vote against recalling the Court's mandate).

The separate-but-equal doctrine had an impressive pedigree which some Justices were loath to jettison. *Plessy* in 1896 had conferred the Court's blessing upon separate-but-equal in the transportation context, and subsequent decisions strongly implied the doctrine's equal applicability to public education.[139] Several Justices expressed hesitation during the Court's *Brown* deliberations at rejecting such a substantial accumulation of precedents.[140] Justice Jackson, in an unpublished concurring opinion, articulated this concern as follows:

> Layman as well as lawyer must query how it is that the Constitution this morning forbids what for three-quarters of a century it has tolerated or approved. He must further speculate as to [the justification for] . . . this reversal of its meaning by the branch of the Government supposed not to make new law but only to declare existing law and which has exactly the same constitutional materials that so far as the states are concerned have existed since 1868 and in the case of the District of Columbia since 1791. Can we honestly say that the states which have maintained segregated schools have not, until today, been justified in understanding their practice to be constitutional?[141]

A racial classification rule would have required the Court not only to discard substantial precedent but also to transcend the original understanding of the Fourteenth Amendment.[142] Internal evidence confirms that this prospect troubled several of the Justices. Frankfurter, for example, stated that he had "read all of [the Fourteenth Amendment's] history and . . . can't say it meant to abolish segregation," and Jackson observed that "nothing in the history of the 14th amendment . . . says this is unconstitutional."[143] To illuminate the historical issue, Frankfurter assigned his impressive young law clerk, Alexander Bickel, to exhaustively research the congressional debates surrounding adoption of the Fourteenth Amendment.[144] Yet Bickel and the Justices were unable to find solace in the original understanding of the Thirty-ninth Congress. As Justice Jackson candidly conceded in his draft concurrence, "[i]t is hard to find an indication that any influen-

139. Gong Lum v. Rice, 275 U.S. 78 (1927); Cumming v. Richmond County Bd. of Educ., 175 U.S. 528 (1899).

140. *See, e.g.*, Douglas conference notes, *supra* note 130 (Justice Clark stating that "we had led the states on to think segregation is OK and we should let them work it out"); Jackson conference notes, *supra* note 122 (Chief Justice Vinson: "Body of law [is] back of us on separate but equal . . .").

141. Jackson draft concurrence, *Brown v. Board of Educ.* 5 (Mar. 15, 1954) (LOC, Jackson Papers, Box 184, case file: segregation cases).

142. *See supra* note 95.

143. Douglas conference notes, *supra* note 130; *see also* Jackson conference notes, *supra* note 122 (Vinson: "Congress pass[ed] no statute [to the] contrary. [The same] Men [were] there who passed [the] amendments. Hard get[ting] away [from] that interpretation of Amendments.").

144. *See* Frankfurter memorandum to conference (Dec. 3, 1953) (Frankfurter Papers, Part II, reel 4, at 59). Bickel's findings were later published as an article. Bickel, *supra* note 63.

tial body of the movement that carried the Civil War Amendments had reached the point of thinking about either segregation or education of the Negro as a current problem, and harder still to find that the Amendments were designed to be a solution."[145] Still unwilling to cut loose from the moorings of original intention, however, the Court in *Brown* finessed the problem by intimating that had the framers foreseen the crucial role of education in mid-twentieth-century America, they would have prohibited public school segregation.[146] The Justices, then, were sufficiently hesitant about abandoning original intent that they adhered to the framers' fundamental rights orientation, even while disregarding their views as to the constitutionality of particular social practices.

3. *A Bifurcated Equal Protection Clause*

My third proffered explanation for the Court's failure to adopt a racial classification rule is more speculative — that such a rule would have required bifurcating the Equal Protection Clause into disparate standards of review. As we shall see in the next section, the Court by this time already had adopted an extremely deferential approach to equal protection review of economic and social regulation, thus aligning that body of doctrine with its post-*Lochner* substantive due process jurisprudence.[147] Such legislation was to be sustained so long as the Court could conjure up plausible justifications for it. A racial classification rule, however, would have required the government to produce compelling justificatory purposes, and to demonstrate the inadequacy of race-neutral classifications to accomplish those objectives. Because *every* statute creates some classification, and thus is subject to equal protection challenge,[148] the rigorous standard of review that a racial classification rule calls for could not feasibly be put to general equal protection use. Yet constitutional history, at that point in time, was devoid of instances in which a single constitutional provision acquired different meaning depending on the sort of legislation under challenge. That plainly was not an approach openly embraced in the *Lochner* era's substantive due process decisions, where the Court claimed to be

145. Jackson draft concurrence, *supra* note 141, at 7.

146. *See supra* note 114 and accompanying text.

147. *See infra* text accompanying notes 168-72.

148. This distinguishes equal protection (and substantive due process) from most other constitutional provisions, which have a range of applicability far short of the entire universe of laws. The First Amendment, for example, is not plausibly implicated by most statutes; the Equal Protection Clause is.

applying a minimum rationality test across the board.[149]

Evidence from a later period confirms that the notion of bifurcating the Equal Protection Clause might have troubled the Justices. While today's Court obviously has overcome any doubts about subdividing the Equal Protection Clause, having created at least three (and arguably more)[150] distinct tiers of scrutiny, that compartmentalizing approach has generated considerable internal dissent. Justice Stevens, for example, has insisted that the Equal Protection Clause, properly understood, embodies a single standard of review — reasonableness.[151] Justice Powell not only publicly has objected to *tri*furcating equal protection review to accommodate gender classifications, but privately has questioned the need to apply anything but a unitary reasonableness test, including to racial classifications.[152] Finally, an analogous objection to differential standards of equal protection review has appeared in recent affirmative action cases where Justices have stated that minority racial preferences should be subjected to strict scrutiny because "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to . . . another . . . ."[153] Apparently the notion of a unitary equal protection standard possesses powerful intuitive force for many Justices. Perhaps, then, the Court during the early years of modern equal protection, having firmly embraced a deferential approach towards economic regulation, considered it anomalous simultaneously to construe the equal protection guarantee as presumptively invalidating racial classifications.

D. *Ramifications of the Court's Failure To Adopt a Racial Classification Rule*

1. *Footnote Eleven and the Post-*Brown *Per Curiam Opinions*

We have seen that Chief Justice Warren carefully crafted *Brown* to

149. *See, e.g.*, Adkins v. Childrens Hosp., 261 U.S. 525, 556 (1923); Coppage v. Kansas, 236 U.S. 1, 14 (1915); Lochner v. New York, 198 U.S. 45, 56-57 (1905).

150. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985); Plyler v. Doe, 457 U.S. 202 (1982) (both applying a heightened review standard of uncertain rigor).

151. *E.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 451-52 (1985) (Stevens, J., concurring); Craig v. Boren, 429 U.S. 190, 211 (1976) (Stevens, J., concurring).

152. Craig v. Boren, 429 U.S. 190, 210 n.* (1976) (Powell, J., concurring); BERNARD SCHWARTZ, THE ASCENT OF PRAGMATISM: THE BURGER COURT IN ACTION 251 (1990) (quoting Powell comments at *Cleburne* conference) ("I hesitate to go to heightened scrutiny, which I've never favored. I'm not sure even race or gender needs more than rational [basis]."); *see also id.* at 231 (Stewart at *Rostker v. Goldberg* conference stating that "I don't agree with tier tests — invidious is the only test").

153. Regents of the University of Cal. v. Bakke, 438 U.S. 265, 289 (1978) (Powell, J.); *accord* sources cited in note 461 *infra*.

fit within the existing structure of equal protection thought — that is, rather than stating a racial classification rule, *Brown* elevated education to the level of other fundamental rights with regard to which the Equal Protection Clause forbade racial discrimination.[154] *Brown* did not establish the unconstitutionality of racial segregation in any context but grade school education or of racial discrimination with regard to any rights but fundamental ones. Rather, it held only that education was sufficiently important in modern society to warrant insulating it from racial discrimination, and that segregation in education was discrimination because "[s]eparate educational facilities are inherently unequal."[155]

The narrow rationale of *Brown* created two distinct problems for the Court. First, because *Brown* failed to embrace a racial classification rule, the Justices had to explain why racially segregated public school education necessarily constituted discrimination. Enter footnote eleven, invoking social science data to establish that racially segregated educational facilities were "inherently unequal."[156] Express reliance upon controversial sociological and psychological evidence in a Supreme Court opinion was virtually unprecedented, and thus certain to be disparaged as overly subjective, as Justice Jackson himself observed.[157] Predictably, the Court suffered considerable academic criticism on account of footnote eleven.[158] Especially in connection with a ruling certain to arouse virulent criticism, if not outright defiance, in a large portion of the nation, an intellectually unimpeachable opinion was imperative; yet the Court's unwillingness to espouse a racial classification rule compelled resort to a less persuasive tack.

Perhaps more importantly, *Brown*'s narrow rationale left unresolved the constitutionality of segregation in contexts less fundamental than education — that is, most areas of life. Thus, the Justices scarcely could have been surprised to discover in the wake of *Brown* that lower courts sustained other forms of public segregation, distinguishing *Brown* on the grounds that education was both (1) more important than, for example, access to public bathhouses, and (2)

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154. *See supra* text accompanying notes 114-16.

155. Brown v. Board of Educ., 347 U.S. 483, 495 (1954).

156. 347 U.S. at 494-95 n.11.

157. Jackson draft opinion, *Brown v. Board of Educ.* 11-12 (Feb. 15, 1954) (LOC, Jackson Papers, Box 184, case file: segregation cases) ("I do not think we should import into the concept of equal protection of the law these elusive psychological and subjective factors. They are not determinable with satisfactory objectivity or measurable with reasonable certainty."); *cf.* Clark conference notes, *reproduced in* Hutchinson, *supra* note 10, at 92 (Jackson stating that "[Thurgood] Marshall's brief starts and ends with sociology").

158. *E.g.*, Cahn, *supra* note 123, at 157-68; Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 32-33 (1959).

compulsory, whereas recreation was voluntary.[159] Admittedly, these lower court decisions enjoyed short lives, as the Supreme Court in a series of per curiam opinions over the next several years struck down segregation in all public settings.[160] Yet an honest reading of *Brown*, given its emphasis on the importance of education, did not support invalidation of segregated recreational facilities. Some additional explanation, such as candid avowal of a racial classification rule, was required to justify convincingly the results in the post-*Brown* per curiams. Yet the Court provided none. Especially during the hegemony of the "reasoned elaboration" school of jurisprudence,[161] for the Court significantly to expand *Brown*'s holding without a word of explanation was deemed wholly indefensible. In consequence, the Court endured some vicious academic criticism, much of it emanating from commentators sympathetic to the result in *Brown*.[162]

2. *The Danger of Reinventing* Lochner *Under the Equal Protection Clause*

One obvious ramification of the Court's failure to tie equal protection to the political process rationale, and thus to demand compelling justifications for racial decisionmaking, was a decision like *Akins v. Texas*, in which the Court sanctioned blatantly race-conscious jury selection.[163] A more subtle, though equally important, implication was that the Justices, lacking a theory to inform their equal protection jurisprudence, might become *too* interventionist. One can conceive of this happening in either of two ways. First, the Court, continuing to mouth minimum rationality review while generating results more consistent with a racial classification rule, might have unwittingly augmented the rigor of rationality review, with attendant ramifications for economic regulation cases.

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159. *E.g.*, Lonesome v. Maxwell, 123 F. Supp. 193 (D. Md. 1954), *revd.*, 220 F.2d 386 (4th Cir.), *affd. per curiam sub nom.* Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955); Holmes v. City of Atlanta, 124 F. Supp. 290 (N.D. Ga. 1954), *affd.*, 223 F.2d 93 (5th Cir.), *vacated*, 350 U.S. 879 (1955); *see also* Paul G. Kauper, *Segregation in Public Education: The Decline of* Plessy v. Ferguson, 52 MICH. L. REV. 1137, 1153-55 (1954) (noting that *Brown* left open the possibility of sustaining racial segregation in contexts other than public schooling).

160. *See, e.g.*, Gayle v. Browder, 352 U.S. 903 (1956) (public transportation); Holmes v. City of Atlanta, 350 U.S. 879 (1955) (public golf courses); Mayor of Baltimore City v. Dawson, 350 U.S. 877 (1955) (public beaches).

161. *See, e.g.*, HENRY M. HART, JR., & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 164-70 (tentative ed. 1958); Wechsler, *supra* note 158, at 11-12, 15-17.

162. *See, e.g.*, Alexander M. Bickel & Harry H. Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 3, 4 (1957); Henry M. Hart, *The Supreme Court, 1958 Term — Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 98 & n.32 (1959); Wechsler, *supra* note 158, at 22.

163. 325 U.S. 398 (1945), discussed *supra* text accompanying notes 111-12.

Second, and probably of greater importance, the Court's practice of intuiting the vice of racial classifications without understanding it in political process terms posed a threat to certain nonracial classifications that were unobjectionable under any sensible equal protection theory. The most striking example here is *Kotch v. Board of River Port Pilot Commissioners,*[164] involving a Louisiana scheme for distributing river boat pilot licenses which privileged the friends and relatives of existing pilots — old-fashioned nepotism, in other words. A divided Supreme Court rejected an equal protection challenge to Louisiana's so-called "blood" classification. Of greatest significance for present purposes, however, is Justice Rutledge's dissent, which probably would have been the majority opinion had Justice Black not parted ways with his liberal cohorts. For the dissenters, the Louisiana law was constitutionally suspect because blood, like race, was an impermissible basis for classification.[165] That view possesses some surface plausibility, as blood resembles race in its immutability and its likely irrelevance to most legitimate governmental purposes. From a political process perspective, though, the analogy is inapt, for those denied licenses because unrelated to Mississippi river boat pilots did not constitute a group suffering debilitating historical discrimination and political disempowerment, as did blacks.[166] Indeed, even more tellingly, to distinguish the nepotism of *Kotch* from the monopolistic privileges routinely granted by legislatures to powerful interest groups is quite difficult. While one can fashion a constitutional theory under which such ostensibly nonpublic-regarding legislation is impermissible,[167] the Supreme Court during this era unambiguously rejected that approach.

My point, more specifically, is that the constitutional position narrowly failing to secure a majority in *Kotch* was irreconcilable with *Railway Express Agency v. New York*[168] and *Williamson v. Lee Optical, Inc.*,[169] two of the Court's seminal minimum rationality cases. *Railway Express* involved a New York City ordinance prohibiting advertising on vehicles other than those operated by the owner. The dis-

164. 330 U.S. 552 (1947).

165. 330 U.S. at 566 (Rutledge, J., dissenting).

166. The plaintiffs in *Kotch* were white, and nothing in the Supreme Court briefs or Justice Douglas' conference notes suggests that race was an issue in the case.

167. *See, e.g.,* Cass R. Sunstein, *Naked Preferences and the Constitution,* 84 COLUM. L. REV. 1689 (1984) (describing current constitutional doctrine in a variety of contexts as forbidding unadulterated interest group transfers); Tussman & tenBroek, *supra* note 61, at 349-50 (arguing that any coherent theory of equal protection must require that legislation bear a public interest justification).

168. 336 U.S. 106 (1949).

169. 348 U.S. 483 (1955).

tinction between advertising on owner-operated and other vehicles for traffic safety purposes was less than crystalline; indeed this facially bizarre classification probably was attributable primarily to the powerful lobbying arm of the city's newspapers.[170] Several Justices were troubled by a classification difficult to justify in terms other than raw interest group power. While *Railway Express* came down unanimous as to result, the Court initially was divided five to four, with Justice Reed arguing (correctly) in his draft dissent that to sustain a law based on such a "whimsical" distinction was essentially to render the Equal Protection Clause "useless in state regulation of business practices."[171] Thus at least four members of the Court initially questioned the constitutional validity of a legislative classification serving no apparent purpose but satiation of a powerful interest group. That they and their brethren overcame such qualms to unanimously dismiss the equal protection challenge in *Railway Express* suggests, I submit, considered rejection of a constitutional theory forbidding nonpublic-regarding legislation. That rejection was reaffirmed six years later in *Lee Optical*, where a unanimous Court dismissed an equal protection challenge to an equally blatant piece of special interest legislation, privileging optometrists and opthamologists over opticians to no apparent public purpose.[172] The position of the *Kotch* dissenters seems irreconcilable with the unanimous decisions in *Railway Express* and *Lee Optical.* In all three cases the challenged classification was plausibly explicable only as an interest group power play, yet in *Kotch* the Court almost invalidated the statute for lack of an equal protection theory distinguishing racial classifications from blood ones.

Kotch serves as my principal illustration of how an equal protection jurisprudence fueled only by unreflective intuitions regarding the legitimacy of particular legislative classifications risked spinning out of control. For convenience's sake I will limit myself to just one more example, though others could be cited.[173] In *Moore v. New York*[174] the Court rejected an equal protection challenge to state use of blue

170. *See Railway Express,* 336 U.S. at 113 (Jackson, J., concurring).

171. Reed draft dissent, *Railway Express* 2 (Jan. 1949) (LOC, Jackson Papers, Box 152, case file no. 51). On the conference vote, see *id.*, Jackson conference notes (noting Rutledge, Jackson, Reed, and Vinson as dissenting). Internal documents do not reveal what inspired the dissenters ultimately to join the majority opinion.

172. Although at conference Chief Justice Warren referred to the statute as "lousy" and Justice Minton was "very doubtful" about sustaining it, at no point was the Court's vote to reject the equal protection challenge anything but unanimous. *See* Douglas conference notes, *Lee Optical* (Mar. 5, 1955) (LOC, Douglas Papers, Box 1160, case file nos. 184, 185).

173. *See, e.g.,* South v. Peters, 339 U.S. 276, 278-79 (1950) (Douglas, J., dissenting) (arguing that *geographic* discrimination violates the Equal Protection Clause).

174. 333 U.S. 565 (1948).

ribbon juries which excluded disproportionate numbers of the less well educated. While a strong argument can be made that such selectivity in jury composition violates the Sixth Amendment's fair cross-section requirement, the four dissenters in *Moore* implausibly contended that equal protection proscribed use of special jurors "chosen because they possessed some trait or characteristic which distinguished them from the general panel of jurors."[175] To condemn government classifications based on "some trait or characteristic" without further specification simply reinvents *Lochner* under the Equal Protection Clause, for government regulation inevitably classifies people according to "some" criterion. If, more specifically, the objectionable classification in *Moore* was the restriction of special juries to "the 'best' or the most learned or intelligent" citizens,[176] one wonders what general theory of equal protection would presumptively prohibit governmental decisionmaking based on such ostensibly innocent, indeed laudable, criteria.[177] In sum, these examples suggest that the Court's eschewal of *Carolene Products* as its underlying equal protection theory left it somewhat befuddled as to the criteria rendering a particular legislative classification constitutionally objectionable.

II. *GRIFFIN* TO *SHAPIRO*

The preceding Part presented *Brown v. Board of Education* as the terminus of the initial phase of modern equal protection. This categorization may appear puzzling at first glance, given my argument that *Brown* represented no significant advance in equal protection thought — that is, the Court simply added education to the panoply of rights that the Fourteenth Amendment insulated from racial discrimination, rather than adopting a racial classification rule. I would defend my organizational structure, however, on the ground that *Brown* fundamentally altered the course of equal protection jurisprudence by attenuating its historical underpinnings. From a doctrinal, as opposed to a social, perspective, *Brown*'s principal historical significance may have been its cavalier disregard of the original understanding of the Fourteenth Amendment.[178]

175. 333 U.S. at 569 (Murphy, J., dissenting).

176. 333 U.S. at 570 (Murphy, J., dissenting).

177. The charitable interpretation of the dissenters' position is that defeat the preceding year in the incorporation debate, *see* Adamson v. California, 332 U.S. 46 (1947), forced them to convert what should have been a fair cross-section argument into an equal protection one. Nonetheless, the Equal Protection Clause has a general coverage, and it would have required a clever contortion for the liberal Justices, had they succeeded in *Moore,* to explain why classifications that were impermissible in one context were unobjectionable in others.

178. *See* Philip B. Kurland, *Foreword: Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government,* 78 HARV. L. REV. 143, 143 n.1 (1964); *cf.* ROBERT

I argued in Part I that all of the Court's pre-*Brown* race cases involved racially oriented rights restrictions that the Fourteenth Amendment's drafters might have agreed were impermissible. Public grade school segregation was an entirely different creature. When Chief Justice Warren declared in *Brown* that evidence of the framers' views on school segregation was "inconclusive,"[179] he was being considerably less than candid. Evidence regarding the original understanding of the Fourteenth Amendment is ambiguous as to a wide variety of issues, but not school segregation.[180] Virtually nothing in the congressional debates suggests that the Fourteenth Amendment was intended to prohibit school segregation, while contemporaneous state practices render such an interpretation fanciful; twenty-four of the thirty-seven states then in the union either required or permitted racially segregated schools.[181] The failure of Senator Charles Sumner's repeated efforts in the early 1870s to secure congressional legislation prohibiting school segregation further undermines the notion that

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F. NAGEL, CONSTITUTIONAL CULTURES: THE MENTALITY AND CONSEQUENCES OF JUDICIAL REVIEW 4 (1989) ("The tolerance among otherwise sophisticated people for exceedingly implausible interpretive functions is traceable to *Brown.*") (footnote omitted); Lino A. Graglia, Remarks at Roundtable Discussion of the Judiciary Act of 1789 (Feb. 11, 1989), *in* 14 NOVA L. REV. 269, 271 (1989) ("As important as *Brown* was for what it held, it was vastly more important for its impact on people's — especially judges' — perception of the possible role of the Court.").

179. *Brown*, 347 U.S. at 489.

180. *See, e.g.*, BERGER, *supra* note 63, at 241-45; KLUGER, *supra* note 86, at 634; Bickel, *supra* note 63, at 10, 53, 56, 58-59, 64 (all concluding that the Fourteenth Amendment was not intended to prohibit school segregation); *but cf.* NELSON, *supra* note 95, at 135 (arguing that, although most Americans in 1866 favored segregated schools, Congress "never institutionalized this judgment in its debates on the Fourteenth Amendment"); Frank & Munro, *supra* note 95, at 458, 464-65, 467 (noting "room for substantial difference of opinion concerning the dominant intent of the Reconstruction as to mixed schools").

Warren's description of the legislative history as "inconclusive" can be traced back to Alexander Bickel's research memorandum, prepared at Justice Frankfurter's behest and then circulated to the entire Court. *See* Letter from Alexander M. Bickel to Justice Frankfurter 2 (Aug. 22, 1953) (Frankfurter Papers, microfilm edition, part II, reel 4, at 212). Bickel and Warren intended something very different from this similar terminology, however. The plain implication of Warren's statement is that congressmen in 1866 were divided over the constitutionality of school segregation. Bickel meant nothing of the kind, as evidenced by this summary of his exhaustive research findings: "[I]t is impossible to conclude that the 39th Congress intended that segregation be abolished; impossible also to conclude that they foresaw it might be, under the language they were adopting." *Id.* When Bickel labeled the Fourteenth Amendment's history "inconclusive," he meant not that the framers' views on the constitutionality of school segregation were mixed, but rather that "the Congress was on notice that it was enacting vague language of indeterminate reach." *Id.* Bickel's argument, in other words, was that the precise intentions of the amendment's drafters were irrelevant since they *should have been aware* that subsequent generations of judges might construe expansively the amendment's spacious language. Bickel later polished this argument for publication, suggesting that the Fourteenth Amendment's broad phraseology flowed from a deliberate compromise between moderate and radical Republicans, enabling each to claim victory without jeopardizing passage of the amendment. Bickel, *supra* note 63, at 61-63. That argument, while clever, is as lacking in evidentiary support as the more direct claim that the framers specifically intended to prohibit public school segregation. For potent criticism, see BERGER, *supra* note 63, at 102-10.

181. *See* KLUGER, *supra* note 86, at 633-34.

the Thirty-ninth Congress regarded that practice as constitutionally objectionable.[182]

To strike down public school segregation in *Brown,* therefore, required the Justices consciously to burst asunder the shackles of original intent. That those Justices committed to a constrained judicial role in constitutional adjudication were deeply troubled by this prospect is illustrated by Justice Jackson's posture in *Brown.* For Jackson the historical record demonstrated that invalidation of school segregation could not be justified "as a judicial act"; he told his colleagues at conference, however, that perhaps he could be persuaded to join a ruling against segregation that candidly avowed its "political" nature.[183] Jackson's tribulations are revealed in a draft concurrence that he never published:

> Convenient as it would be to reach an opposite conclusion, I simply cannot find in the conventional material of constitutional interpretation any justification for saying that in maintaining segregated schools any state or the District of Columbia can be judicially decreed, up to the date of this decision, to have violated the fourteenth amendment.[184]

Yet Jackson ultimately joined the unanimous opinion in *Brown,* as did other Justices who initially had expressed qualms about ignoring the framers' intentions.

This willingness to transcend the historical underpinnings of the Fourteenth Amendment, I would suggest, represents *Brown*'s principal significance for modern equal protection. By the 1960s only one Justice, John Marshall Harlan, continued to evince serious concern with the Fourteenth Amendment's original understanding, as evidenced by his scholarly dissents in the apportionment and poll tax cases.[185] On those sporadic occasions where a Warren Court majority opinion undertook historical exegesis, the elicited conclusions were sufficiently implausible to suggest virtual contempt for the integrity of the historical record.[186] By the 1970s, moreover, a markedly more

182. *See* Alfred H. Kelly, *The Congressional Controversy over School Segregation, 1867-1875,* 64 AM. HIST. REV. 537 (1959); Frank & Munro, *supra* note 95, at 461-62.

183. Douglas conference notes, *supra* note 122 (Jackson: "This is a political question — education at the time of the 14th amendment was not an issue — precedents and custom are for segregation — can't justify elimination of segregation as a judicial act"); *see also* KLUGER, *supra* note 86, at 608-09 (reporting Justice Burton's conference notes to the same effect).

184. Jackson draft concurrence, *supra* note 141, at 10.

185. Reynolds v. Sims, 377 U.S. 533, 589 (1964) (Harlan, J., dissenting); Harper v. Virginia, 383 U.S. 663, 680 (1966) (Harlan, J., dissenting); *see also* Oregon v. Mitchell, 400 U.S. 112, 201 (1970) (Harlan, J., dissenting) (expressing "complete astonishment" at Justice Douglas' statement that original understanding is "irrelevant" to the question of congressional power under Section Five of the Fourteenth Amendment).

186. *See, e.g.,* Kelly, *supra* note 95, at 132 (accusing Warren Court of doing "law-office [history]" that "fail[s] to stand up under the most superficial scrutiny"). For two examples of especially egregious history, see Jones v. Alfred Mayer, 392 U.S. 409 (1968) (construing § 1982 to

conservative set of Justices scarcely batted a collective eyelash at extending meaningful equal protection review to groups — women, aliens, and nonmarital children — plainly not among the contemplated beneficiaries of the Fourteenth Amendment.

Disengagement from history permitted, but of course did not require, any number of equal protection expansions. This Part of the article interprets the principal equal protection innovations of the Warren era. The first section briefly describes the development representing the culmination of Part I — the Court's espousal of a presumptive constitutional bar on racial classifications. Next, I consider the Warren Court's voting decisions, with the primary aim of shedding new light on the adoption of one person-one vote in *Reynolds v. Sims.*[187] Then this Part examines what I regard as the elemental development of this middle phase of modern equal protection — the Warren Court's gradual groping across an array of doctrinal niches towards an understanding of equal protection rights as entitlements to prescribed outcomes, rather than, as more traditionally conceived, as checks upon deliberate governmental disadvantaging. More concretely, I shall argue that with regard to the fundamental rights strand of equal protection, the state action issue, and the school desegregation cases, the Court consistently moved towards constitutionalizing particular substantive outcomes.

A. *Adoption of a Racial Classification Rule*

Brown, by declining to adopt a presumptive ban on racial classifications, failed to transform the dominant conceptualization of equal protection as a universal rationality test. An important thrust towards modifying that understanding was supplied by weighty constitutional commentary critiquing *Brown*'s reasoning, though not necessarily its result. Probably the most famous example was Herbert Wechsler's

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reach private racial discrimination, and sustaining the constitutionality of the statute, as so interpreted, under Congress' Thirteenth Amendment enforcement power), discussed *infra* text accompanying notes 305-11, and Wesberry v. Sanders, 376 U.S. 1 (1964) (interpreting Article I, § 2 to require one person-one vote in federal congressional elections). Justice Black's use of history in *Wesberry* is demolished in Justice Harlan's dissent. 376 U.S. at 24; *see also* Kelly, *supra* note 95, at 135 (stating that Justice Black's opinion "mangled constitutional history"). For equally devastating criticism of Justice Stewart's history in *Jones,* see 392 U.S. at 450-76 (Harlan, J., dissenting); FAIRMAN, *supra* note 62, at 1207-59; Gerhard Casper, Jones v. Mayer: *Clio, Bemused and Confused Muse,* 1968 SUP. CT. REV. 89, 96-99. For a refusal by the Court to address history at all, see Reynolds v. Sims, 377 U.S. 533 (1964); *see also* 377 U.S. 589, 590 (Harlan, J., dissenting) (chastising majority for its "failure to address itself at all to the . . . legislative history of the [Fourteenth] Amendment").

To avoid misunderstanding I emphasize that this article takes no normative position on the relevance of history to constitutional interpretation.

187. 377 U.S. 533 (1964).

Neutral Principles article.[188] What is often forgotten about Wechsler's criticism — which was, in essence, that the *Brown* rationale placed undue weight on the minority group's subjective perceptions[189] — is its inapplicability to a presumptive rule against racial classifications. Professors Louis Pollak and Charles Black quickly responded to Wechsler's criticism by suggesting that *Brown* was better understood as founded upon a racial classification rule.[190] Pollak expressly justified such a rule on *Carolene Products* grounds, which, as he correctly noted, would eliminate the need for debatable social science judgments by transferring the burden of justification to the government.[191]

While individual Justices may have arrived there earlier, the full Court first stated a presumptive rule against racial classifications in *McLaughlin v. Florida,*[192] where it struck down on equal protection grounds a state law criminalizing cohabitation by unmarried interracial couples. For the first time the Court in *McLaughlin* both articulated *and* applied a more rigorous review standard to racial classifications, requiring as justification an "overriding" state purpose as well as a showing that the classification was "necessary," rather than just rationally related, to the proffered governmental interest.[193] This racial classification rule subsequently was reaffirmed in *Loving v. Virginia,*[194] where the Court finally resolved the miscegenation issue that it had so unglamorously ducked in *Naim* and evaded in *McLaughlin.*

The racial classification rule's novelty, I would posit, explains the result in *Swain v. Alabama,*[195] decided just one year after *McLaughlin.* At issue in *Swain* was the constitutionality of racially motivated exercise of peremptory jury challenges by the prosecution in a criminal case. A general rule against race-conscious governmental decisionmaking would appear to bar such a practice, yet *Swain* rejected an

188. Wechsler, *supra* note 158.

189. *Id.* at 32-33.

190. Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions,* 69 YALE L.J. 421 (1960); Louis H. Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler,* 108 U. PA. L. REV. 1 (1959).

191. Pollak, *supra* note 190, at 27; *see also* Owen M. Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts,* 78 HARV. L. REV. 564, 595 n.59 (1965) (surmising from post-*Brown* per curiam opinions that the Court refuses to respect the results of a political process from which blacks are effectively excluded).

192. 379 U.S. 184 (1964). On individual Justices arriving there earlier, see Douglas conference notes, *Brown v. Board of Educ.* (Dec. 13, 1952), *supra* note 130 (Justice Douglas: "segregation is an easy problem — no classification on the basis of race can be made") (Justice Minton: "classification on the basis of race does not add up — it's invidious and can't be maintained").

193. 379 U.S. at 192-93, 196; *see also* 379 U.S. at 197 (Harlan, J., concurring).

194. 388 U.S. 1 (1967).

195. 380 U.S. 202 (1965).

equal protection challenge to a consistent prosecutorial practice of striking prospective black jurors. Equally noteworthy was the dissenters' concession that only "systematic exclusion," not isolated race-based challenges, violated the Equal Protection Clause.[196] In *Swain*, as in *Akins* twenty years earlier, the Justices sanctioned racially discriminatory governmental conduct in their eagerness to reject a constitutional entitlement to racial proportionality on juries. That the decidedly more conservative Burger Court overruled *Swain* by a resounding seven-to-two margin probably is due to the influence of two additional decades of thinking about equal protection in terms of a racial classification rule.[197]

While *McLaughlin* and *Loving* finally adopted such a rule, they failed to produce a convincing justificatory rationale. The most one can derive from these and other contemporaneous opinions was the centrality to the Fourteenth Amendment's framers of protecting blacks.[198] That historical justification was scarcely compelling, though, given that most of the framers did *not* intend to constitutionalize a racial classification rule.[199]

Identifying the justification for such a rule has proven critical to resolution of the three issues which, in combination, have dominated the most recent phase of modern equal protection. First is the question of which groups, in addition to racial minorities, qualify for heightened equal protection review. A casual nod towards history provides some (minimal, in my view) support for a presumptive rule against *racial* classifications, but more is required to shelter other groups under the equal protection umbrella. Second, a racial classification rule serves two distinct values; it purges the legislative process of racial hostility and stereotypes, and it insulates an historically oppressed group from additional burdens (whether imposed intentionally or not) unless compellingly justified. The Warren Court had no need to choose between these processual and impact values, yet that issue proved as momentous as any in equal protection during the 1970s in the specific guise of constitutional challenges to facially neutral laws yielding disparate racial impacts. Finally, *McLaughlin* and *Loving*, in failing to spell out the justification for a racial classification rule, left unresolved the constitutional status of racial classifications designed to *benefit* the minority group — i.e., affirmative action. More specifi-

196. 380 U.S. at 245 (Goldberg, J., dissenting).

197. *See* Batson v. Kentucky, 476 U.S. 79 (1986).

198. *See, e.g., McLaughlin*, 379 U.S. at 191-92; 379 U.S. at 197 (Harlan, J., concurring); Shapiro v. Thompson, 394 U.S. 618, 659 (1969) (Harlan, J., dissenting); Harper v. Virginia, 383 U.S. 663, 682 n.3 (1966) (Harlan, J., dissenting).

199. *See supra* note 95.

cally, the Court did not decide whether racial classifications are objectionable primarily because of their unhappy history of oppressing racial minorities or because racial decisionmaking is simply anathema to good government.

B. *The Voting Rights Revolution*

One principal arena of the Warren Court's "egalitarian revolution" was voting rights. Until 1960 the Justices steadfastly declined to enter the political thicket, with the sole exception of invalidating several flagrant black exclusions from the franchise.[200] Through the 1950s the Court regularly rejected challenges to legislative malapportionment, geographical vote weighting, and the poll tax.[201] Indeed, as late as 1959 a unanimous Court rejected an equal protection challenge to a state literacy test.[202]

The camel's nose under the voting booth was *Gomillion v. Lightfoot,*[203] where the Court struck down blatant racial gerrymandering of city lines, which excluded nearly every black resident, but not a single white. Because this infringement on voting rights was racially motivated, the Court was able to rely entirely upon the *Fifteenth* Amendment, thus creating no generally applicable vote dilution precedent. Indeed, Justice Frankfurter's majority opinion went to great lengths to distinguish earlier nonracial vote dilution controversies in which the Court had refused to intervene.[204]

Gomillion in no sense rendered inevitable the Court's ensuing decision to constitutionalize legislative apportionment rules.[205] To the contrary, internal evidence reveals the Justices' considerable hesitation at embarking upon this novel enterprise. *Baker v. Carr,*[206] a suit challenging gross malapportionment in the Tennessee legislature, was first argued in the Court's 1960 Term. At conference Justice Frankfurter, articulating a view later embellished in his famous dissent, warned

200. *E.g.,* cases cited *supra* note 104 ("white primary" cases); Guinn v. United States, 238 U.S. 347 (1915) (literacy test excluding blacks while grandfathering whites).

201. *See, e.g.,* South v. Peters, 339 U.S. 276 (1950) (geographic vote weighting); Colegrove v. Green, 328 U.S. 549 (1946) (malapportionment); Breedlove v. Suttles, 302 U.S. 277 (1937) (poll tax).

202. *See* Lassiter v. Northampton County Bd., 360 U.S. 45 (1959).

203. 364 U.S. 339 (1960).

204. *See* 364 U.S. at 346 (distinguishing *Colegrove* on the grounds that it involved a *nonracial* vote *dilution* resulting from legislative *inaction*); *see also* Frankfurter draft opinion, *Gomillion v. Lightfoot* 7-8 (Nov. 10, 1960) (LOC, Warren Papers, Box 471, case file no. 32) (distinguishing *Colegrove* on several additional grounds).

205. *See, e.g.,* Jo Desha Lucas, *Dragon in the Thicket: A Perusal of* Gomillion v. Lightfoot, 1961 SUP. CT. REV. 194, 244 (predicting after *Gomillion* that the Court would not involve itself in the apportionment issue).

206. 369 U.S. 186 (1962).

that the Court would "get into great difficulty and . . . rue the results" if it intervened.[207] Justice Harlan reiterated that position at a subsequent conference, observing that the Court's "greatness" was partially attributable to its consistent refusal to enter "political contests."[208] The justiciability of legislative apportionment challenges was a sufficiently vexing issue that the Justices proved unable to make up their collective mind that Term; more specifically, the Court split four to four, with Justice Stewart undecided and thus pressing for reargument.[209]

The following year, of course, a comfortable majority was assembled behind the relatively narrow proposition that constitutional challenges to legislative apportionment were justiciable; no substantive standards emanated from the Court at this time, however.[210] A close examination of the various opinions in *Baker* reveals that on the issues of original intent, political history, and judicial precedent, the dissenting Justices scored all of the points.[211] Justice Frankfurter accurately summarized the situation, stating in dissent that *Baker* "reverse[d] a uniform course of decision established by a dozen cases," as well as casting aside the "equally uniform course of our political history regarding the relationship between population and legislative representation."[212] While fully persuasive in his reading of the traditional materials of constitutional interpretation, however, Frankfurter man-

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207. Douglas conference notes, *Baker v. Carr* (Apr. 20, 1961) (LOC, Douglas Papers, Box 1266, case file no. 6).

208. Douglas conference notes, *Baker v. Carr* (Oct. 13, 1961), *id.* Harlan's observation elicited from Douglas the written remark: "My God — what does he think the Segregation Cases were — or the Youngstown Case — or the Tuskegee case *[Gomillion]*?"

209. *See* Douglas conference notes, *supra* note 207 (Warren, Black, Douglas, and Brennan willing to reverse dismissal of the constitutional claim for failure to state a claim; Frankfurter, Clark, Harlan, and Whittaker coming out the other way; Stewart noting that "he is not at rest on the issue" and that "he has sufficient doubt that he passes"); Douglas conference notes, *Baker v. Carr* (Apr. 28, 1961) (LOC, Douglas Papers, Box 1266, case file no. 6).

210. *See Baker,* 369 U.S. at 197-98.

211. *Compare, e.g.,* 369 U.S. at 218-29 (distinguishing numerous Guarantee Clause cases on the unconvincing ground that they arose under a different constitutional provision), 229-31 (relying on *Gomillion* for support even though the Court there went to great lengths to distinguish the apportionment issue), *and* 232-37 (distinguishing on tenuous grounds precedents rejecting apportionment challenges) *with* 369 U.S. at 277-80 (Frankfurter, J., dissenting) (discussing apportionment precedents), 289-302 (discussing Guarantee Clause precedents and concluding that this case "is, in effect, a Guarantee Clause claim masquerading under a different label"), *and* 307-18 (discussing the nation's political history and the original understanding of the Fourteenth Amendment's drafters); *see also* Carl A. Auerbach, *The Reapportionment Cases: One Person, One Vote — One Vote, One Value,* 1964 SUP. CT. REV. 1, 85 (agreeing with Justice Frankfurter that *Baker* presents "in effect, a Guarantee Clause claim masquerading under a different label"); Paul G. Kauper, *Some Comments on the Reapportionment Cases,* 63 MICH. L. REV. 243, 244 (1964) (same); Neal, *supra* note 123, at 255-56 (noting *Baker*'s distortion of precedent and arguing that the decision was unsupported by constitutional language, original intent, or precedent).

212. 369 U.S. at 266.

aged no response to the simple yet compelling argument, advanced by some of the Justices in the majority, that Tennessee legislators possessed such an abiding interest in maintenance of the apportionment scheme under which they held office that they might never budge unless judicially ordered to do so.[213] Given the Tennessee legislature's predictable resistance to remedying malapportionment and the unavailability of alternative avenues of relief for Tennesseans, Frankfurter's admonition that "[a]ppeal must be to an informed, civically militant electorate" rather than to the courts[214] rang quite hollow.

Political process theory, then, apparently played at least a marginal role in the Court's initial decision to enter the apportionment fray. Yet, it explains neither the rapid adoption of one person-one vote as the governing constitutional standard, nor the application of that standard to political contexts in which malapportionment manifestly was *not* attributable simply to legislative self-interest. I shall consider these two points in turn. Having decided in *Baker* to enter the political thicket, the Justices had, roughly speaking, three plausible apportionment standards from which to choose. First, and least intrusively, the Court might have reserved intervention for situations evidencing "systematic frustration of the will of a majority of the electorate" by a self-serving legislature.[215] Second, and just slightly more interventionist, would have been to require that any deviation from equal voting weights be rationally explicable — that is, a straightforward extension of the general equal protection rationality standard to apportionment cases.[216] Finally, the Court could have embraced, as it ultimately did, a strong presumption in favor of one person-one vote, defeasible only in a few narrow instances.[217]

Interestingly, at the time *Baker v. Carr* was decided, neither the Justices nor the commentators appear to have thought beyond the first

213. 369 U.S. at 248 (Douglas, J., concurring) ("[E]ntrenched political regimes" make avenues of relief other than judicial "illusory."); 369 U.S. at 258-59 (Clark, J., concurring); *see also* Reynolds v. Sims, 377 U.S. 533, 553-54, 570 (1964) (noting the unavailability of political remedies for malapportionment in Alabama owing to lack of initiative mechanism and to state requirement that constitutional amendments originate in the legislature). For academic commentary relying upon this justification for judicial intervention in apportionment cases, see ELY, *supra* note 38, at 120; Vince Blasi, *A Requiem for the Warren Court*, 48 TEX. L. REV. 608, 614 (1970); Klarman, *supra* note 7, at 757-58.

214. 369 U.S. at 270.

215. Lucas v. Forty-Fourth General Assembly, 377 U.S. 713, 753-54 (1964) (Stewart, J., dissenting); *see also Baker*, 369 U.S. at 261-62 (Clark, J., concurring); Robert G. McCloskey, *Foreword: The Reapportionment Case*, 76 HARV. L. REV. 54, 71 (1962) (suggesting that preventing "frustration of majority will" is one direction in which the Court might move after *Baker*).

216. *See, e.g., Baker*, 369 U.S. at 251-52, 254 (Clark, J., concurring); 369 U.S. at 265-66 (Stewart, J., concurring); McCloskey, *supra* note 215, at 72-73.

217. *Reynolds* rejected all justifications for deviating from equally weighted votes except respect for political subdivision lines. 377 U.S. at 578, 579-80.

two options.[218] None of the Justices in *Baker,* either at conference[219] or in their multiple opinions, mentioned anything but the patent irrationality of Tennessee's apportionment "scheme." Thus Justice Brennan's majority opinion, in its only reference to substantive standards, noted that it "has been open to courts since the enactment of the fourteenth amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action."[220] Similarly, Justices Douglas, Stewart, and Clark all wrote separately to emphasize that equal voting weights were *not* constitutionally required; the latter described Tennessee's apportionment as "a crazy quilt without rational basis."[221]

The Justices, though plainly not thinking in terms of one person-one vote at the time of *Baker,* moved rapidly in that direction over the next two years, first requiring equality in statewide elections, then in congressional elections, and finally in state legislative districting as well.[222] The explanation for this dramatic shift in approach is not clear. Justice Douglas' detailed conference notes reveal that the Justices were speaking equality language in the autumn of 1963, whereas two years earlier their emphasis had been on rationality; yet virtually no justification was forthcoming.[223] One possibility is that the lower courts' response to *Baker* was so aggressive (especially when contrasted with their unenthusiastic response to *Brown*) that the Justices, believing they had hit upon "a latent consensus," became markedly bolder in their own apportionment posture.[224]

Another hypothesis not inconsistent with the first is that the Justices selected one person-one vote as their constitutional standard sim-

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218. *See, e.g.,* McCloskey, *supra* note 215, at 71-72; Robert B. McKay, *Political Thickets and Crazy Quilts: Reapportionment and Equal Protection,* 61 MICH. L. REV. 645, 682 (1963).

219. *See* Douglas conference notes, *supra* note 208 (Warren: "state need not have precise equality; . . . we come in only where the line of arbitrariness has been crossed") (Black: "does this act bear so unequally and arbitrarily as to deny equal protection?") (Stewart: rejects "the assumption that Equal Protection requires legislature to apportion votes so there is no discrimination").

220. 369 U.S. at 226.

221. 369 U.S. at 253-54 (Clark, J., concurring); *accord* 369 U.S. at 244-45 (Douglas, J., concurring); 369 U.S. at 265 (Stewart, J., concurring).

222. *See* Reynolds v. Sims, 377 U.S. 533 (1964) (state legislative districting); Wesberry v. Sanders, 376 U.S. 1 (1964) (congressional elections); Gray v. Sanders, 372 U.S. 368 (1963) (statewide elections).

223. *See, e.g.,* Douglas conference notes, *WMCA v. Simon* (Nov. 15, 1963) (LOC, Douglas Papers, Box 1300, case file: argued cases nos. 19-22) (Warren: "Principle of equality is starting point") (Black: "Each citizen should have right to equal vote . . . .") (Brennan: "The standard is 'equality' ").

224. *See* McCloskey, *supra* note 215, at 56-59 & n.14 (enumerating post-*Baker* judicial developments and calling the short-term response "nothing short of astonishing"); McKay, *supra* note 218, at 645-46, 660, 706-10 app. (elaborating judicial response to *Baker* state by state and describing it as "immediate, widespread, indeed eager").

ply for reasons of administrative simplicity. By this I mean not that they sought to conserve judicial energy, but rather to avoid the intractable problems that had so consternated Justice Frankfurter. In other words, having steeled themselves to enter the political thicket, the Justices immediately embraced a substantive equal protection standard that would render irrelevant the controversial political calculations that any standard less mechanical than one person-one vote would entail.[225] One person-one vote, while difficult to defend on any interpretivist constitutional theory,[226] was fully responsive to Justice Frankfurter's warnings that judicial intervention in apportionment controversies would "charge courts with the task of accommodating the incommensurable factors of policy that underlie these mathematical puzzles."[227]

I would suggest that a similar reluctance to weigh "incommensurable factors" explains the Court's extension of one person-one vote to contexts in which the case for judicial intervention was considerably weaker than in *Baker* or *Reynolds.* One of *Reynolds'* companion cases, *Lucas v. Forty-Fourth General Assembly,*[228] involved Colorado's (comparatively mild) malapportionment scheme which, significantly, had secured the approbation of state voters at a recent referendum. In his opinion for the Court, Chief Justice Warren rejected the significance of that referendum, observing that "individual constitutional rights cannot be deprived, or denied judicial effectuation, because of the existence of a nonjudicial remedy through which relief against the alleged malapportionment, which the individual voters seek, might be achieved."[229] In general one might concede the soundness of the Chief Justice's proposition; since most constitutional rights are fundamentally concerned with checking majority overreaching, putting those rights up for a referendum would be nonsensical. That general truth is quite inapplicable, however, when the right in issue was first judicially recognized in order to safeguard the majoritarian political process from distortions inflicted by self-seeking legislators. Measured against that justificatory rationale, *Lucas'* refusal to countenance a state electorate's knowing waiver of its right against malapportionment is

225. For commentary reaching a similar conclusion, see, *e.g.,* ELY, *supra* note 38, at 120-21; Ralph K. Winter, Jr., *Poverty, Economic Equality, and the Equal Protection Clause,* 1972 SUP. CT. REV. 41, 91.

226. Justice Harlan correctly noted that the right to an equally weighted vote recognized in *Reynolds* was "tied to the equal protection clause only by the constitutionally frail tautology that 'equal' means 'equal.' " 377 U.S. at 590 (Harlan, J., dissenting).

227. *Baker,* 369 U.S. at 268 (Frankfurter, J., dissenting); *see also* McCloskey, *supra* note 215, at 73; Neal, *supra* note 123, at 275.

228. 377 U.S. 713 (1964).

229. 377 U.S. at 736.

troubling.[230] The explanation, I would suggest, is the same as that underlying one person-one vote generally. For the Court on a case-by-case basis to attempt distinguishing legislative frustrations of the majority will from voluntary waivers of the majority's right not to suffer egregious malapportionment would be just as unmanageable, and thus politically costly, as determining which deviations from equal voting weights were rationally defensible.[231]

Having committed itself to safeguarding equality in voting weights, the Court next set about defining constitutional boundaries for the political community. During the five years after *Reynolds,* the Court progressively narrowed the permissible grounds of exclusion from political participation, first striking down voting restrictions on resident servicemen, then invalidating de facto disfranchisement of the poor through the poll tax, and finally severely limiting exclusions from special purpose elections.[232] These voting rights cases too can be justified on political process grounds. Legislators, and the enfranchised groups they represent, are too interested in the outcome to be entrusted with the authority to delineate the bounds of the political community. Historically, groups enjoying political power have opposed extending the franchise because doing so would threaten their hegemony.[233] Thus, for example, during the 1930s and 1940s, federal legislation that would have repealed disfranchising poll taxes was opposed, in part, by conservative groups resistant to expansion of the New Deal's natural constituency — the poor.[234]

It is worth noting, in conclusion, that political process theory probably explains why the more conservative Burger Court, which I shall argue in Part III effected a dramatic turnabout in other equal protection contexts, generally *expanded* constitutional voting rights guarantees. Thus it was the Burger Court that first invalidated multi-

230. *See Lucas,* 377 U.S. at 753-54 (Stewart, J., dissenting) (no systematic frustration of majority will in Colorado); *cf.* Douglas conference notes, *supra* note 223 (Douglas suggesting as to *Lucas* that perhaps courts should not interfere "as a matter of equity" where the "political remedy" of initiative and referendum exists); (White noting that Colorado "gave the voters a real choice and they voted an unequal system").

231. For example, the Court might have to draw inferences from the electorate's failure to employ initiative and referendum procedures, or determine how the precise formulation of options in a referendum should influence the inference to be drawn from its result.

232. *See* Cipriano v. City of Houma, 395 U.S. 701 (1969) (per curiam) (restriction on participation in revenue bond referendum for municipal utility); Kramer v. Union Free School Dist., 395 U.S. 621 (1969) (restriction on participation in school board elections); Harper v. Virginia, 383 U.S. 663 (1966) (poll tax); Carrington v. Rash, 380 U.S. 89 (1965) (exclusion of resident servicemen).

233. *See, e.g.,* H.B. MAYO, INTRODUCTION TO DEMOCRATIC THEORY 120 (1960); J.A. LaPonce, *The Protection of Minorities by the Electoral System,* 10 W. POL. Q. 318, 319 (1957).

234. *See, e.g.,* LAWSON, *supra* note 105, at 55-56, 59-60.

member legislative districts that diminished the effectiveness of black votes, candidate filing fees for primary elections, lengthy durational residency requirements for voting, as well as certain forms of political gerrymandering, and increased the stringency of the one person-one vote requirement in congressional elections.[235] It was the Burger Court, in addition, that just one year before striking down its first affirmative action plan sustained the use of race-conscious gerrymandering to preserve black voting power.[236] Apparently the voting rights aspect of the Warren Court's egalitarian revolution has become reasonably uncontroversial, notwithstanding its disregard of original intent, judicial precedent, and the nation's political history. The most plausible explanation for this phenomenon is that under political process theory few, if any, subject areas are more appropriately delegated to judicial supervision than voting rights.

C. *Changing Conceptualization of Equal Protection Rights*

This Part thus far has considered two pathbreaking equal protection developments of the Warren era, both plausibly explicable in political process terms: the adoption of a racial classification rule and the expansion of constitutional voting rights protection. I would argue, though, that this period's most dramatic equal protection development was one transcending discrete doctrinal niches: the Court's increasing willingness to interpret equal protection as an entitlement to particular substantive outcomes, rather than, pursuant to the conventional understanding, as a guarantee against deliberate governmental disadvantaging.[237] This departure from the traditional focus on legislative inputs is neither mandated, nor barred, by political process theory. Though that theory plainly condemns legislation motivated by hostility towards disfranchised or discrete and insular minorities, it

235. *See, e.g.*, Davis v. Bandemer, 478 U.S. 109 (1986) (political gerrymandering); Karcher v. Daggett, 462 U.S. 725 (1983) (stringent one person-one vote requirement); Lubin v. Panish, 415 U.S. 709 (1974) (candidate filing fees); White v. Regester, 412 U.S. 755 (1973) (multimember legislative districts); Dunn v. Blumstein, 405 U.S. 330 (1972) (durational residency requirements).

236. United Jewish Orgs. v. Carey, 430 U.S. 144 (1977), *discussed infra* note 442 and accompanying text.

237. On the conventional understanding, see, *e.g.*, Brown v. Allen, 344 U.S. 443, 473 (1953) (not an equal protection violation to use poll tax lists to select jurors notwithstanding disparate racial impact); South v. Peters, 339 U.S. 276 (1950) (implicitly rejecting argument that disparate racial impact of malapportionment violates Equal Protection Clause); Akins v. Texas, 325 U.S. 398, 403 (1945) (no constitutional right to racial proportionality on juries). I have argued that during the early phase of modern equal protection only certain fundamental rights were deemed to be protected against racial discrimination. *See supra* section I.B. Under the "conventional understanding" of equal protection, then, those fundamental rights — e.g., the franchise and jury service — were safeguarded against racially motivated interferences but not against licitly motivated, racially disparate impacts.

plausibly extends as well to laws enacted out of selective indifference towards the interests of such groups.[238] Thus, for example, while public discrimination against blacks unquestionably violates the Equal Protection Clause, a public decision to *tolerate* private race discrimination arguably should as well if demonstrably attributable to the systematic devaluation of black interests by the legislature — i.e., similar discrimination against whites would have been statutorily prohibited. The Warren Court's move towards a substantive entitlements approach to equal protection, then, is perfectly consistent with a certain conception of political process theory.

This section will first consider the fundamental rights strand of equal protection, which principally involved constitutional guarantees against governmental action producing disparate wealth effects with regard to certain "fundamental" interests. While under the traditional understanding equal protection rights are negative constraints upon government, the fundamental rights strand decisions created affirmative governmental obligations to redress poverty not directly attributable to the state. Second, significant reconceptualization of rights occurred in the "state action" cases where the Court, across an array of diverse factual settings, ruled that ostensibly private race discrimination violated the Equal Protection Clause. Holding private discrimination unconstitutional represented another departure from the conventional view of equal protection as a right against deliberate *governmental* hostility. Third, I shall examine the de facto school segregation issue, which plausibly can be subcategorized within state action doctrine, though traditionally it has been treated as an independent doctrinal category. The Warren Court never had to decide the constitutionality of public school segregation attributable to factors other than the deliberate choices of government actors. I shall argue, though, that the Court's 1968 decision in *Green v. County School Board*[239] signified some willingness to hold government responsible for redressing segregation not of its own making, and that internal Court documents strongly suggest that a Warren Court majority could have been assembled to invalidate de facto school segregation.

1. *The Fundamental Rights Strand of Equal Protection*

Prior to 1956 the Supreme Court had not construed the Equal Pro-

238. *See infra* notes 391-92 and accompanying text. For the argument that only the access, and not the prejudice, prong of *Carolene Products* can justify condemnation of race discrimination without violating the value-neutral premises of political process theory, see Klarman, *supra* note 7, at 788-812.

239. 391 U.S. 430 (1968).

tection Clause (or any other constitutional provision) to bar discrimination against the poor. Indeed the Court's 1941 decision in *Edwards v. California,* striking down a California law criminalizing the introduction of indigents into the state, carefully avoided such a ruling, holding instead that the Dormant Commerce Clause prohibited this restriction on interstate migration.[240] Similarly the Court had rejected equal protection challenges to laws conditioning voting and jury service on payment of the poll tax, despite the obvious disparate impact such practices had upon the poor.[241] In just one constitutional context had the Court manifested any clear concern about poverty — criminal cases in which indigent defendants were charged with capital offenses[242] — and the requirement that government redress poverty in that setting, to the extent of providing free counsel, was easily cabined.

Against this backdrop of unconcern with wealth "discrimination," in 1956 a divided Court ruled in *Griffin v. Illinois* that a state-created right of appeal against criminal convictions could be conditioned upon production of a trial transcript only if indigent defendants were provided with free ones.[243] Justice Black's plurality opinion steadfastly refused to choose between the Equal Protection and Due Process Clauses, though its egalitarian rhetoric was striking.[244] *Griffin* was noteworthy for its virtually unprecedented pronouncement of the Court's constitutional concern with poverty. Moreover, the wealth discrimination invalidated there was a disparate wealth effect flowing from governmental action not motivated by animus towards the poor. As Justice Harlan correctly noted in dissent, *Griffin* did not involve special designation of the poor for disadvantageous treatment, but rather refusal to exempt them from a generally applicable fee requirement.[245] Logical expansion of *Griffin*'s wealth discrimination rationale could have justified invalidation of all government fee requirements

240. *Edwards,* 314 U.S. 160, 174 (1941), discussed *supra* text accompanying notes 29-33.

241. Brown v. Allen, 344 U.S. 443 (1953) (jury service); Breedlove v. Suttles, 302 U.S. 277 (1937) (voting), *overruled by* Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966).

242. *See, e.g.,* Powell v. Alabama, 287 U.S. 45 (1932). The statement in the text is oversimplified in that the Court's decisions also required state-provided counsel in noncapital cases where the defendant, "by reason of age, ignorance or mental capacity" was incapable of representing himself adequately. *See, e.g.,* Wade v. Mayo, 334 U.S. 672, 684 (1948); *see also* Walter V. Schaefer, *Federalism and State Criminal Procedure,* 70 HARV. L. REV. 1, 9 (1956).

243. 351 U.S. 12 (1956).

244. 351 U.S. at 19 ("There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."). Neither Frankfurter, whose concurring vote was essential to the result, nor Black could reconcile a due process grounding for *Griffin* with views they had expressed elsewhere regarding that constitutional provision. *See, e.g.,* Adamson v. California, 332 U.S. 46, 67 (1947) (Frankfurter, J., concurring); 332 U.S. at 90 (Black, J., dissenting); Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 467-69 (1947) (Frankfurter, J., concurring); Betts v. Brady, 316 U.S. 455, 475 (1942) (Black, J., dissenting).

245. 351 U.S. at 34 (Harlan, J., dissenting) (the state has simply "fail[ed] to alleviate the

including, for example, public university tuition charges, bail requirements in criminal cases, and even state sales taxes.[246] Even more broadly, *Griffin*'s novel conceptualization of equal protection rights provided the grounding for an array of creative constitutional commentary in the 1960s calling for imposition of affirmative obligations on government to redress inequalities not of its own making.[247]

Griffin underwent minor expansion within the criminal context over the next several years, culminating in 1963 with the landmark rulings in *Gideon v. Wainwright*[248] and *Douglas v. California*,[249] which held indigent defendants constitutionally entitled to state-provided counsel at trial and the first appeal, respectively. Invocation of the wealth discrimination rationale outside of the criminal context first came in *Harper v. Virginia State Board of Elections*,[250] where the Court invalidated a state poll tax on equal protection grounds. Again the Court employed broad wealth discrimination rhetoric — "[w]ealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process"[251] — in constitutionally barring the state from enforcing a generally applicable fee requirement that disproportionately disadvantaged the poor.

The virtually limitless reach of a constitutional rule condemning disparate wealth effects pressured the Court to restrict its wealth discrimination rationale to "fundamental" rights, which both *Griffin* and *Harper* clearly involved.[252] Even recharacterizing those cases in fundamental rights terms, however, left considerable room for expansion.

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consequences of differences in economic circumstances that exist wholly apart from any state action").

246. 351 U.S. at 34-35 (Harlan, J., dissenting); Douglas v. California, 372 U.S. 353, 361-62 (1963) (Harlan, J., dissenting).

247. *See, e.g.*, Fiss, *supra* note 191, at 593 n.50 (noting that *Griffin* suggests that facially neutral laws producing disparate racial impacts violate equal protection); Harold W. Horowitz, *Unseparate but Unequal — The Emerging Fourteenth Amendment Issue in Public School Education*, 13 UCLA L. REV. 1147, 1168 (1966) (finding implicit in *Griffin* an equal protection requirement that the state provide remedial education to the culturally disadvantaged); Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 9-13 (1969) (relying on *Griffin* and progeny to support a "minimum protection" guarantee that "just wants" be satisfied by government); Sager, *supra* note 54, at 777 (noting the connection between *Griffin* and the Warren Court's evisceration of the state action requirement). *See generally* Archibald Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 93 (1966) (calling *Griffin* and progeny's imposition of affirmative obligations on government the "most creative force in constitutional law").

248. 372 U.S. 335 (1963).

249. 372 U.S. 353 (1963).

250. 383 U.S. 663 (1966).

251. 383 U.S. at 668.

252. *See, e.g.*, Michelman, *supra* note 247, at 22, 24-25; Sager, *supra* note 54, at 778; Bertram F. Willcox & Edward J. Bloustein, *The* Griffin *Case — Poverty and the Fourteenth Amendment*, 43 CORNELL L.Q. 1, 13 (1957).

Only a lawyer, after all, could argue with a straight face that legal assistance in a criminal appeal is more important than, for example, food and shelter.[253] A more fruitful limiting rationale, not identified in *Griffin* or *Harper* but concocted post hoc by Justice Harlan in *Boddie v. Connecticut,*[254] treated as central the elements of state coercion and monopolization. Thus while the state compels defendants' participation in the criminal justice system and monopolizes meaningful exercise of the franchise, it exerts no equivalent control over food, housing, or medical care.

Even the monopolization limitation, however, was left by the wayside (*before* Justice Harlan had articulated it, ironically) in *Shapiro v. Thompson,*[255] decided during the Warren Court's last Term. Indeed, I would suggest that *Shapiro* is the most revealing of the fundamental rights strand decisions because it demonstrated the Court's willingness to extend its wealth discrimination concern beyond the scope of the monopolization rationale.[256] In *Shapiro* the Court invalidated one-year durational residency requirements for welfare in an opinion by

253. For lawyers making such implausible arguments, see, *e.g.,* Yale Kamisar, *Has the Court Left the Attorney General Behind? — The Bazelon-Katzenbach Letters on Poverty, Equality and the Administration of Criminal Justice,* 54 KY. L.J. 464, 468-69 (1966); Willcox & Bloustein, *supra* note 252, at 16-17.

254. 401 U.S. 371 (1971), discussed *infra* text accompanying notes 331-32. *Boddie* struck down divorce court filing fees as applied to the indigent. 401 U.S. at 382-83.

255. 394 U.S. 618 (1969). I do not wish to suggest that there were no other important wealth discrimination developments before *Shapiro.* Indeed the *Massiah-Escobedo-Miranda* line of cases represented a potentially enormous expansion of the Court's concern for wealth effects in the administration of criminal justice. Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964); Massiah v. United States, 377 U.S. 201 (1964). *Griffin* and progeny — most notably, *Douglas v. California* and *Gideon v. Wainwright* — involved the impact of indigency on the determination of "factual guilt" in criminal trials. In other words, the Court's concern was that an indigent defendant unable to secure a lawyer at trial or on appeal might be unjustly convicted. *Massiah* and progeny, however, involved the effect of indigency on a different stage of the criminal justice process — pretrial investigation. The Court's extension of the right to counsel to the investigative, as contrasted with the adjudicatory, stage of criminal proceedings manifested a concern less with preventing conviction of the indigent innocent than with ensuring that the indigent guilty did not fare markedly worse in the criminal justice system than the nonindigent guilty; the latter, owing to superior education and information, generally understand how to avail themselves of the rights to counsel and against self-incrimination even without instruction. *See* William J. Stuntz, *Waiving Rights in Criminal Procedure,* 75 VA. L. REV. 761, 837-38 (1989). Yet this concern for disparate wealth effects in the criminal justice system has no logical stopping point; the indigent criminal may fare worse simply because, for example, his inability to afford a fast getaway car increases the likelihood of apprehension. *See id.* at 838. In addition, the indigent probably are more likely than others to commit certain sorts of crimes — most notably, theft — owing to their poverty.

256. *See, e.g.,* Winter, *supra* note 225, at 60-61. That the Court perceived the importance of *Shapiro* is confirmed by that decision's complex internal history. For present purposes, it is sufficient to note that the initial argument late in the 1967 Term yielded a majority to *reject* constitutional challenges to durational residency requirements for welfare. *See* Docket book, *Shapiro v. Thompson* (LOC, Douglas Papers, Box 1398, file: administrative dockets nos. 801-1000, case file no. 813). For fuller discussion, see BERNARD SCHWARTZ, THE UNPUBLISHED OPINIONS OF THE WARREN COURT 304-93 (1985).

Justice Brennan which relied upon an ill-defined combination of equal protection and right-to-travel grounds. While Brennan's opinion is plausibly susceptible to two different readings, *both* of them transcend Justice Harlan's monopolization rationale.

One can interpret *Shapiro,* as subsequent Burger Court decisions generally have done, as invalidating durational residency requirements for welfare owing to their "penaliz[ation]" of the constitutionally itinerant right to travel.[257] This reading, while not implausible, requires one to regard the Court's invocation of equal protection as simply a mistake, since government incursions upon constitutionally protected rights are invalid without reference to the classification employed to accomplish that infringement. Yet even accepting the right-to-travel construction of *Shapiro,* the only challengeable government action was refusal to provide newcomers to the jurisdiction with welfare benefits. Thus *Shapiro,* on this reading, imposed an affirmative governmental obligation to redress poverty in a context where government monopolization was not even arguably present: interstate travel.

The other plausible interpretation of *Shapiro,* which frequently was espoused contemporaneously, was as a fundamental rights strand decision condemning unequal distribution of the right to welfare.[258] While Justice Brennan did not explicitly invoke a right to welfare, he did emphasize, in describing the challenged statutory classification, that a "class is [being] denied welfare aid upon which may depend the ability of the families to obtain the very means to subsist."[259] The right-to-welfare interpretation of *Shapiro* makes better sense of the opinion's equal protection focus, though it renders somewhat superfluous the right-to-travel discussion. Bolstering this reading is Justice Brennan's unambiguous subsequent endorsement of a constitutional entitlement to a subsistence income.[260] The right-to-welfare interpretation, as with the right-to-travel construction, plainly expanded the fundamental rights strand of equal protection beyond Justice Harlan's monopo-

257. *See Shapiro,* 394 U.S. at 629-31. On the subsequent decisions, see, *e.g., infra* text accompanying notes 331-32 *(Boddie); infra* note 340 *(Rodriguez);* Memorial Hosp. v. Maricopa Cty., 415 U.S. 250, 253-55 (1974).

258. *See, e.g.,* Michelman, *supra* note 247, at 40 n.94; Winter, *supra* note 225, at 56; *see also* Shapiro v. Thompson, 394 U.S. 618, 661 (1969) (Harlan, J., dissenting) (noting "the Court's . . . cryptic suggestion that the 'compelling interest' test is applicable merely because the result of the classification may be to deny the appellees 'food, shelter, and other necessities of life' ").

259. 394 U.S. at 627.

260. *See* Douglas conference notes, *Dandridge v. Williams* (Dec. 12, 1969) (LOC, Douglas Papers, Box 1475, case file no. 131) (Brennan: "on constitutional question, basis is minimum assistance required to live — when family of 2 get[s] same as family of 8 there is inequality in constitutional sense").

lization rationale, as government does not generally control the means of its citizens' subsistence.

2. *Evisceration of the State Action Requirement*

While *Griffin* and progeny were advancing a novel understanding of equal protection rights with regard to poverty, the "state action" cases[261] were doing the same in connection with race. By the early 1960s it was apparent that the scope of the Fourteenth Amendment's state action limitation would become one of the critical issues in constitutional law. The post-Reconstruction *Civil Rights Cases,*[262] of course, had construed the Equal Protection Clause as applying only to state, and not to purely private, conduct. The Court began making inroads upon the state action concept as the post-World War II period witnessed a renaissance of judicial concern with race discrimination. The white primary cases, *Marsh v. Alabama* (not a race case), and *Shelley v. Kraemer,* all rejected the most formalistic understanding of state action.[263] Yet one must be careful not to read too much into these decisions; the Vinson Court was not about to constitutionally proscribe private race discrimination. While *Shelley*'s holding — that judicial enforcement of private racially restrictive covenants was state action — had potentially radical implications,[264] subsequent decisions revealed that the Court contemplated no revolution in state action law. Thus, for example, in *Black v. Cutter Laboratories,*[265] the Court curtailed *Shelley*'s reach by finding no state action in judicial enforce-

261. While I have chosen to adhere to the traditional categories, I find entirely persuasive the trend in recent constitutional commentary to treat the "state action" cases simply as particular instances of the *Washington v. Davis* issue — that is, the constitutionality of facially neutral state decisionmaking that produces disparate racial impacts. *See, e.g.,* Harold W. Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment,* 30 S. CAL. L. REV. 208, 208-09 (1957); David A. Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. CHI. L. REV. 935, 937-38, 967-68 (1989); Mark V. Tushnet, Shelley v. Kraemer *and Theories of Equality,* 33 N.Y.L. SCH. L. REV. 383, 383 (1988). Thus, for example, under this approach the correctness of *Shelley v. Kraemer,* given the existence of a *Washington v. Davis* rule, depends on whether state courts generally enforced restrictive land covenants or were making an exception for racial ones. *See* Tushnet, *supra,* at 386-88.

262. 109 U.S. 3 (1883).

263. *Shelley,* 334 U.S. 1 (1948); *Marsh,* 326 U.S. 501 (1946); *supra* note 104 (white primary cases).

264. For example, *Shelley*'s logic suggested that state court probating of a will that devised property with a racial restriction or state court enforcement of trespass laws in support of a property owners' racially motivated exclusion would violate the Equal Protection Clause. *See, e.g.,* Bell v. Maryland, 378 U.S. 226 (1964) (trespass conviction); Pennsylvania v. Board of Directors of City Trusts, 353 U.S. 230 (1957) (per curiam) (testamentary trust).

265. 351 U.S. 291 (1956); *see also* Rice v. Sioux City Memorial Park, Inc., 348 U.S. 880 (1954) (per curiam) (Justices divided evenly as to whether a racially restrictive covenant could be used as a defense to a breach of contract claim without violating the Fourteenth Amendment).

ment of a private contract, the terms of which possibly would have violated the First Amendment had they been embedded in state law.

The internal history of *Terry v. Adams*[266] likewise confirms that the Vinson Court's relaxation of the state action requirement had been highly tentative. In *Terry* the Court struck down under the Fifteenth Amendment an ostensibly private scheme that effectively disfranchised blacks. The Jaybirds, a "private" association comprised of every white voter (and no blacks) in one Texas county, balloted themselves to select candidates for the Democratic Party primary, who invariably were then elected to office. The Court's invalidation of the Jaybird scheme by a resounding eight-to-one margin may suggest a willingness to relax the state action requirement that is quite misleading. The initial conference vote in *Terry* had been five to four *the other way,* with several Justices expressing their inability to discern any state action.[267] Even after Justice Frankfurter immediately and inexplicably switched his vote, a closely divided decision appeared in the offing. Justice Jackson, for example, prepared a dissenting opinion lambasting his brethren for sacrificing "sound principle[s] of interpretation" in their haste to inter the Jaybirds' "hateful little local scheme."[268] Ultimately, though, three of the prospective dissenters — Vinson, Jackson, and Reed — chose instead to join Justice Clark's concurring opinion. My point simply is that *Terry* must have represented the limits of the Court's flexibility on state action; interpreting decisions such as *Marsh, Shelley,* and *Terry* as indicative of a judicial commitment to eradicate private racial discrimination is quite unjustifiable. Closer to the mark, I believe, was one commentator's observation in 1960 that expansion of the state action concept to date had been "very slight."[269]

Over the next decade the Court decided three important state action cases, each finding governmental involvement (and an equal protection violation) in a factual context that went well beyond existing precedent. The first of these was *Burton v. Wilmington Parking Authority,*[270] involving a policy of racial exclusion by a restaurant operat-

266. 345 U.S. 461 (1953).

267. *See* Clark conference notes, *Terry v. Adams* (University of Texas Law Library, Clark Papers, Box A20, case file no. 52) (Jan. 16, 1953) (statements by Vinson, Reed, Frankfurter, and Jackson); Jackson conference notes, *Terry v. Adams* (Jan. 16, 1953) (LOC, Jackson Papers, Box 179, case file no. 52) (tabulating votes).

268. Jackson draft dissent, *Terry v. Adams* 1, 9 (Apr. 3, 1953) (LOC, Jackson Papers, Box 179, case no. 52).

269. Thomas P. Lewis, *The Meaning of State Action,* 60 COLUM. L. REV. 1083, 1121 (1960). *But see* Charles L. Black, Jr., *Foreword: "State Action," Equal Protection, and California's Proposition 14,* 81 HARV. L. REV. 69, 92 (1967) (arguing that *Marsh, Shelley,* and *Terry* constituted a significant evisceration of the state action requirement).

270. 365 U.S. 715 (1961).

ing on property leased from the state. In an opinion notable for both the absence of underlying precedent and the author's evident determination to avoid creating new precedent, Justice Clark ruled that the state was sufficiently entwined with the private discriminator to be held responsible for its racial exclusion policy.[271] Clark noted the public ownership of the restaurant building, the benefit derived by the restaurant from its location within a publicly owned parking facility, and the state's unexercised power to forbid discrimination in its lease agreements.[272] Yet he also stressed repeatedly the fact-dependent nature of the state action inquiry, and carefully refrained from articulating general principles that would illuminate the relevance of particular facts as well as their comparative weights.[273] It is difficult to emerge from *Burton* without the sense that the Court's priority was invalidating private discrimination suffused with a public *appearance* rather than generating a coherent theory of state action.

The chronological successor to *Burton* was *Evans v. Newton,*[274] involving an equal protection challenge to a city's transferral of a park's stewardship to private trustees once the city became constitutionally disabled from abiding by racial restrictions contained in the original property devise. The Court invalidated the transfer of control, relying on both the history of city involvement and the "public function" doctrine of *Marsh* and *Terry.*[275] Since the city's past involvement with the park was of dubious relevance to the issue of present state action, and since subsuming parks under the public function doctrine required its significant expansion, it is difficult to dispute Justice Harlan's charge, leveled in dissent, that *Evans* was "more the product of human impulses . . . than of solid constitutional thinking."[276]

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271. 365 U.S. at 724-25. *See, e.g.,* Philip B. Kurland, *Egalitarianism and the Warren Court,* 68 MICH. L. REV. 629, 650 (1970) (calling *Burton* "a rather murky opinion"); Thomas P. Lewis, Burton v. Wilmington Parking Authority — *A Case Without Precedent,* 61 COLUM. L. REV. 1458, 1466 (1961) (Court "appears to have done its best to decide a case without creating a precedent"); Jerre S. Williams, *The Twilight of State Action,* 41 TEX. L. REV. 347, 382 (1963) (calling the *Burton* opinion "vague and obscure").

272. 365 U.S. at 723, 724, 725.

273. 365 U.S. at 722, 725-26.

274. 382 U.S. 296 (1966).

275. 382 U.S. at 301-02. Under the public function doctrine, private parties conducting an activity traditionally performed by the government are deemed state actors for purposes of the Fourteenth Amendment.

276. 382 U.S. at 315, 318, 320. The Warren Court's willingness to expand the public function doctrine beyond hitherto recognized limits was again demonstrated in Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, 391 U.S. 308 (1968), where the Court ruled a private shopping center to be a state actor for First Amendment purposes. *Logan Valley* is usefully contrasted with the Court's unwillingness in 1950 to review a state court decision rejecting the public function argument in the context of large housing developments that discriminated against blacks. *See* Dorsey v. Stuyvesant Town Corp., 299 N.E.2d 541 (N.Y. 1949), *cert. denied,* 339 U.S. 981 (1950).

The third principal state action ruling of the Warren era was *Reitman v. Mulkey*,[277] which revealed the extent to which the Court was prepared to distort state action doctrine to avoid an unpalatable result. Involved in *Reitman* was California's Proposition Fourteen, which both repealed existing state fair housing laws and required that similar legislation in the future be enacted by state constitutional amendment rather than by ordinary legislative processes. One can generate a persuasive argument that structuring the political process so as to unduly encumber efforts to secure legislation favorable to a racial minority constitutes impermissible race discrimination,[278] but Justice White's majority opinion did not even hint at such a rationale. Rather he emphasized that public "authorization" or "encouragement" of racial discrimination amounted to state action.[279] While the Court was on safe ground in declaring that genuine state encouragement of private discrimination was unconstitutional, it is difficult to find in *Reitman* any state involvement beyond simple repeal of existing prohibitions on race discrimination in housing.[280] And to rule unconstitutional an unadorned shift in state policy from forbidding to tolerating private discrimination was, as Justice Harlan identified in his usual perspicacious manner, to espouse a "novel and potentially far-reaching constitutional theory."[281]

I have removed from this otherwise chronological presentation what strikes me as the most compelling evidence of the Warren Court's willingness to invalidate even "private" race discrimination; the episode to which I refer is the famous series of sit-in cases that preoccupied the Court for much of the early 1960s.[282] The sit-in cases arose from trespass and breach-of-the-peace prosecutions of civil rights demonstrators seeking to secure desegregation of lunch counters and restaurants in southern states. The constitutional issue presented was whether arrest and prosecution of persons refusing voluntarily to vacate privately owned facilities upon request converted private racial

277. 387 U.S. 369 (1967).

278. *See* Black, *supra* note 269, at 75-76, 78-79, 82; *see also* Hunter v. Erickson, 393 U.S. 385 (1969) (striking down city charter provision that barred enactment of fair housing ordinance except by local referendum).

279. *See* 387 U.S. at 375-76, 380-81.

280. *See* 387 U.S. at 389 (Harlan, J., dissenting); *see also* Kenneth L. Karst & Harold W. Horowitz, Reitman v. Mulkey: *A Telophase of Substantive Equal Protection*, 1967 SUP. CT. REV. 39, 50-55.

281. Harlan draft dissent from denial of certiorari, *Reitman v. Mulkey* (Nov. 21, 1966) (LOC, Douglas Papers, Box 1392, case file no. 483).

282. For factual descriptions of the sit-in cases, see Kurland, *supra* note 271, at 651-58; Thomas P. Lewis, *The Sit-In Cases: Great Expectations*, 1963 SUP. CT. REV. 101, 103-13; Monrad G. Paulsen, *The Sit-in Cases of 1964: "But Answer Came There None,"* 1964 SUP. CT. REV. 137, 138-45.

discrimination into an equal protection violation — in other words, the question was how far to extend *Shelley v. Kraemer.* From the published record all one confidently can conclude is that the Justices ducked the constitutional issue for several years through a variety of stratagems, until passage of the 1964 Civil Rights Act effectively mooted the question by *statutorily* prohibiting race discrimination in places of public accommodation.[283] Internal Court documents, however, considerably illuminate the Justices' thought regarding the sit-in controversy, revealing how broadly a majority was prepared to interpret the state action requirement in order to avoid judicial enforcement of private discriminatory preferences.

From the beginning of the sit-in controversy, some Justices privately were adamant in their refusal to extend *Shelley* to cover the arrest and prosecution of sit-in demonstrators.[284] Yet the entire Court, including the usually unbending Frankfurter and Harlan, evinced some willingness to compromise their legal rectitude in order to avoid Court affirmance of the demonstrators' convictions.[285] Underlying this unusual display of flexibility by Justices who prided themselves on their principled decisionmaking was recognition of the sit-in cases' tremendous symbolic importance. As with *Brown* the Justices considered unanimity to be vital,[286] even if, again as with *Brown,* this required some Justices to participate in uncharacteristic doctrinal manipulation. Thus at Court conferences on the sit-in cases, individ-

283. *See, e.g.,* Bouie v. City of Columbia, 378 U.S. 347 (1964) (invalidating on due process/vagueness grounds convictions of sit-in demonstrators for refusing to leave premises after being asked to do so under trespass statute prohibiting *entry* after warning); Garner v. Louisiana, 368 U.S. 157 (1961) (reversing disturbing-the-peace convictions of sit-in demonstrators on due process ground of total absence of evidence).

284. *See, e.g.,* Douglas memorandum to the files, *Garner v. Louisiana* (Nov. 6, 1962) (LOC, Douglas Papers, Box 1268, case file nos. 26-28: sit-in cases) (Justices Black and Frankfurter); *id.,* Douglas conference notes, *Garner v. Louisiana* (Oct. 20, 1961) (Justices Clark and Harlan).

285. Thus in *Garner* Justices Frankfurter and Harlan struggled for a means of reversing the sit-in demonstrators' convictions despite having denied the existence of such grounds at the Court's certiorari conference. *Compare* Garner v. Louisiana, 368 U.S. 157, 176 (1961) (Frankfurter, J., concurring) (supporting reversal of convictions owing to absence of evidence) *and* 368 U.S. at 197-99, 205 (Harlan, J., concurring) (supporting reversal on grounds that disturbing the peace statute as applied to defendants was unconstitutionally vague and that lunch counter owner's failure to ask defendants to leave constituted implied consent to their presence) *with* Douglas conference notes, certiorari conference on case nos. 617, 618, 619 (Mar. 17, 1961) (LOC, Douglas Papers, Box 1268, case nos. 26-28: *Garner v. Louisiana* et al.) (Frankfurter: "This is not too vague an ordinance — there is enough evidence here — *Thompson* case does not govern — owner need not call in police — police need not wait until there is a fracas") (Harlan agreeing with Frankfurter).

286. *See* Letter from Chief Justice Warren to Justice Douglas (May 18, 1963) (LOC, Warren Papers, Box 604, case file: sit-in cases) (noting statements by Justices Stewart and Goldberg to the conference emphasizing the importance of unanimity in the sit-in cases and observing "the great benefit" flowing from unanimity in *Brown*). On the perceived importance of unanimity in the school desegregation cases, see KLUGER, *supra* note 86, at 679, 683, 696; Hutchinson, *supra* note 10, at 87.

ual Justices proclaimed their willingness to stretch for the "right" result, which was understood to mean reversal of convictions without reaching the constitutional question.[287] Accordingly, the Court employed a variety of clever/disingenuous strategies for reversing the demonstrators' convictions, and when a case arose during the 1962 Term regarding which unanimity appeared unobtainable, the Justices agreed to put it over for reargument.[288]

By the 1963 Term, the more conservative Justices apparently had reached their breaking point. After Chief Justice Warren opened the sit-ins conference by suggesting some even more tenuous bases for reversing convictions without reaching the state action question, Justice Black balked at what appeared to him to constitute a functional overruling of the *Civil Rights Cases*.[289] The vote at conference was five to four to sustain convictions in two of that Term's cases on the ground that no state action was present.[290] That vote remained intact until just days before the decisions were scheduled to be announced in May 1964; the Court appeared poised to make its stand on the traditional understanding of equal protection rights as guarantees against *state* discrimination.[291] Almost at the last moment, though, one member of the majority, Tom Clark, apparently decided he could not endure responsibility for affirming the convictions.[292] Without delving unneces-

287. *See, e.g.*, Warren conference notes, 1962 Term sit-in cases (LOC, Warren Papers, Box 604, case file: sit-in cases) (Justice Black declaring that he "would try to work out opinions to reverse on all [these cases]") (Justice Stewart stating with regard to various cases that he is willing to "cooperate," "probably could be persuaded," and "with some difficulty accepts the . . . argument") (Justice White stating that he "has some trouble with *Griffin* but probably could go along with reversal").

288. That case was Griffin v. Maryland, 378 U.S. 130 (1964) (reversing trespass conviction on ground that arrest by park employee who had been deputized as sheriff constituted state action). *See* Letter from Chief Justice Warren to Justice Douglas, *supra* note 286 ("I share the view of the Conference that it is highly desirable that we do present as united a front as possible, leaving some facets of the problem to be dealt with next Term. To this end all agreed that we would do well to put over for reargument the case of *Griffin v. Maryland.*"); Warren conference notes, *supra* note 287.

289. Warren conference notes, 1963 Term sit-in cases (LOC, Warren Papers, Box 510, case file: sit-in cases) (Chief Justice expressing willingness to reverse convictions on grounds that police participated too extensively in the arrests, that the convictions took place in department stores open to the public in all areas but their lunch counters, and that the trespass statute was too vague) (Justice Black noting that Warren's position would overrule the *Civil Rights Cases*).

290. *See id.* (Justices Black, Clark, Harlan, Stewart, and White). The two cases that were to be affirmed were Bell v. Maryland, 378 U.S. 227 (1964) (vacating sit-in convictions and remanding to state court to reconsider in light of intervening enactment of state and local public accommodations laws), and Robinson v. Florida, 378 U.S. 153 (1964) (reversing sit-in convictions on ground that state regulation mandating racially separate washroom facilities for restaurant employees and customers implicated state in policy of restaurant segregation).

291. *See* Black draft opinion, *Bell v. Maryland* (May 7, 1964) (LOC, Douglas Papers, Box 1311, case file no. 12).

292. *See* Douglas memorandum for the files, *Bell v. Maryland* (June 20, 1964) (LOC, Douglas Papers, Box 1314, case file no. 12, folder 16) ("Clark for some reason finally left Black just before the opinions were to be announced . . . ."); *id.*, Douglas handwritten memorandum to the

sarily into the complex negotiations that then consumed the Court,[293] I will note simply that Justice Clark soon produced his own draft opinion explaining why state action was present (though not to the naked eye) in the principal case, *Bell v. Maryland.*[294] Clark's vote, when added to those of the four Justices who earlier had favored reversal on the merits, translated into a majority prepared to revolutionize state action law, at least in the context of race discrimination by places of public accommodation, rather than to place the state's authority behind private discriminatory choices.[295] Because another op-

files (undated) ("Tom Clark came in today, saying he was going to change his vote in the sit-in cases. They were ready to come down 5/18/64 and at our conference on 5/15/64 he had asked that they go over."). Clark earlier had enthusiastically approved Justice Black's draft opinion affirming the sit-in demonstrators' trespass convictions. Letter from Justice Clark to Justice Black (Mar. 9, 1964) (reprinted in A.E. Dick Howard & John G. Kester, The Deliberations of the Justices in Deciding the Sit-in Cases of June 22, 1964, at 10 (unpublished manuscript compiled from the files of Justice Black by his law clerks) (LOC, Black Papers, Box 376, case file: sit-in cases)) (describing opinion as *"just right"* and "[a] fine job").

293. The story is concisely told from Justice Douglas' perspective in Douglas memorandum for the files, *supra* note 292. Briefly, the story goes like this: The conference vote in *Bell v. Maryland* had been five to four to sustain the convictions. Justice Brennan, one of the four prospective dissenters, subsequently conceived the idea of a vacate-and-remand disposition to allow the Maryland court to consider the retroactive applicability of a recently enacted local public accommodations law; the five Justices favoring affirmance of the convictions were not persuaded by Brennan's suggestion, however, and the decision in *Bell* was scheduled to come down on May 18. Justice Clark, however, at the last moment fled the majority to join Justice Brennan. But of the original prospective dissenters, Justice Douglas adamantly refused to acquiesce in any disposition short of reversal, while Goldberg and Warren appeared willing both to join Brennan and to support reversal on the merits. At this point Justice Black recirculated an amended version of what had been the majority opinion; Black now contended that of the Justices wishing to reach the merits, the vote was four to three for affirmance. That potentiality apparently disturbed Justice Clark, who responded by drafting his own opinion reversing on the merits. With Clark thus prepared to find state action, a strong possibility existed that a majority would materialize for reversal on the merits; that result would have required luring Justice Brennan from his vacate-and-remand position, but this seemed quite plausible given that Brennan consistently had expressed at conference his willingness to extend the *Shelley v. Kraemer* rationale to trespass convictions. At this point another member of the original majority, Justice Stewart, bolted the fold; apparently distraught at the idea of a reversal on the merits, Stewart told Clark that he would join Brennan's vacating opinion if Clark would return to it. Clark then was torn between joining Brennan and adhering to his own opinion reversing on the merits. Douglas sought to enlist the Chief in a lobbying effort to convince Clark to stick with his opinion on the merits, probably calculating that Brennan then would succumb to the pressure to take that route as well. Chief Justice Warren pursued the opposite tack, however, deciding to join Brennan himself, and convincing Goldberg to do so as well (although the Chief also joined Goldberg's separate opinion supporting reversal on the merits). Thus was constituted the final result in *Bell* — five votes to vacate and remand (Warren, Clark, Brennan, Stewart, and Goldberg), and three votes each to reverse (Warren, Douglas, and Goldberg) and to affirm (Black, Harlan, and White) on the merits.

294. Clark draft opinion, *Bell v. Maryland* (June 11, 1964) (LOC, Warren Papers, Box 512, case file no. 12). Clark's draft opinion relied on an undifferentiated agglutination of the common law of innkeepers, *Shelley v. Kraemer,* and the public function doctrine of *Marsh v. Alabama. Id.* at 8-13.

295. *See* Douglas memorandum for the files, *Bell v. Maryland* 2 (June 20, 1964) (LOC, Douglas Papers, Box 1314, case file no. 12, folder 16) ("At that point there was a majority of the Court to reach the basic constitutional issue and to reverse on the merits."); *cf.* Letter from Justice Douglas to Justice Goldberg (May 8, 1964) (LOC, Douglas Papers, Box 1314, case file

tion emerged, however, and because Justice Brennan was dogged in his pursuit of it, the Court once again chose to duck the state action issue, remanding *Bell* to the state court for consideration of the retroactive applicability of recently enacted state and local public accommodations laws.[296]

The state action cases of the 1960s, then, reveal a Court willing to relax considerably the state action requirement as part of its battle against race discrimination. Apparently several of the Justices shared Professor Charles Black's contemporaneous view that the "most important single task to which American law must address itself is the task of eradicating racism," and that the state action doctrine was "[t]he only strategic hope left for the maintenance of de facto racism."[297] Indeed a brief survey of the period's constitutional commentary, relevant not so much for its possible influence on the Court as for its depiction of the "constitutional culture" of the period, reveals that the dominant trend in legal academic thought espoused abolition of the state action requirement.[298] Thus, for example, the law review

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no. 12, folder 16) ("Bill Brennan . . . said the other day that if there were a majority of the Court to hold the sit-in convictions unconstitutional, he would not file the dissent he is now filing.").

296. Bell v. Maryland, 378 U.S. 227, 228 (1964). Justice Douglas suggested, quite plausibly in my opinion, that Brennan resisted reverting to his earlier position, reversal on the merits, for fear of appearing hypocritical. Brennan initially had voted in *Bell* to reverse the convictions on equal protection grounds, and indeed regularly had expressed the view at conference that *Shelley v. Kraemer* should be extended to bar trespass convictions of sit-in demonstrators. *E.g.*, Warren conference notes, *supra* note 289 (Brennan noting his willingness to reverse all the 1963 Term sit-in cases "on *Shelley* or limited grounds"). Brennan's shift to the vacate-and-remand option was a bald attempt to avoid a decision affirming the convictions. *See* Letter from Justice Douglas to Justice Clark (June 8, 1964) (LOC, Douglas Papers, Box 1314, case file no. 12, folder 16) ("When Bill Brennan first circulated his opinion for remand to the Maryland court, I asked him if he would have done the same thing if we had voted to reverse rather than to affirm. He said No."). But when Justice Clark switched sides, it became difficult for Brennan to return to his earlier position without appearing disingenuous. If Brennan had conceived his vacate-and-remand theory as a principled means of avoiding resolution of a controversial constitutional question, it should have been equally applicable regardless of whether a majority existed for affirmance or reversal on the merits. Justice Stewart apparently pointed this out in conference after Clark switched his vote, implying that if Brennan were to realign himself with those reversing on the merits this would reveal his vacate-and-remand opinion to have been one "not of principle but of expediency." Douglas memorandum for the files, *supra* note 292, at 2. That charge, according to Douglas, "hit Brennan pretty deep," *id.*, for afterwards Brennan adamantly refused to consider returning to his earlier position on the merits. *See* Letter from Justice Douglas to Justice Clark, *supra* (noting "[t]he intensity of [Brennan's] feeling").

297. Black, *supra* note 269, at 69, 70, 107.

298. *See, e.g., id.* at 73 (predicting that Court would interpret the Equal Protection Clause to require states to enact fair housing laws); Sager, *supra* note 54, at 770 ("there are no meaningful lines between that which the state tolerates, that which it encourages, and that which it effectuates"); John Silard, *A Constitutional Forecast: Demise of the "State Action" Limit on the Equal Protection Guarantee*, 66 COLUM. L. REV. 855, 855, 872 (1966) (predicting that the Equal Protection Clause soon will be extended to cover state failure to secure equality for blacks in public life); Williams, *supra* note 271, at 389. *See generally* WILLIAM M. WIECEK, LIBERTY UNDER LAW: THE SUPREME COURT IN AMERICAN LIFE 160 (1988) ("[S]ome observers thought it [the state action requirement] would vanish, leaving all private conduct subject to the sanctions of

commentary of the 1960s is rife with statements such as: "[t]he sun is setting" on state action, the state action concept "has outlived any usefulness it ever had," and radical changes in society are "tolling the demise of state action."[299] To replace the state action formula, many of these commentators proposed a more functional approach that would balance the nature of the challenged conduct, the severity of its impact on equality, and the availability of alternative measures that were more egalitarian.[300] In sum, the state action decisions of the Warren Court both reflected and reinforced the dominant trend in legal academic scholarship.

It is worth briefly noting, in conclusion, that the Warren Court laid to rest the traditional understanding of the state action concept as a Fourteenth Amendment limitation upon congressional as well as judicial power. The *Civil Rights Cases,*[301] which first articulated the state action doctrine, involved both these aspects; the Court not only ruled that private discrimination failed to trigger Section One of the Fourteenth Amendment, but also that congressional enforcement power under Section Five did not extend to prohibiting such conduct. During the 1960s the Court, in its eagerness to sanction congressional action against private race discrimination, took the following three important steps: it approved congressional power to regulate interstate commerce beyond previously recognized limits in sustaining the 1964 Civil Rights Act's prohibition on discrimination in places of public accommodation;[302] it "invited" Congress to legislate against private discrimination by proclaiming in dicta its preparedness to approve such prohibitions under Section Five of the Fourteenth Amendment (that is, to overrule the *Civil Rights Cases*);[303] and it created uncharted, potentially revolutionary constitutional law doctrine by sanctioning under the Section Five enforcement power congressional

federal power."); Winter, *supra* note 225, at 44 (observing that academic commentary had interred the state action doctrine).

299. Williams, *supra* note 271, at 389; Kenneth L. Karst & William W. Van Alstyne, *Comment: Sit-ins and State Action — Mr. Justice Douglas, Concurring,* 14 STAN. L. REV. 762, 763 (1963); Silard, *supra* note 298, at 855.

300. *E.g.,* Black, *supra* note 269, at 100-01; Louis Henkin, Shelley v. Kraemer: *Notes for a Revised Opinion,* 110 U. PA. L. REV. 473, 492-94 (1962); Karst & Horowitz, *supra* note 280, at 75; Williams, *supra* note 271, at 368-69.

301. 109 U.S. 3 (1883).

302. Katzenbach v. McClung, 379 U.S. 294 (1964); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); *see* Louis Henkin, *Foreword: On Drawing Lines,* 82 HARV. L. REV. 63, 83 (1968) (Court "dismiss[ed] constitutional objections to novel and far-reaching assertions of congressional power as though they were frivolous").

303. United States v. Guest, 383 U.S. 745, 761-62 (1966) (Clark, J., concurring, with Black and Fortas, JJ.) (noting that Congress undoubtedly possesses power under § 5 of the Fourteenth Amendment to punish purely private conspiracies interfering with Fourteenth Amendment rights); 383 U.S. at 777, 782 (Brennan, J., dissenting, with Warren, C.J., and Douglas, J.) (same).

definition of the scope of Fourteenth Amendment rights.[304]

Jones v. Alfred Mayer Co.[305] exemplifies the Justices' willingness to compromise traditional legal canons in their apparent quest to eradicate private racial discrimination. *Jones* involved a large private housing developer's refusal to sell to blacks. The Court, assuming it was so inclined, had two plausible strategies for prohibiting this discrimination. First, there existed a Reconstruction-era civil rights statute, section 1982, which guaranteed blacks the same rights to own property as whites; the flaw in this rationale was the long prevalent assumption that section 1982 covered state, not private, restrictions on black property ownership. Second, the Court could extend the public function doctrine of *Marsh v. Alabama* to large housing developers; this approach, though, would substantially expand the array of actors subjected to constitutional restrictions (not limited to prohibitions on race discrimination).

The Court's internal deliberations reveal a strong commitment to reaching the politically "right" result. At the Court's conference, convened the day after Martin Luther King's assassination in Memphis, with "a good deal of Washington, D.C. . . . on fire as a result of . . . race riots," only the stolid Justice Harlan raised even a doubt as to whether the Court should invalidate the challenged discrimination.[306] A majority of the Justices declared that *Marsh* should be expanded to cover large private real estate developers. Interestingly, they apparently regarded the Constitution as providing the *narrower* basis for decision, perhaps because section 1982, once interpreted to reach nonstate action, would appear linguistically to cover discriminatory conduct by even a solitary individual, whereas the *Marsh* rationale could

304. *See* Katzenbach v. Morgan, 384 U.S. 641, 650, 652 (1966) (construing § 5 of the Fourteenth Amendment as a Necessary and Proper Clause with regard to § 1, and extending tremendous deference to congressional legislation aimed at preventing denials of equal protection); *cf.* South Carolina v. Katzenbach, 383 U.S. 301, 324, 326 (1966) (similar construction of § 2 of the Fifteenth Amendment). I call this approach "revolutionary" because it potentially inverted the traditional allocation of institutional authority in constitutional interpretation. More specifically, these decisions seemed to permit Congress to "define" Fourteenth Amendment violations in such a way as to statutorily overrule the Court's constitutional decisions. *See Katzenbach,* 384 U.S. at 668 (Harlan, J., dissenting); Alexander M. Bickel, *The Voting Rights Cases,* 1966 SUP. CT. REV. 79, 95-101. *But see Katzenbach,* 384 U.S. at 651 n.10 (denying that Congress can *diminish* Fourteenth Amendment protections announced by the Court); William Cohen, *Congressional Power to Interpret Due Process and Equal Protection,* 27 STAN. L. REV. 603, 613-15, 620 (1975) (arguing that Section Five of the Fourteenth Amendment should be interpreted to sanction congressional abrogation of federalism, but not individual rights, restrictions).

305. 392 U.S. 409 (1968).

306. Douglas memorandum to the files (Apr. 5, 1968) (LOC, Douglas Papers, Box 1423, case file no. 645: *Jones v. Alfred Mayer Co.*); Douglas conference notes, *Jones v. Alfred Mayer Co.* (Apr. 5, 1968) (Harlan: "not at rest; should be treated by Congress; as presently advised he could join on *Marsh* ground but on no other; in effect a delegation of municipal functions to this development group"). Harlan eventually decided to dissent, and Justice White joined him.

be limited to large developers.[307] Appalled by the conference's provisional espousal of the "narrower" constitutional ground for decision, Justice Douglas proceeded to lecture his colleagues for their "fly specking" and "timid[ity]."[308] Ultimately the three Justices who at conference had favored reliance on section 1982 — Black, Douglas, and Stewart — convinced the others to go along. The upshot was a decision construing section 1982 to forbid private racial discrimination in housing — an interpretation that not only lacked historical support and contravened several precedents, but also rendered largely superfluous both the 1968 Fair Housing Act and the 1964 Civil Rights Act.[309] As one critic accurately observed, while *Jones* "did not provide the long-sought rationale for state action, . . . it may have made that rationale irrelevant."[310] Thus not only were the Warren Court Justices prepared to sanction congressional prohibition of private discrimination notwithstanding the traditional understanding of the state action restriction as applicable to congressional as well as judicial power, but they evinced willingness in *Jones* to manufacture such a prohibition when Congress dithered.[311]

3. *De Facto School Segregation*

During the Warren era the traditional conception of equal protection rights also was eroded in the school segregation context. The critical issue here was whether the Constitution required only that government actors refrain from deliberately segregating public schools along racial lines or, more broadly, that those schools be racially integrated regardless of whether existing segregation was directly attributable to state action. Thus the school segregation issue replicated in a different guise the *Griffin* question — under what circumstances was

307. *See* Douglas memorandum to the files, *supra* note 306 ("The Court was very eager at this Conference to avoid any decision under Section 1982"). While the § 1982 ground was broader in that it reached discrimination by smaller entities, it was narrower in that the statute's language apparently was restricted to race discrimination claims, unlike the more capacious equal protection guarantee.

308. *Id.* at 1, 2.

309. *See Jones*, 392 U.S. at 478 (Harlan, J., dissenting); Casper, *supra* note 186, at 130-32; Henkin, *supra* note 302, at 85-86. For devastating criticism of the Court's history, see sources cited in note 186 *supra*. The contravened precedents were, *e.g.*, Hurd v. Hodge, 334 U.S. 24, 31 (1948) ("We may start with the proposition [not assumption] that the statute [the 1866 Civil Rights Act] does not invalidate private restrictive agreements . . . ."); Corrigan v. Buckley, 271 U.S. 323, 331 (1926) (Reconstruction-era civil rights statutes "do not in any manner prohibit or invalidate contracts entered into by private individuals in respect to the control and disposition of their own property."); Civil Rights Cases, 109 U.S. 3, 11 (1883) (Fourteenth Amendment "does not authorize Congress to create a code of municipal law for the regulation of private rights").

310. Kurland, *supra* note 271, at 670.

311. *Cf.* Henkin, *supra* note 302, at 83 (questioning whether Court did "more than its share" in civil rights struggle by "giv[ing] the country statutes which no Congress ever enacted").

the state responsible for redressing disparate impacts, whether wealth or racial, that it did not directly cause?

Candor requires me to admit that the Justices' willingness to depart from the traditional understanding of equal protection rights is more speculative in this area than in the others previously canvassed. One cannot determine with certainty how the Warren Court would have resolved the de facto school segregation issue, for its tenure terminated before the Justices granted review in any of the northern school desegregation cases, which were the first to present the issue. Yet piecing together the Warren Court's general predisposition towards racially egalitarian results, its landmark 1968 decision in *Green v. County School Board,*[312] lower court resolutions of the de facto segregation issue, and internal evidence from the first northern school desegregation case, one can construct a reasonably convincing argument that the Warren Court, had it been squarely confronted with the issue, would have interpreted the Equal Protection Clause to require actual racial integration of public schools.[313]

Brown, in its immediate aftermath, was interpreted by many lower federal courts to require an end to segregation rather than actual integration.[314] As the school desegregation cases moved north, however, rulings on the de facto segregation issue grew increasingly mixed; several cases found constitutional violations, while others did not.[315] Legal commentators, moreover, argued with increasing frequency through the 1960s that the Equal Protection Clause proscribed segregated public schools, regardless of the cause.[316] While neither legal

312. 391 U.S. 430 (1968).

313. Some eminent commentators have reached the opposite conclusion, but without knowledge of the archival data discussed in the text. *See, e.g.,* Blasi, *supra* note 213, at 616; *cf.* Paul Brest, *Race Discrimination,* in THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T 113, 113-16 (Vincent Blasi ed., 1983)[hereinafter THE BURGER COURT] (implying that the Warren Court would not have invalidated de facto school segregation).

314. *E.g.,* Rippy v. Borders, 250 F.2d 690, 692-93 (5th Cir. 1957), *overruled by* United States v. Jefferson County Bd. of Educ., 380 F.2d 385 (5th Cir. 1967); Allen v. School Bd., 249 F.2d 462, 465 (4th Cir. 1957) (per curiam), *cert. denied,* 355 U.S. 953 (1958).

315. *Compare, e.g.,* Hobson v. Hansen, 269 F. Supp. 401, 503-11 (1967) (requiring compelling justification for school board policy producing de facto segregation), *affd. sub nom.* Smuck v. Hobson, 408 F.2d 175 (1969) (en banc); Blocker v. Board of Educ., 226 F. Supp. 208, 222-23, 227 (E.D.N.Y. 1964) (school board cannot simply acquiesce in school segregation resulting from segregated housing patterns since plaintiffs have a "right not to be segregated") *with* Downs v. Board of Educ., 336 F.2d 988, 998 (10th Cir. 1964), *cert. denied,* 380 U.S. 914 (1965) *and* Bell v. School Bd., 213 F. Supp. 819, 828-31 (N.D. Ind.), *affd.,* 324 F.2d 209 (7th Cir. 1963), *cert. denied,* 377 U.S. 924 (1964) (only de jure segregation violates the Constitution).

316. *See, e.g.,* Fiss, *supra* note 191, at 584 ("[I]n every case of racially imbalanced schools sufficient responsibility can be ascribed to government to satisfy the requirement that stems from the Equal Protection Clause's proscription of unequal treatment by government."); Karst & Horowitz, *supra* note 280, at 62-63 (speculating, based on cases like *Griffin* and *Reitman,* that the Court might soon invalidate de facto school segregation); J. Skelly Wright, *Public School Desegregation: Legal Remedies for De Facto Segregation,* 40 N.Y.U. L. REV. 285, 298-303 (1965)

commentary nor lower court cases are reliable indicia of Supreme Court decisionmaking, they do assist one in conceiving the universe of plausible alternatives; by the mid-1960s, Supreme Court invalidation of de facto school segregation was well within the realm of possible constitutional developments.

While the Warren Court never addressed the de facto segregation issue, *Green v. County School Board*[317] suggested that a school board proven to have engaged in past racial discrimination would be required to take remedial steps beyond redressing the effects of its constitutional transgressions. *Green* represented an important departure in school desegregation jurisprudence owing to its proclamation that once purposeful segregative conduct by state officials had been established, subsequent school board behavior was to be judged under an effects test — that is, did the school board action promise to produce "a unitary, nonracial system of public education"?[318] Yet an effects test, especially in a district displaying segregated housing patterns, almost inevitably would require the redress of more than simply state-created segregation; it thus represented a potentially significant departure from the traditional understanding of equal protection rights as checks against deliberate governmental disadvantaging. Since *Green* itself involved a school district where housing patterns were *not* segregated, however, only the Court's language, not its holding, bore implications for the de facto segregation issue; it thus would be a mistake to overstate the significance of *Green* in this regard.

Far more compelling evidentiary support for my argument is found in an internal memorandum circulated in connection with the Court's first northern school desegregation case, *Keyes v. School District No. 1*,[319] argued initially in the 1970 Term. In this *Keyes* memorandum four holdover Justices from the Warren Court — Douglas, Brennan, Stewart, and Marshall — supported affirmance of a lower court ruling that, without deciding the per se validity of de facto school segregation, found a constitutional violation because segregation had produced unequal educational opportunity for blacks in psychological, if no other, terms.[320] In other words, relying on the fundamental rights strand of equal protection, rather than the racial classification strand, four Justices evinced willingness to invalidate

(arguing that courts should invalidate de facto segregation owing to the critical importance of education).

317. 391 U.S. 430 (1968).

318. 391 U.S. at 436.

319. 413 U.S. 189 (1973).

320. Douglas memorandum, 4th draft, *Keyes v. School Dist. No. 1*, at 6-10 (Apr. 12, 1971) (LOC, Black Papers, Box 436, case file nos. 281, 349).

public school segregation owing to its deleterious impact on the educational opportunities of minority children.[321] It seems very likely that *either* Justice Fortas or Chief Justice Warren would have supplied the fifth vote for this rationale. One can imagine Warren, for example, rejecting the de jure segregation requirement as dismissively as he dealt with the state action limitation in his draft opinion (never published) in one of the 1963 Term sit-in cases — as one of a variety of "narrow and technical arguments which are offered as the excuse for denying fundamental human rights."[322]

III. EQUAL PROTECTION IN THE BURGER AND REHNQUIST COURTS

The boundary line I have drawn between the middle and late phases of modern equal protection is far more natural than that identified between stages I and II. In my view equal protection thought

321. The Douglas memorandum was written in the heady pre-*Rodriguez* days, when it generally was assumed that education, like voting and access to the criminal process, was a fundamental right for equal protection purposes. *See, e.g.*, Rodriguez v. San Antonio Indep. Sch. Dist., 337 F. Supp. 280, 283 (W.D. Tex. 1971) (three-judge court) (per curiam), *revd.*, 411 U.S. 1 (1973); Horowitz, *supra* note 247, at 1150; Michelman, *supra* note 247, at 28, 37; Sager, *supra* note 54, at 790.

322. Warren draft dissent, *Barr v. City of Columbia* 1 (May 7, 1964) (LOC, Warren Papers, Box 510, case file no. 9); *see also* Wright, *supra* note 316, at 294-95 ("It is inconceivable that the Supreme Court will long sit idly by watching Negro children crowded into inferior slum schools while the whites flee to the suburbs to place their children in vastly superior predominantly white schools.")

I have limited myself in the text to just three examples of the Warren Court's willingness to depart from the traditional understanding of rights in equal protection cases. Another equal protection example was the requirement in apportionment cases that all votes be equally weighted regardless of whether existing inequality was attributable to state cartography or to demographic shifts for which the state bore no responsibility. For a nice statement of the tension between this requirement and the traditional understanding of equal protection rights, see Note from Justice Goldberg to Justice Douglas (undated) (LOC, Douglas Papers, Box 1311, case file no. 12: *Bell v. Maryland*) ("Failure of a state to act in a reapportionment case is state action (Baker v. Carr). Failure of a state court to act to protect civil rights according to Hugo [Black] and his majority is not state action. May well have to explain why!"). For scholars making a similar point, see Neal, *supra* note 123, at 282-83; Williams, *supra* note 271, at 364.

The Warren Court's revised understanding of constitutional rights also seeped into areas of constitutional law other than equal protection. Thus, for example, the Court held that the right against self-incrimination not only prevented the state from coercing criminal defendants into testifying against themselves, but also required the state to facilitate exercise of the right by informing criminal suspects of its existence. Miranda v. Arizona, 384 U.S. 436 (1966). Two late Warren era First Amendment cases likewise treated constitutional rights as entitlements to affirmative governmental assistance. First the Court found state action, and consequently a First Amendment violation, in a state court's injunction of informational picketing in a privately owned shopping center; the Court ruled, in other words, that government is constitutionally obliged to secure an individual's right to free expression on certain sorts of private property. Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, 391 U.S. 308 (1968), *overruled by* Hudgens v. NLRB, 424 U.S. 507 (1976). Second the Court, in rejecting a constitutional challenge to the Federal Communications Commission's "fairness doctrine," noted in dicta the existence of a First Amendment right of access to broadcasting — in other words, the government is constitutionally required to ensure that private licensees provide minimal public access to the airwaves. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969).

took a dramatic turn in 1969 when Warren Burger and Harry Blackmun replaced Earl Warren and Abe Fortas on the Supreme Court. That appraisal apparently is in tension with the dominant scholarly evaluation of the Burger Court's constitutional box score. According to the received wisdom the Burger Court represented a "counterrevolution that wasn't."[323] More specifically, Nixon's four quick Supreme Court appointments, conferred upon individuals with unambiguously conservative credentials, were expected to produce significant contraction of individual rights guarantees.[324] What actually transpired, though, was expansion of free speech protection, dramatic substantive due process development, inauguration of an Eighth Amendment death penalty jurisprudence, broadened Free Exercise and Establishment Clause coverage, and an explosion of procedural due process safeguards.[325] With specific reference to equal protection, furthermore, the conventional wisdom emphasizes the Burger Court's unprecedented extension of heightened equal protection review to classifications based on gender, alienage, and illegitimacy.[326]

I intend here to take issue with only one slice of the received wisdom — namely, that the Burger Court effected no counterrevolution in equal protection. Of the Warren Court's equal protection innovations, those carrying the greatest "revolutionary" potential were the incipient reconceptualization of equal protection rights as entitlements to particular results and, more specifically, the equation of disparate wealth effects with wealth discrimination. Thus, in evaluating whether the Burger Court effected a counterrevolution in equal protection, it seems plausible to focus, at least initially, on these issues. And it is here that the "counterrevolutionary" accomplishments of the Burger Court are most striking.

More generally, this Part of the article seeks to interpret the principal equal protection developments of the last two decades. The first

323. *See generally* THE BURGER COURT, *supra* note 313; RICHARD Y. FUNSTON, CONSTITUTIONAL COUNTERREVOLUTION? 331-38 (1977); A.E. Dick Howard, *Burger Court,* in ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 177 (Leonard W. Levy et al. eds., 1989); William F. Swindler, *The Burger Court, 1969-1979: Continuity and Contrast,* 28 KAN. L. REV. 99 (1979).

324. *See, e.g.,* G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION 434-35 (expanded ed. 1988); Swindler, *supra* note 323, at 99; Winter, *supra* note 225, at 41.

325. *See generally* Vincent A. Blasi, *The Rootless Activism of the Burger Court, in* THE BURGER COURT, *supra* note 313, at 198, 204-05 (listing cases and concluding that "[i]f its legacy of innovative constitutional doctrines is what made the Warren Court the paradigm of an activist court, no new paradigm is needed to comprehend the central tendency of its successor").

326. *See, e.g.,* Blasi, *supra* note 325, at 204; Ruth B. Ginsburg, *The Burger Court's Grapplings with Sex Discrimination, in* THE BURGER COURT, *supra* note 313, at 132-33; Gerald M. Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government,* 1977 SUP. CT. REV. 275, 298; J. Harvie Wilkinson, III, *The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality,* 61 VA. L. REV. 945, 948-50 (1975).

two sections argue, as sketched above, that the Burger Court decisively halted further erosion in, and indeed reversed its predecessor's incursions upon, the traditional understanding of equal protection rights as checks upon deliberate governmental disadvantaging. Section III.A traces the substantial demise of the fundamental rights strand of equal protection and suggests that the Burger Court, in its eagerness to curtail the notion of constitutional entitlements to government benefits, inadvertently overshot its target and legitimized patent government discrimination against the poor. In the course of this discussion, moreover, I hope to explain the Court's willingness to derive a tenuously supported abortion right from the Due Process Clause just weeks after announcing its refusal to discover fundamental rights under an equal protection rubric.

Section III.B traces the Burger Court's resurrection of the traditional understanding of equal protection rights in three other contexts — state action, school desegregation, and the *Washington v. Davis*[327] question of whether facially neutral laws that produce a disparate racial impact but are not racially motivated violate the Equal Protection Clause. In each of these areas the Burger Court reverted to the traditional conception of equal protection rights, often yielding decisions in considerable tension with, if not outright contravention of, Warren era precedent. In modern parlance, the Burger Court's focus has been upon cleansing the legislative *process,* whereas its predecessor took significant strides towards ensuring egalitarian *results.* One must not, however, confuse the Burger Court's preference for process over results with a commitment to political process theory. We must, at this point, draw a critical distinction between "political process" and "process" theory. The former, which is an outgrowth of *Carolene Products,* identifies particular subject matter areas — such as voting rights and race discrimination — as appropriate for judicial intervention based on the likelihood that the political process has been subverted, either through franchise restrictions or prejudice directed against "discrete and insular minorities." Process theory (which, to avoid confusion, I shall henceforth refer to as "legislative inputs" theory) is an entirely distinct notion; independently of subject matter area, it directs judicial review towards purging legislative decisionmaking of certain considerations rather than guarding against particular substantive outcomes. While I have discovered no reference to this distinction in the literature, it is crucial to understanding the development of equal protection law in the Burger Court. For example, I shall argue in section III.C that the Burger Court's gradual conversion to a legislative inputs

327. 426 U.S. 229 (1976).

theory neatly accounts for its otherwise chaotic series of gender discrimination rulings. Yet under a political process approach, the Court's willingness to extend heightened scrutiny to gender classifications is itself questionable given that women constitute a fully enfranchised majority of the voting-age population. Similarly, the Burger and Rehnquist Court's recent affirmative action decisions are plausibly explicable in terms of the goal of eliminating racial considerations from the universe of acceptable legislative inputs. Those rulings are virtually indefensible, though, under a political process theory that justifies judicial solicitude only for groups traditionally frozen out of the legislative marketplace — i.e., not the whites disadvantaged by affirmative action.

As briefly noted above, then, section III.C argues that the Burger Court's gender discrimination cases come into focus when viewed through the lens of that Court's prototypical legislative inputs decision, *Washington v. Davis.* Finally, section III.D explores the thorniest equal protection problem of the last decade, affirmative action. The intractability of that issue, I shall argue, derives from the choice between competing equal protection theories that affirmative action poses for the Court. More specifically, the constitutionality of affirmative action substantially depends upon choosing between a normative equal protection theory defining criteria of relevance to government decisionmaking and a putatively positive political process theory focusing on historical disadvantage and political powerlessness. The Court's recent affirmative action decisions represent an apparent choice for the "relevance" theory of equal protection — a choice that is, however, difficult to reconcile with the conservative Justices' purported adherence to a constitutional philosophy of strict constructionism.

A. *Demise of the Fundamental Rights Strand of Equal Protection*

The fundamental rights strand of equal protection generally was regarded by commentators and the more conservative Justices as dangerously open-ended.[328] This section argues that apprehension regarding the fundamental rights strand was due not to its constitutionalizing of unenumerated rights, but rather to its potential for judicial wealth redistribution. It is the latter concern, I believe, that accounts for the Burger Court's determination to reexplain Warren era fundamental rights strand cases as something other than what they were, as

328. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 661 (1969) (Harlan, J., dissenting); Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972); Winter, *supra* note 225, at 58.

well as its refusal to create any new fundamental rights for equal protection purposes.

The fundamental rights strand of equal protection was, as we saw in Part II, significantly expanded, if not actually conceived, in *Griffin v. Illinois.*[329] Justice Harlan, who dissented vigorously in *Griffin,* battled over the next fifteen years to reconceptualize that case as a due process, rather than an equal protection, decision; Harlan contended, in other words, that *Griffin* had ruled appellate review of criminal convictions to be mandated by procedural due process.[330] In 1970 Harlan's crusade ended triumphantly in *Boddie v. Connecticut.*[331] Involved there was a divorce court filing fee which an indigent plaintiff could not satisfy. Harlan wrote the majority opinion, invalidating the fee on due process grounds. Reliance on that rationale in *Boddie,* however, required an analytical twist unnecessary for *Griffin,* where the state affirmatively had deprived the criminal defendant of his liberty; in *Boddie* the state deprivation of liberty was less apparent. Harlan solved this problem by introducing the notion of monopolization — that the state's exclusive control over marriage and divorce placed the civil divorce plaintiff in a posture similar to that of the criminal defendant, both of whom were compelled to participate in a state system in which they were relatively disadvantaged owing to their poverty. Any doubt as to the cause of Harlan's concern regarding the doctrinal underpinning of *Boddie* and *Griffin* is resolved by his *Shapiro* dissent, where he warned of the drastic ramifications of a wealth effects test applied to important interests, as prescribed under the fundamental rights strand;[332] Harlan's due process analysis, by way of contrast, could be confined to fundamental interests over which the state exercised monopoly power.

The Burger Court's commitment to narrowly construing *Griffin* was confirmed in *United States v. Kras,*[333] where the Court refused to

329. 351 U.S. 12 (1956), discussed *supra* text accompanying notes 243-47. Credit for inception of the fundamental rights strand generally goes to Skinner v. Oklahoma, 316 U.S. 535 (1942) (invalidating state law establishing mechanism for sterilizing certain recidivist criminals). Many commentators, however, plausibly have treated *Skinner* as a substantive due process decision dressed in equal protection garb by a Court haunted by *Lochner*'s ghost. *E.g.,* William Cohen, *Is Equal Protection Like Oakland? Equality As A Surrogate for Other Rights,* 59 TUL. L. REV. 884, 891-92 (1985); Ira C. Lupu, *Untangling the Strands of the Fourteenth Amendment,* 77 MICH. L. REV. 981, 1018-19 (1979).

330. *See, e.g.,* Douglas v. California, 372 U.S. 353, 361, 363-64 (1963) (Harlan, J., dissenting); Griffin v. Illinois, 351 U.S. 12, 36 (1956) (Harlan, J., dissenting).

331. 401 U.S. 371 (1971).

332. Shapiro v. Thompson, 394 U.S. 618, 661 (1969) (Harlan, J., dissenting); *see* William H. Clune, III, *The Supreme Court's Treatment of Wealth Discriminations Under the Fourteenth Amendment,* 1975 SUP. CT. REV. 289, 308-10 (suggesting that Justice Harlan relied in *Boddie* on due process rather than equal protection owing to the former's narrower ramifications).

333. 409 U.S. 434 (1973).

apply *Boddie*'s monopolization rationale in a context where it seemed plausibly applicable — bankruptcy filing fees. While lawyers may quibble over whether a new financial start in life is as fundamental as the ability to remarry, or whether the state's control over the creditor/debtor relationship is as complete as over the marital union,[334] Justice Douglas' conference notes for *Kras* yield a much more striking revelation: all four of the Nixon appointees either doubted whether *Boddie* remained good law or emphasized that, if it did, the Court should narrowly confine it. Thus, Chief Justice Burger declared that *Boddie* must be kept "in bounds"; Justice Blackmun "question[ed] [the] validity of *Boddie*"; Justice Powell observed that "*Boddie* is [a] troublesome case" and that there was "no end of [the] road to *Boddie*"; and Justice Rehnquist stated that he "would not extend *Boddie* an inch."[335]

At the same time that it reconceptualized *Griffin* and progeny as due process cases, thus undermining the very notion of a fundamental rights equal protection doctrine, the Burger Court announced in cases such as *Dandridge v. Williams*[336] and *San Antonio School District v. Rodriguez*[337] that the door to discovery of new fundamental rights was firmly shut. *Dandridge,* rejecting an equal protection challenge to Maryland's policy of capping AFDC benefits for large families, denied that anything more rigorous than minimum rationality review was appropriate simply because of the vast importance of welfare benefits to the poor. By conceding that "the most basic economic needs of impoverished human beings" were at issue, yet nonetheless rejecting heightened scrutiny, the Court left no doubt that the fundamental rights strand was being truncated.[338]

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334. *See, e.g., Kras,* 409 U.S. at 454-55 (Stewart, J., dissenting) (noting that, from ex post perspective, the state has as much control over the penniless bankrupt's options as over the prospective divorcee's).

335. Douglas conference notes, *United States v. Kras* (Oct. 20, 1972) (LOC, Douglas Papers, Box 1594, case file no. 71-749).

336. 397 U.S. 471 (1970).

337. 411 U.S. 1 (1973).

338. *Dandridge,* 397 U.S. at 485. Nor is USDA v. Moreno, 413 U.S. 528 (1973), convincing authority to the contrary. The Court there invalidated on equal protection grounds congressional exclusion of "unrelated households" from participation in the federal food stamp program. *Moreno* is something of a constitutional anomaly, for the Court, purporting to apply minimum rationality review (as required by *Dandridge*), invalidated a statutory classification that was not plainly irrational. *See* 413 U.S. at 546 (Rehnquist, J., dissenting) (arguing that the challenged classification is a plausible, albeit inexact, means of rooting out the fraudulent use of food stamps). I believe *Moreno* is explicable by a combination of factors. First, the welfare denial there was complete, rather than partial as in *Dandridge. Cf.* Plyler v. Doe, 457 U.S. 202, 239 n.3 (1982) (Powell, J., concurring) (holding that exclusion of illegal aliens from free public school education violates equal protection, and distinguishing *Rodriguez* on the ground that only a *relative* educational deprivation was involved there). Second, the congressional classification apparently was intended to exclude "hippie communes" from participation in the food stamp program,

The message of *Dandridge* was powerfully reinforced in *Rodriguez,* where the Court rejected an equal protection challenge to state funding of public education derived partially from local property taxes, a system that produced spending disparities across school districts. Not only did *Rodriguez* reject the notion, implicit in *Brown,* that education was a fundamental right, but also the Court declared its unwillingness to identify for equal protection purposes fundamental rights that were not explicitly embraced in, or implicitly derivable from, the constitutional text.[339] Reconciling that position with precedent required the same sort of creative revisionism that Justice Harlan had so skillfully executed in *Boddie.*[340] *Rodriguez* emphasized, moreover, as had *Dandridge,* that the importance of the affected interest — education in *Rodriguez* — was simply irrelevant to the constitutional analysis.[341] *Rodriguez* seemed, in short, to compel the conclusion that future fundamental rights strand expansion was out of the question.[342]

From a pre-1973 perspective, more than one credible explanation existed for the Burger Court's apparent aversion to the fundamental

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yet its sweep was so broad that it generated a large number of extremely sympathetic plaintiffs. *See, e.g.,* 413 U.S. at 532, 534. Third, conference notes reveal that the *Moreno* majority was a very tenuous one; of the Justices ultimately joining the majority, Stewart described himself as "doubtful[ ]," White as "tentative[ ]," Powell as "very much in doubt," while Blackmun actually was "incline[d] to reverse." Douglas conference notes, *USDA v. Moreno* (Apr. 1973) (LOC, Douglas Papers, Box 1615, case file no. 72-848).

339. *Rodriguez,* 411 U.S. at 29-30, 33-34.

340. Thus in *Rodriguez* Justice Powell treated *Shapiro* solely as a right-to-travel case, 411 U.S. at 31-32 & n.71, though, as I previously have argued, the decision possibly makes better sense in other terms. *See supra* text accompanying notes 257-60. Powell treated *Skinner* as involving an independent constitutional right — procreation — rather than an equal protection-based "fundamental" interest. 411 U.S. at 34 n.76. While one plausibly can interpret *Skinner* that way, *see supra* note 329, some of the Justices in the majority could not easily have reconciled such a result with their general constitutional philosophies. *See supra* note 244.

341. 411 U.S. at 29-30.

342. Plyler v. Doe, 457 U.S. 202 (1982), is not to the contrary. There the Court struck down on equal protection grounds Texas' denial of free public education to the children of illegal aliens. The majority opinion emphasized both the faultlessness of the children and the importance of education. 457 U.S. at 219-21. Internal documents suggest that four of the five Justices in the *Plyler* majority were prepared forthrightly to hold education a fundamental interest for equal protection purposes. *See* Brennan draft opinion, *Plyler v. Doe* 34 (Jan. 25, 1982) (LOC, Brennan Papers, Box 590, case file nos. 80-1538, 80-1934) (stressing the importance of education and arguing that "equal access to basic education was recognized by the framers of the Fourteenth Amendment as an essential aspect of the framework of equality embodied in that amendment); *id.,* Letter from Justice Blackmun to Justice Brennan 1 (Mar. 10, 1982) (would treat education as a "fundamental" right because "necessary to preserve rights of expression and participation in the political process"); *id.,* Letter from Justice Stevens to Justice Brennan (Mar. 10, 1982) ("could join a disposition based . . . on the premise that some modicum of education is 'fundamental' "). Justice Powell, however, who supplied the fifth vote for the *Plyler* majority, balked at the idea of "creating another heretofore unidentified right." *Id.,* Letter from Justice Powell to Justice Blackmun 1 (Mar. 12, 1982). That a majority of the Justices do not acknowledge a fundamental right to education is confirmed by Kadrmas v. Dickinson Public Schools, 487 U.S. 450, 459 (1988) (limiting *Plyler* to its "unique circumstances" in rejecting constitutional challenge to school board user fees for public school transportation).

rights strand of equal protection. Professor Gerald Gunther, in his famous Harvard *Foreword* of 1972, plausibly suggested that recent decisions rejecting a fundamental right to welfare *(Dandridge)* and housing *(Lindsey v. Normet)* [343] were attributable to a strict constructionist Court's predictable reluctance to discover additional unenumerated rights lurking within the Equal Protection Clause.[344] That account was rendered incredible, though, when the same Court identified in 1973 a woman's right to abortion emanating from the elusive constitutional right to privacy. *Roe v. Wade,*[345] soon followed by additional substantive due process rulings recognizing rights to contraceptive access, familial living arrangements, and parental custody,[346] revealed a Court undisturbed by the manufacture of unenumerated rights. The Burger Court has, moreover, frequently expanded specific Bill of Rights provisions well beyond the bounds of precedent and original intent.[347]

Given its latitudinarian interpretations of the Fourteenth Amendment's Due Process Clause and certain Bill of Rights provisions, the Burger Court's constriction of the fundamental rights strand of equal protection cannot plausibly have been motivated by strict constructionist concerns.[348] Rather, I think, the explanation must be that the Justices were more comfortable forbidding state regulation of certain spheres than requiring government equalization (or at least "minimum protection") of fundamental interests such as education, food, shelter, and medical care. The unpalatable aspect of fundamental rights equal protection, in other words, was not its recognition of unenumerated rights,[349] but its reconceptualization of equal protection as an entitle-

343. 405 U.S. 56, 74 (1972) ("We are unable to perceive in [the Constitution] any . . . guarantee of access to dwellings of a particular quality . . . .").

344. Gunther, *supra* note 328, at 12-13.

345. 410 U.S. 113 (1973).

346. *E.g.,* Carey v. Population Servs. Intl., 431 U.S. 678 (1977) (invalidating law prohibiting distribution of contraceptives by anyone other than a licensed pharmacist); Moore v. City of East Cleveland, 431 U.S. 494 (1977) (striking down an ordinance disabling extended families from living in the same household); *cf.* Caban v. Mohammed, 441 U.S. 380 (1979) (striking down on equal protection grounds a statute permitting termination of a father's parental rights in order to facilitate adoption of his illegitimate offspring, as applied to a father enjoying a substantial relationship with his child).

347. *E.g.,* Solem v. Helm, 463 U.S. 277 (1983) (Eighth Amendment forbids imposition of life sentence without possibility of parole for nonviolent recidivist); Coker v. Georgia, 433 U.S. 584 (1977) (Eighth Amendment forbids imposition of death penalty for crime of rape); Elrod v. Burns, 427 U.S. 347 (1976) (First Amendment precludes political patronage dismissal of nonpolicymaking government employee); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976) (First Amendment protects commercial speech).

348. Nor is a strict constructionist constitutional philosophy consistent with the Burger Court's unprecedented extension of meaningful equal protection review to classifications based upon gender, alienage, and illegitimacy.

349. Just as the Burger Court distinguished between, for example, gender and age within the

ment to affirmative governmental assistance.[350] The abortion funding decisions both corroborate the Burger Court's hostility to the fundamental rights strand and confirm my proffered explanation for it. Since *Roe v. Wade* already had identified a constitutional right to abortion, *Maher v. Roe*,[351] the first abortion funding case, implicated no plausible strict constructionism concern. Presented with the contention that the state was unequally distributing the fundamental right to abortion by financing a poor woman's child-bearing expenses while refusing to subsidize her abortion, the Court simply invoked the traditional notion of constitutional rights; no fundamental right was denied, Justice Powell explained, when the government declined to remove an obstacle not of its own creation — the indigent woman's poverty.[352]

One case not meshing neatly with my explanation of the Burger Court's hostility towards the fundamental rights strand is *James v. Valtierra*.[353] There the Court rejected an equal protection challenge to facial discrimination against the poor — a California constitutional provision forbidding the establishment of low-cost housing in a partic-

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classification strand of equal protection, so could it have created a hierarchy of rights justifying differential treatment of, for example, education and golf. *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 233 (1982) ("Only a pedant would insist that there are no meaningful distinctions among the multitude of social and political interests regulated by the State . . . ."); *cf.* Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1134-42 (1989) (suggesting that liberal theory informs a prioritization of rights that implicitly underlies the Court's disparate application of the *Washington v. Davis* rule across contexts).

350. *See, e.g.*, Letter from Justice Powell to Justice Brennan 1 (Jan. 30, 1982) (LOC, Brennan Papers, Box 590, case file nos. 80-1538, 80-1934: *Plyler v. Doe*) ("It was my view [in *Rodriguez*] and now that there is no constitutional right to a *state provided* education any more than there is such a constitutional right to welfare, housing, health services, public works and public utilities — all of which are considered by most of us to be essential.") (emphasis added). Thus, I strongly disagree with commentators who have suggested that the Warren Court employed equal protection to accomplish the same results that might have been achieved under substantive due process by Justices less exercised by *Lochner*. For that contention, see, *e.g.*, Lupu, *supra* note 329, at 994-96; Michael J. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1077-81 (1979). The truly distinctive feature of the fundamental rights strand of equal protection was, to repeat, not the articulation of unenumerated constitutional rights, but the imposition of an affirmative duty upon government to redress poverty not of its direct creation.

351. 432 U.S. 464 (1977).

352. 432 U.S. at 473-74; *see also* Harris v. McRae, 448 U.S. 297, 316 (1980) ("[A]lthough government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation. Indigency falls in the latter category."). That rationale failed to distinguish *Griffin* and *Harper*, where the Court required the government to redress poverty for which it was not directly responsible. Even if those cases are distinguishable on Justice Harlan's monopolization rationale, *see* 432 U.S. at 469-71 nn.5-6, *Shapiro* plainly is not, for government no more controls the means of subsistence than it monopolizes abortion funding. Finally, even if one treats *Shapiro* as a right-to-travel rather than a right-to-welfare decision, as the Burger Court has in cases such as *Dandridge* and *Rodriguez*, *Maher* still cannot be reconciled unless the government is constitutionally required to finance exercise of travel, but not abortion, rights.

353. 402 U.S. 137 (1971).

ular community without its prior referendum approval. Plaintiff's contention in *James,* then, was not that the Equal Protection Clause mandated affirmative governmental assistance to the poor, but rather that it forbade deliberate governmental hostility. Even a Court committed to the traditional understanding of equal protection rights could have invalidated the statute in *James.* But the Burger Court did not, ruling implicitly that wealth was not a suspect classification like race, and thus distinguishing its invalidation three years earlier of a similar referendum scheme requiring local voter approval for enactment of fair housing laws addressed towards *racial* discrimination.[354] *James* was a surprising decision given that even the conservative Justice Harlan, who had vigorously lobbied against the affirmative governmental obligation aspect of fundamental rights equal protection, had conceded that government could not constitutionally inflict deliberate harm upon the poor.[355] The explanation for this puzzling decision must be, I think, that the Justices were so eager to foreclose the far-reaching ramifications of the fundamental rights strand that they either failed to notice, or else did not care, that the wealth discrimination involved in *James* was of a different order than that implicated in the fundamental rights cases.[356] In other words, *James* probably came out the way it did principally because of the Court's determination to reject constitutional challenges in cases such as *Dandridge* and *Rodriguez.*

B. *Resurrection of the Traditional Understanding of Equal Protection Rights*

The virtual demise of the fundamental rights strand in the early 1970s reversed in one important area the Warren era trend towards reconceptualizing equal protection rights as entitlements to particular outcomes. This section considers three additional contexts in which the Burger Court reverted to the traditional rights understanding.

1. *The State Action Cases*

The Warren Court, from 1960 onward, seems never to have met a state action argument it did not like. The Burger Court immediately

354. 402 U.S. at 140-41 (distinguishing Hunter v. Erickson, 393 U.S. 385 (1968)).

355. *See, e.g.,* Douglas v. California, 372 U.S. 353, 361 (1963) (Harlan, J., dissenting) ("The States, of course, are prohibited by the Equal Protection Clause from discriminating between 'rich' and 'poor' *as such* . . . ."); Griffin v. Illinois, 351 U.S. 12, 35 (1956) (Harlan, J., dissenting) (conceding that facial discrimination against indigents would be unconstitutional).

356. *See* Clune, *supra* note 332, at 335. In this pre-*Washington v. Davis* period, moreover, the distinction between a facial discrimination and disparate impact might have appeared less than crystalline.

disrupted that pattern in *Evans v. Abney,*[357] the successor case to *Evans v. Newton,* discussed in Part II. Following the Supreme Court ruling that even private trustees could not constitutionally operate a Macon park in a racially segregated manner, the Georgia courts held that the property reverted to the donor's heirs since the trust had become impossible of fulfillment.[358] On appeal again to the U.S. Supreme Court, the Justices rejected an equal protection challenge owing to the absence of state action. *Abney* apparently was the first decision since 1935 in which the Court dismissed on state action grounds an equal protection challenge to purposeful race discrimination.[359] Justices more committed to racially egalitarian outcomes could have reached the opposite result without abandoning the state action limitation. Under *Shelley v. Kraemer* state action could have been located in the Georgia court's involvement in the reverter, or, more narrowly, reversal might have been grounded upon the early twentieth-century Georgia law authorizing charitable trusts dedicated to park use only if racially restricted. Given that Justices Brennan and Douglas dissented in *Abney* while Marshall did not participate, and that Fortas and Warren had provided the two additional votes for granting certiorari, one might plausibly speculate that the result would have differed under the Warren Court.[360]

Four years later, in *Moose Lodge No. 107 v. Irvis,*[361] the Burger Court again rejected a race discrimination challenge owing to the absence of state action. *Moose Lodge* involved the constitutionality of a state-licensed private club's refusal to serve blacks. The Court rejected the equal protection challenge, finding no state action in either Pennsylvania's grant of a limited monopoly liquor license or its close supervision of licensees' business operations. Given dissents by the three holdover liberals from the Warren Court — Douglas, Brennan, and Marshall — *Moose Lodge* too perhaps would have been resolved differently in 1969. While Warren era precedents did not mandate a different result, creative interpretation of *Burton*'s "joint participant" rationale or of *Reitman*'s "authorization" notion easily could have accommodated a finding of state action in *Moose Lodge.*[362]

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357. 396 U.S. 435 (1970).

358. Evans v. Abney, 165 S.E.2d 160 (Ga. 1968).

359. *See* Grovey v. Townshend, 295 U.S. 45 (1935) (finding no state action in exclusion of blacks from state convention of Democratic Party), *overruled by* Smith v. Allwright, 321 U.S. 649 (1944).

360. *See* certiorari memorandum from law clerk to Justice Douglas 3 (Apr. 28, 1969) (LOC, Douglas Papers, Box 1471, case no. 60) (noting the certiorari vote).

361. 407 U.S. 163 (1972).

362. The state was a "joint participant" in Moose Lodge's racial discrimination in that it derived financial benefit from the club's use of a state-granted liquor license; in *Burton* the Court

Abney and *Moose Lodge* represent the full extent of the Burger Court's state action decisions in the equal protection context. That Court has, however, even more dramatically reinvigorated the state action requirement in other constitutional settings. Though one reasonably may question the transferability of state action precedents across constitutional compartments, the Court has never even hinted that the meaning of state action fluctuates so, and indeed such malleability would be difficult to reconcile with the language of the Fourteenth Amendment. Thus it seems defensible to treat these subsequent state action decisions as applicable to equal protection.

The first such case was *Jackson v. Metropolitan Edison Co.*,[363] where the Court rejected a due process challenge to termination of customer service without a hearing by a private utility company operating pursuant to a state-granted monopoly. Justice Rehnquist, writing for the majority, denied that the combination of monopoly service, extensive state regulation (including approval of the charter provision allowing Metropolitan Edison to terminate customer service without a hearing), and the public nature of utility service translated into state action. Precedent seemed plainly to indicate a contrary result, however. The expansion of *Marsh*'s public function doctrine in *Evans v. Newton* to cover parks was more than sufficient to encompass utility service as well.[364] That the state public utilities commission implicitly had approved the challenged company practice, furthermore, arguably constituted state action under the "authorization" rationale of *Reitman v. Mulkey*. Moreover, heavy state regulation of Metropolitan Edison's business operations represented at least as much state involvement as was present in *Burton*.[365] Finally, *Jackson*'s general approach to state action, which Justice Douglas' dissent accurately described as "fundamentally sequential rather than cumulative"[366] —

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partially had relied on an analogous governmental financial benefit in finding state action. 365 U.S. at 724. In *Moose Lodge*, the state had "authorized" the discrimination in that state law empowered the liquor control board to supervise closely all aspects of its licensees' business operations. *See* 407 U.S. at 184-85 (Brennan, J., dissenting).

363. 419 U.S. 345 (1974).

364. Justice Rehnquist rejected the public function argument, observing that the state was under no obligation to provide utility services. 419 U.S. at 352-53. But that argument fails to distinguish *Newton* or *Terry v. Adams*, since the state has no obligation to provide parks or to make public offices elective rather than appointive. Rehnquist's treatment of *Moose Lodge* was particularly disingenuous. There, in the course of rejecting the state action argument, he had emphasized that the defendant club did not enjoy monopoly status. 407 U.S. at 176-77. In *Jackson*, however, he declared that monopoly status was insufficient to convert the utility company into a state actor, and cited *Moose Lodge* as rejecting the state action argument despite the presence there of some elements of monopolization. 419 U.S. at 352.

365. The majority opinion sought, without success, to distinguish *Burton*. 419 U.S. at 357-58.

366. 419 U.S. at 362-63.

that is, the Court considered, and rejected, each state action argument independently, rather than evaluating them in toto — flatly contravened the "sifting facts and weighing circumstances" approach of *Burton.*[367]

The next important state action decision of the Burger Court was *Flagg Brothers, Inc. v. Brooks.*[368] At issue there was the constitutionality of the Uniform Commercial Code provision, enacted into New York law, permitting warehousemen to liquidate through auction their lien on goods in their possession without affording notice or hearing to the "owner." Rejecting the due process challenge owing to the absence of state action, Justice Rehnquist's majority opinion, as had his earlier opinion in *Jackson*, cast doubt upon the continued vitality of the public function prong of state action analysis. The nonconsensual transfer of property was not a public function, Justice Rehnquist reasoned, because it was not an activity "exclusively reserved" to the state.[369] That qualification of the public function doctrine flatly contravened *Evans v. Newton,* which Justice Rehnquist tried, disingenuously, to redescribe as something other than a public function case.[370] Indeed the "exclusively reserved" test seems logically incompatible with the public function doctrine, the premise of which is that some activities not invariably performed by the state nonetheless qualify as state action owing to their public nature. *Flagg Brothers* seems inconsistent, moreover, with a line of cases commencing with the Warren Court's decision in *Sniadach v. Family Finance Corp.,*[371] in which the Court ruled that garnishment and replevin remedies, obtainable by private parties with the assistance of purely ministerial court involvement, constituted state action. Those decisions, notwithstanding Justice Rehnquist's contention to the contrary in *Flagg Brothers,*[372] were more plausibly explicable on the basis of the state's traditional monopolization over nonconsensual property transfers, than of the court

367. 365 U.S. at 722.

368. 436 U.S. 149 (1978). The vote in *Flagg Brothers* was five to three, with Justice Brennan not participating.

369. 436 U.S. at 158.

370. 436 U.S. at 159 n.8 (arguing that the state action in *Evans* was the city's continued involvement in maintenance of the park after it had reverted to private trusteeship). *But see* Evans v. Newton, 382 U.S. 296, 302 (1966) (expressly relying on public function doctrine). The Burger Court flatly overruled another of its predecessor's expansions of the public function doctrine in Hudgens v. NLRB, 424 U.S. 507 (1976), *overruling* Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, 391 U.S. 308 (1968) (ruling shopping centers to be state actors under the public function doctrine).

371. 395 U.S. 337 (1969); *see also* North Georgia Finishing Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975); Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974); Fuentes v. Shevin, 407 U.S. 67 (1972).

372. 436 U.S. at 157.

clerk's nondiscretionary issuance of a requested writ.[373] Finally, without belaboring the point with additional examples, I note that the Burger and Rehnquist Courts have significantly bolstered the state action requirement in a variety of other contexts.[374]

2. Washington v. Davis

Even where state action undeniably exists, the traditional understanding of equal protection rights acknowledged a constitutional violation only when a particular group had been *deliberately* disadvantaged. The reason *Griffin* and *Harper* carried such radical implications, even if their precise holdings were unremarkable, was that they inverted the traditional rights understanding by holding the state responsible for unintended disparate wealth effects.[375] Scattered dicta in Warren Court decisions, moreover, suggested that facially neutral legislation producing disparate racial impacts possibly violated the Equal Protection Clause regardless of legislative motivation.[376] To stress such casual statements, though, would be to suggest that the Warren Court had resolved the critical *Washington v. Davis* issue, when in fact it plainly had not. A more accurate evaluation, provided in 1969 by Professor Lawrence Sager, was that the constitutionality of de facto racial classifications was "far from clear."[377]

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373. *See Flagg Bros.*, 436 U.S. at 169, 173-74 (Stevens, J., dissenting); *see also* Paul Brest, *State Action and Liberal Theory: A Casenote on* Flagg Bros. v. Brooks, 130 U. PA. L. REV. 1296, 1310-11 (1982).

374. *E.g.*, National Collegiate Athletic Assn. v. Tarkanian, 488 U.S. 179 (1988) (NCAA not a state actor); San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522 (1987) (U.S. Olympic Committee not a state actor); Blum v. Yaretsky, 457 U.S. 991 (1982) (nursing homes' decisions to transfer patient to lower level of care in accordance with Medicaid regulations not state action); Rendell-Baker v. Kohn, 457 U.S. 830 (1982) (heavily regulated and almost wholly state-subsidized private school specializing in special needs students not a state actor).

375. *See, e.g.*, Paul Brest, Palmer v. Thompson: *An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95, 110; John H. Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1255 (1970); Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 143 (1976).

376. *See, e.g.*, Hunter v. Erickson, 393 U.S. 385, 391 (1968) (racial classification facially treating blacks and whites "in an identical manner" violates equal protection when its "impact falls on the minority"); United States v. O'Brien, 391 U.S. 367, 384-85 (1968) (redescribing *Gomillion* as standing "not for the proposition that legislative motive is a proper basis for declaring a statute unconstitutional, but that the inevitable effect of a statute on its face may render it unconstitutional"); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 672 (1966) (Black, J., dissenting) ("If the record could support a finding that the law as written or applied has [a racially discriminatory] effect, the law would of course be unconstitutional . . . ."); *see also* Michelman, *supra* note 247, at 21 & n.38 (apparently assuming that disparate racial impact violates equal protection); Fiss, *supra* note 191, at 593 & n.50 (interpreting *Griffin* to suggest that disparate racial impacts produced by facially neutral laws violate equal protection); Horowitz, *supra* note 247, at 1154-55 (discriminatory intent not necessary for an equal protection violation in the school segregation context).

377. Sager, *supra* note 54, at 786.

The first puzzle *Washington v. Davis* poses for the historian of equal protection, then, is why the underlying issue was not squarely presented to the Court until 1976. The likeliest explanation is that resolution of preceding race cases had not required precise identification of the objectionable aspect of racial classifications. More specifically, prior cases invariably involved both a decisionmaking *process* consciously motivated by hostility towards blacks or geared to the assumption (explicit or implicit) of black inferiority and a *result* harmful to blacks.[378] Thus these decisions did not require the Court to decide whether the Equal Protection Clause was concerned principally with barring race-conscious decisionmaking or the cumulative disadvantaging (regardless of intention) of historically oppressed minorities. When the Court in the mid-1960s finally embraced a racial classification rule in *McLaughlin* and *Loving,* its doctrinal formulation — whether the racial classification was necessary to accomplish a compelling state interest — was susceptible to both a processual and an impact interpretation. Specifically, the function of equal protection strict scrutiny can be viewed either as uncovering illicit legislative purposes or as ensuring that harm is visited upon an historically disadvantaged racial minority only when unavoidable in accomplishing an overriding governmental objective.[379]

The first case requiring the Court to choose between the processual and impact understandings of equal protection was *Palmer v. Thompson.*[380] There the city of Jackson, Mississippi, had closed its public swimming pools to avoid court-ordered integration. The city's action unquestionably had a constitutionally objectionable purpose, but its impact seemed nondiscriminatory: neither blacks nor whites could any longer enjoy public swimming pools. Perhaps unsurprisingly, this first case requiring precise identification of the dominant value underlying equal protection produced chaos in the courts. The Fifth Circuit divided seven to six en banc,[381] and the Supreme Court then followed

378. *See* Fiss, *supra* note 375, at 158-59, 170-71.

379. *See, e.g.,* Brest, *supra* note 91, at 6-8, 10-11, 15; Rosberg, *supra* note 326, at 299-301. The processual explanation is most fully developed in ELY, *supra* note 38, at 145-48; perhaps the best elaboration of the impact account is Fiss, *supra* note 375, at 145-46. Strict scrutiny uncovers illicit motivations by requiring that legislatures, in order to justify racial classifications, produce compelling purposes and demonstrate the unsuitability of nonracial classifications to achieve the same objectives; legislatures unable to make both of these showings are presumed to have acted out of racial hostility. Strict scrutiny protects historically disadvantaged minorities from cumulative burdens by requiring that any harms visited upon them, whether or not intentional, be justified by overriding governmental purposes.

380. 403 U.S. 217 (1971).

381. 419 F.2d 1222 (5th Cir. 1969) (en banc). The majority, rejecting the constitutional challenge, observed that "where the facilities around which revolve the status of equality are removed from the use and enjoyment of the entire community, we see no withdrawal of any badge of equality." 419 F.2d at 1227. The dissenters argued principally that the illegitimate

with a five-to-four decision rejecting the constitutional challenge. Justice Blackmun, a very tentative member of the majority, poignantly observed in a draft concurrence that "[f]or me, this is perhaps the most excruciatingly difficult case of the present Term. I frankly admit that I find myself close to dead center."[382] *Palmer,* in emphasizing the difficulty of discerning legislative purpose, seemed necessarily to reject a legislative inputs approach to equal protection, which requires identification of illicit motivation.[383]

Lower courts, faced with *Palmer*'s rejection of a legislative inputs focus, assumed plausibly, though not inevitably, that the Court had opted instead for the impact theory of equal protection. Bolstered by the Court's contemporaneous interpretation of Title VII as a disparate impact test,[384] many lower courts ruled that the Equal Protection Clause prohibited facially neutral government action that significantly disadvantaged racial minorities.[385] When the Supreme Court revisited the process/impact question five years later in *Washington v. Davis,* the Justices' strong predisposition towards the traditional conception of equal protection rights as checks upon deliberate governmental disadvantaging yielded a decision that was embarrassingly difficult to reconcile with *Palmer.*[386] In arguably the most important equal protection ruling of the last two decades, *Davis* held that facially neutral government conduct producing disparate racial impacts violates the Equal Protection Clause only if illicitly motivated.[387]

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purpose of avoiding integration was sufficient to invalidate the pool closure, 419 F.2d at 1232-33, 1235 (Wisdom, J., dissenting), though they supplemented this argument with a disparate impact one. 419 F.2d at 1233.

382. Blackmun draft concurrence, *Palmer v. Thompson* 1 (Apr. 29, 1971) (LOC, Douglas Papers, Box 1510, case file no. 107).

383. 403 U.S. at 224-25; *see also* Letter from Justice Black to Justice Blackmun (Feb. 16, 1971) (LOC, Douglas Papers, Box 1510, case file no. 107: *Palmer v. Thompson*) (making the distinctly nonprocessual claim that the state can close public facilities that are not constitutionally mandated "for any reason, good or bad").

384. Griggs v. Duke Power Co., 401 U.S. 424, 431-32 (1971).

385. *See, e.g.,* Davis v. Washington, 512 F.2d 956 (D.C. Cir. 1975) (exam producing a disparate racial impact held invalid under Equal Protection Clause unless sufficiently related to job performance), *revd.*, 426 U.S. 229 (1976); Douglas v. Hampton, 512 F.2d 976 (D.C. Cir. 1975) (same); Bridgeport Guardians, Inc. v. Members of the Bridgeport Civil Serv. Comm., 482 F.2d 1333 (2d Cir. 1973) (same); *see also* Brest, *supra* note 91, at 26 (*Palmer* "inadvertently contributed to the growth of the disproportionate impact doctrine").

386. *See* Washington v. Davis, 426 U.S. 229, 242-43 (1976) (distinguishing *Palmer* on the unilluminating ground that it involved different facts).

387. The alternative approach — construing equal protection to require a strong justification for government conduct that burdens racial minorities regardless of motivation — was not unfathomable, though its implications would have been far-reaching. *See* 426 U.S. at 248. For academic commentary adopting the impact approach, see, *e.g.,* Theodore Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication,* 52 N.Y.U. L. REV. 36 (1977); Fiss, *supra* note 375, at 142-43, 153; Kenneth L. Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment,* 91 HARV. L. REV. 1, 50-52 (1977); Suzanna Sherry, *Selective*

The depth of the Burger Court's commitment to the traditional understanding of equal protection rights is illustrated by the rigor with which it subsequently has applied the *Washington v. Davis* rule; not even a legislative inputs orientation mandated the stringent equal protection standard fashioned by *Davis* and progeny. Contrary to Justice Stevens' admonition in *Davis,*[388] the Court seems to have rejected the notion that bad purpose and effect are indistinguishable at the margin. Subsequent decisions have established that equal protection claimants, to succeed under *Davis,* must demonstrate a legislature's deliberate efforts to harm blacks (or another protected group), not simply an indifferent awareness that such harm was likely.[389] Thus even a legislative classification yielding ninety-eight percent of its benefits to males was ruled not to constitute sex discrimination so long as it was facially gender-neutral and not motivated by hostility towards women.[390] A legislative inputs approach to equal protection need not inevitably be so chary in its conception of faulty process. A plausible alternative approach would treat legislatures' selective indifference to a protected group's interests as sufficient grounds for condemning legislative decisionmaking.[391] That alternative notion of "discrimination," however,

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Judicial Activism in the Equal Protection Context: Democracy, Distrust, and Deconstruction, 73 GEO. L.J. 89, 118-19 (1984).

388. 426 U.S. at 253-54 (Stevens, J., concurring).

389. *E.g.,* McCleskey v. Kemp, 481 U.S. 279, 298 (1987); Mobile v. Bolden, 446 U.S. 55, 72 n.17 (1980); Personnel Admr. v. Feeney, 442 U.S. 256, 279 (1979) (proof of discriminatory purpose requires showing that government decisionmaker "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group").

Castaneda v. Partida, 430 U.S. 482 (1977), is not to the contrary. The Court held there that proof of substantial deviations between a racial group's representation on juries and in the population at large, in conjunction with a jury selection system susceptible to abuse, constituted a prima facie equal protection violation. Yet, as the Court observed in *Castaneda,* statistical disparities in a large sample can be shown with virtual certainty not to be random. 430 U.S. at 494 n.13, 496-97 n.17. In other words, proof of disparate racial impact in jury representation in *Castaneda* was tantamount to proof of deliberate discrimination. Thus *Castaneda* is entirely consistent with the stringent purpose requirement apparently espoused in *Davis* and progeny.

Voting is the one instance in which the Court, at least on occasion, has relaxed the rigor of its purpose test. *See* Rogers v. Lodge, 458 U.S. 613 (1982) (allowing generous use of evidence of disparate racial impact to prove discriminatory motivation in use of multimember districting scheme). *But see* Mobile v. Bolden, 446 U.S. 55 (1980) (refusing to find discriminatory purpose in use of multimember districting despite failure of blacks ever to elect a black candidate and a showing that blacks were discriminated against in municipal employment and public schools). For the argument that the stringency of the Court's purpose test varies with the centrality of the affected interest to core values of liberalism, see Ortiz, *supra* note 349.

390. *Feeney,* 442 U.S. at 281 (1979).

391. *See, e.g.,* Brest, *supra* note 91, at 8, 14; Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism,* 39 STAN. L. REV. 317, 347-49 (1987); Strauss, *supra* note 261, *passim*; Sunstein, *supra* note 28, at 897 n.119. While Professor Strauss is correct that equal protection plausibly can be construed to condemn selective indifference as well as conscious discrimination, his suggestion that *Washington v. Davis* adopted this approach — in his terms, the "reversing the groups test" — is belied by the evidence. *See* cases cited *supra* note 389.

would require courts to undertake inevitably speculative inquiries, such as whether the District of Columbia would have adopted the police officers' aptitude test challenged in *Washington v. Davis* had it disproportionately disadvantaged *whites*.[392] The Court's refusal to treat selective indifference as an equal protection violation suggests a preference for a stingy process theory over one that invites surreptitious introduction of impact analysis.

3. *De Facto School Segregation*

While the Warren Court never resolved the de facto segregation question, the Burger Court clearly announced that only de jure school segregation violated the Equal Protection Clause.[393] That Court's landmark decision in *Swann v. Charlotte-Mecklenburg Board of Education*,[394] as ultimately published, represented a significant victory for school desegregation advocates in its ratification of broad desegregation remedies, both in method (i.e., busing) and in scope (i.e., requiring the dismantling of more racial segregation than was directly attributable to discriminatory government conduct). The fascinating internal history of *Swann* illustrates, however, the newly seated Chief Justice's commitment to importing the traditional understanding of equal protection rights into the school desegregation context. Through six draft opinions Chief Justice Burger battled with several Warren Court holdovers in an effort, primarily, to restrict desegregation remedies to the scope of the constitutional violation.

I limit myself here to the story's essentials, noting only those aspects of the Burger draft opinions pertaining directly to the conceptualization of equal protection rights. First, the Chief Justice sought in dicta to forbid use of school desegregation remedies to accomplish goals other than redress of state-imposed public school segregation; such remedies must not, Burger warned, seek to "embrace all the problems of racial prejudice in residential patterns, employment practices, location of public housing, or other factors beyond the jurisdiction of school authorities."[395] Second, he endeavored to limit the scope of remedial action to undoing that portion of existing segregation produced by official misconduct: "The objective should be to achieve as nearly as possible that distribution of students and those

392. *See, e.g.*, Strauss, *supra* note 261, at 971-75, 993-95; Sunstein, *supra* note 28, at 909-10.

393. *E.g.*, Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 464 (1979); Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 413 (1977).

394. 402 U.S. 1 (1971).

395. Burger draft opinion, *Swann v. Charlotte-Mecklenburg Bd. of Educ.* 15 (Jan. 11, 1971) (LOC, Black Papers, Box 436, case file nos. 281, 349, file III).

patterns of assignments that would have normally existed had the school authorities not previously practiced discrimination."[396] Third and relatedly, Burger wished to reject a presumption that single-race schools existing in a system proven to have suffered official segregative action were attributable to that governmental misconduct: "Undesirable though it may be, we find nothing in the Constitution, read in its broadest implications, that precludes the operation of schools, all or predominantly all of one racial composition in a city of mixed population, so long as the school assignment is not part of state-enforced school segregation."[397] Finally, the Chief Justice hoped to prevent district courts from incorporating forecasts of subsequent demographic shifts into their remedial calculations. After a unitary system had been achieved, he wrote, "[i]t does not follow that the communities served by such systems will remain demographically stable, and it should be clear that desegregation decrees are not an appropriate instrument for judicial monitoring of continuing demographic change or shifting residential patterns unrelated to discriminatory segregation."[398] On each of these four points bearing on the scope of an equal protection right to nonsegregated education, a combination of liberal and conservative Warren Court holdovers patiently, but persistently, refused to permit Burger to have his way.[399]

As ultimately published, then, *Swann* embodied a considerably less stringent legislative inputs understanding of equal protection than had Burger's draft opinions.[400] Just two years later, moreover, *Keyes v. School District No. 1*[401] approved the use of lenient evidentiary presumptions that generated considerably more desegregation than simply undoing the impact of official segregative conduct. The Burger

396. *Id.* at 31. The 1970s school desegregation cases have, in considerable part, represented an internal Court battle over the appropriateness of this definition of remedial objectives. *Compare, e.g.,* Milliken v. Bradley, 418 U.S. 717, 746 (1974) *and* Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 420 (1977) *with Milliken,* 418 U.S. at 779-80 (White, J., dissenting) *and* Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 458-61 (1979).

397. Burger draft opinion, *supra* note 395, at 28.

398. *Id.* at 36.

399. *See, e.g.,* Letter from Justice Brennan to Chief Justice Burger 5 (Mar. 8, 1971) (LOC, Black Papers, Box 436, case file nos. 281, 349, file I); *id.,* Letter from Justice Brennan to Chief Justice Burger (Mar. 23, 1971); *id.,* Letter from Justice Harlan to Chief Justice Burger (Mar. 11, 1971); *id.,* Letter from Justice Stewart to Chief Justice Burger, Mar. 24, 1971. *See generally* BERNARD SCHWARTZ, SWANN'S WAY 111-84 (1986).

400. *See Swann,* 402 U.S. at 23 (reserving the question of whether discrimination by public authorities other than school officials can be remedied in a desegregation order), 402 U.S. at 25 (approving use of numerical ratios as starting point in devising remedy), 402 U.S. at 26 (adopting presumption that, once deliberate school segregation has been established, single-race schools are attributable to it, rather than to private housing choices), 402 U.S. at 28-29 (emphasizing broad discretion of district courts in formulating remedial plans).

401. 413 U.S. 189 (1973), discussed *infra* text accompanying note 407.

Court's legislative inputs orientation reasserted itself, however, in *Milliken v. Bradley.*[402] At issue there was the district court's power to remedy a proven constitutional violation. Owing to the broad-scale exodus of whites from the Detroit school system, the district court in *Milliken* could not fashion an intradistrict remedy that would provide meaningful desegregation in the urban school district. Instead, the court produced a desegregation plan encompassing contiguous, overwhelmingly white, suburban school districts as well. In a ruling of tremendous import, a divided Supreme Court reversed that order on the grounds that the plaintiffs had proven neither interdistrict violations — for example, racially motivated districting — nor interdistrict segregative effects flowing from proven constitutional violations in Detroit.[403]

The district court in *Milliken* had opined that school district lines were administrative conveniences to be circumvented when necessary to vindicate the constitutional right to nonsegregated public education. The Supreme Court rejected this view, in effect superimposing a *Washington v. Davis* approach upon the remedial question — that is, the Court ruled that school district lines could be ignored only if constructed for illicit purposes, regardless of whether they inhibited redress of proven constitutional violations. Absent racial motivation, school district boundary drawing was simply racially neutral government decisionmaking that incidentally produced a disparate racial impact — a scenario deemed constitutionally unobjectionable two years later in *Washington v. Davis.*

The final entry on the conventional rights understanding side of the school desegregation ledger is *Pasadena City Board of Education v. Spangler.*[404] There the Supreme Court reversed a district court order requiring amendment of a pending desegregation decree to adjust for demographic shifts that were producing additional racial segregation. The Constitution does not mandate any particular racial balance, Justice Rehnquist observed for the majority; it simply prohibits deliberate state segregative conduct.[405] Thus *Spangler* decisively rejected the notion that de facto school segregation violates the Equal Protection Clause.

Thus far in this section, I have argued that the Burger Court mani-

402. 418 U.S. 717 (1974).

403. 418 U.S. at 744-45. On the importance of *Milliken,* see *e.g.,* WILKINSON, *supra* note 65, at 218, 222; Charles R. Lawrence, III, *Segregation "Misunderstood": The* Milliken *Decision Revisited,* 12 U.S.F. L. REV. 15, 15 (1977); Diane Ravitch, *The "White Flight" Controversy,* 51 PUB. INTEREST 135, 148-49 (1978).

404. 427 U.S. 424 (1976).

405. 427 U.S. at 434-35.

fested some variant of its legislative inputs orientation in the school desegregation cases. Yet only distortion of the evidence could mold these cases comfortably into the pattern evinced by the Burger Court's fundamental rights strand, state action, and *Washington v. Davis* decisions. That Court's first important school desegregation decision, *Swann,* plainly required, despite the Chief Justice's diligent efforts to the contrary, that school districts redress segregation primarily attributable to factors other than state action, such as private housing discrimination, economic differentials, and so forth.[406] Similarly *Keyes,* while apparently retaining the de jure segregation standard, sustained use of two evidentiary presumptions that greatly facilitated broad remedial claims — namely, that significant segregative conduct in one portion of a school district presumptively (1) produced segregative effects in others, and (2) revealed similar illicit activity elsewhere in the district.[407] Notwithstanding intervening decisions less committed to integrative results than *Keyes,* the Court in the late 1970s both reaffirmed its commitment to the *Keyes* presumptions and embraced an additional equally generous one — that current school segregation was attributable to a preceding generation's official discriminatory conduct falling short of statutorily mandated segregated schools.[408] These subsequent rulings also reaffirmed *Green*'s holding that once a constitutional violation was shown, school board actions were to be judged not according to their motivation, but rather by their effectiveness in promoting progress towards a unitary school system.[409]

Justice Rehnquist overstated his position when he complained in *Dayton Board of Education v. Brinkman (Dayton II)* that the Court's "cascade of presumptions . . . sweeps away the distinction between de facto and de jure segregation."[410] To the contrary, I have suggested that the Burger Court partially resurrected the traditional understanding of equal protection in the school segregation context. Yet one cannot plausibly deny that the Burger Court has displayed a more tenuous commitment to the traditional understanding here than elsewhere.[411] The most persuasive explanation for that apparent disjunc-

406. For example, the Court approved a presumption that single-race schools in a system proven to have suffered deliberate governmental segregation were attributable to state action, notwithstanding the existence of racially homogenous housing patterns. 402 U.S. at 25-26. The Court also approved the use of racial population percentages as a starting point for remedial calculations. 402 U.S. at 25.

407. 413 U.S. at 202-03, 207-08.

408. *See* Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 535, 537 (1979); Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 458 (1979).

409. *Dayton,* 443 U.S. at 538; *Columbus,* 443 U.S. at 458-61.

410. 443 U.S. at 542 (Rehnquist, J., dissenting).

411. *See, e.g., Columbus,* 443 U.S. at 481 (Powell, J., dissenting) (observing that the "fictions

tion, I believe, is what Dean Brest has termed "institutional nostalgia" for *Brown.*[412] *Brown* generally is viewed today as an uncontroversial example of defensible, indeed laudable, judicial review; even those most disparaging of modern "judicial activism" have felt obliged to mold their constitutional theories to accommodate the result in *Brown.*[413] To interpret *Brown* as tolerating extensive school segregation owing to the absence of state action surely would have suggested, to the public and possibly to the legal profession as well, that the Justices' commitment to the principles of *Brown* had flagged. Indeed internal evidence from the Burger Court's first two state action decisions, *Evans v. Abney* and *Moose Lodge,*[414] reveals that some Justices felt uncomfortable rejecting race discrimination challenges on "technical" state action grounds.[415] The "institutional nostalgia" thesis is further corroborated by the Justices' willingness in *Swann* to expend considerable time and energy on maintaining the Court's track record of unanimity in school segregation cases.[416]

C. *Understanding the Burger Court's Gender Discrimination Cases in Legislative Inputs Terms*

I have argued thus far in Part III that the Burger Court's predisposition towards the legislative inputs understanding of equal protection

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and presumptions" relied upon in these school desegregation cases are inconsistent with *Washington v. Davis* and progeny); Ortiz, *supra* note 349, at 1131-34 (arguing that the Court has applied a less rigorous purpose requirement in the school desegregation cases than elsewhere).

412. Brest, *supra* note 313, at 119. An alternative explanation is that the Court regards education as an area more appropriate for judicial intervention than the market-oriented contexts of *Washington v. Davis* (employment) and *Arlington Heights* (housing). *See* Ortiz, *supra* note 349, at 1140-42. Support for this alternative theory in the case law is mixed. *Compare* Plyler v. Doe, 457 U.S. 202, 221 (1982) (noting the importance of education in the context of invalidating Texas policy of denying free public schooling to children of illegal aliens) *with* Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450, 459 (1988) (limiting *Plyler* to its "unique circumstances" in rejecting a constitutional challenge to school board user fees for public school transportation) *and* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 29-38 (1973) (rejecting argument that education is a fundamental right for equal protection purposes in the context of sustaining Texas policy of financing public schools partially from local property taxes).

413. *See* Klarman, *supra* note 7, at 815-19 (describing the untouchability of *Brown* and noting the detrimental impact of this phenomenon on constitutional theory).

414. *See supra* text accompanying notes 357-62.

415. Letter from Justice Stewart to Justice Rehnquist 1 (June 2, 1972) (LOC, Douglas Papers, Box 1548, case file no. 70-75: *Moose Lodge v. Irvis*) ("I wonder whether it might not be a good idea, in this sensitive area, to emphasize explicitly that neither the State nor any of its agencies has in any way approved, endorsed, accepted, or supported the racially discriminatory constitution, by-laws, or practices of the appellant."); Letter from Chief Justice Burger to Justice Black 1 (Dec. 10, 1969) (LOC, Douglas Papers, Box 1471, case file no. 60: *Evans v. Abney*) ("This is a difficult case with a result I do not relish . . . .").

416. *See generally* SCHWARTZ, *supra* note 399, at 111-84 (describing laborious process through which unanimity was secured in *Swann*). For powerful recent corroboration of the "institutional nostalgia" thesis, see Missouri v. Jenkins, 110 S. Ct. 1651 (1990) (ratifying power of federal courts to mandate local tax increase to finance broad school desegregation order).

accounts for its truncation of the fundamental rights strand, its resurrection of a strong state action requirement, *Washington v. Davis,* and (less completely) its school desegregation decisions. This section argues that a legislative inputs focus converts the morass of Burger Court gender discrimination cases into an orderly pattern evidencing the Justices' gradual sophistication in process theory.

The Warren Court and its predecessors took no steps towards subjecting gender classifications to meaningful review under the Equal Protection Clause.[417] The Burger Court made that momentous stride in 1971 in *Reed v. Reed,*[418] striking down an Idaho law granting men preference over women in the selection of estate administrators. Over the next five years the Justices struggled with the gender discrimination issue, manifesting considerable disagreement as to the appropriate standard of review, although every Justice but Rehnquist agreed, at least implicitly, that gender classifications should be treated differently from run-of-the-mill legislative classifications.[419] I wish to ignore here the standard-of-review question, which the Court finally laid to rest in *Craig v. Boren,*[420] where it adopted an intermediate standard for gender classifications; rather I shall seek to ascribe some coherence to the apparently chaotic *results* in the Burger Court's gender cases. In my view the gender issue initially proved befuddling to the Court because laws generated by bad process — which, in the gender context, generally connotes sex stereotyping rather than, as with race, malignant motivation — frequently yielded results *materially* advantageous to women.[421] In a pre-*Washington v. Davis* universe where legislative purpose sometimes was deemed irrelevant to equal protection analysis, a law materially advantaging women would be constitutionally unobjectionable despite a grounding in stereotypical assumptions regarding female dependence and domesticity. Once the Court shifted in the mid-1970s to a legislative inputs focus, though, even laws ostensibly benefiting women were constitutionally problematic if constructed upon "archaic and overbroad generalizations"[422] or "traditional

417. *E.g.,* Hoyt v. Florida, 368 U.S. 57 (1961); Goesaert v. Cleary, 335 U.S. 464 (1948); Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873); *see* Ruth B. Ginsburg, *Sexual Equality under the Fourteenth and Equal Rights Amendments,* 1979 WASH. U. L.Q. 161, 164 (prior to 1971 "our fundamental instrument of government was thought an empty cupboard for sex equality claims").

418. 404 U.S. 71 (1971).

419. *See, e.g.,* Frontiero v. Richardson, 411 U.S. 677, 691 (1973) (Rehnquist, J., dissenting).

420. 429 U.S. 190 (1976).

421. I use the word "material" because one can make a strong argument that statutes founded upon gender stereotypes, even if conferring immediate financial or other benefits upon women, nonetheless harm them in more subtle ways.

422. Schlesinger v. Ballard, 419 U.S. 498, 508 (1975).

way[s] of thinking about females."[423]

Pursuant to this analysis *Reed* was an easy case, for the challenged statute both materially disadvantaged women and embodied the stereotypical assumption that women lack the business acumen of men. Nor did *Frontiero v. Richardson*[424] prove particularly troublesome to the Court. The law at issue there allowed male military personnel automatically to claim a spousal allowance, while their female counterparts had to prove actual spousal dependency. Underlying this gender classification was a stereotypical (as well as factually accurate) assumption regarding female financial dependency. Furthermore, while the law ostensibly benefited the female spouses of military personnel, the Court plausibly could fasten upon the relative disadvantaging of female service members to sustain a finding of discriminatory gender impact. Ensuing cases, however, soon confronted the Court with gender classifications probably grounded in similar stereotypes, yet unquestionably benefiting women materially. On the first two such occasions the Justices sustained the law, apparently perplexed as to how the Equal Protection Clause sensibly could be construed to invalidate laws ostensibly benefiting an historically disadvantaged group.

Kahn v. Shevin[425] involved a Florida law granting property tax exemptions to widows but not widowers. Justice Douglas' majority opinion noted the rationality of legally recognizing the greater financial stringency of widowed females,[426] apparently undisturbed by the stereotypical assumption of female dependency plainly underpinning this late nineteenth-century statute. Justice Douglas' conference notes confirm that several Justices considered it dispositive that the Florida law advantaged women.[427] Even Justice Brennan's *Kahn* dissent failed to articulate the legislative inputs objection, conceding the law's beneficent purpose and effect, yet nonetheless maintaining its invalidity owing to an insufficiently close nexus between the classification and its objective.[428] Brennan's position was puzzling, for the two most plausible objectives of heightened means/ends scrutiny are smoking out illegitimate purposes and avoiding imposition of unnecessary burdens on historically oppressed groups; yet on Brennan's own view

423. Califano v. Goldfarb, 430 U.S. 199, 223 (1977) (Stevens, J., concurring).

424. 411 U.S. 677 (1973).

425. 416 U.S. 351 (1974).

426. 416 U.S. at 353-54.

427. Douglas conference notes, *Kahn v. Shevin* (Mar. 1, 1974) (LOC, Douglas Papers, Box 1652, case file no. 73-78) (Burger: "all kinds of reasons why women should receive favorable treatment") (Douglas: "women as widows are largely destitute") (Powell: "Fl[orida] Act is 100 years old — before Social Security widows would starve").

428. 416 U.S. at 359-60 (Brennan, J., dissenting).

neither of these concerns was present in *Kahn.* That the liberal Justice Douglas wrote the *Kahn* decision, while the equally liberal Justice Brennan intuited an objection to the statute but was unable precisely to identify it, suggests to me that *Kahn* represented a transitional stage in the Court's conversion to legislative inputs theory. Decided in 1974, *Kahn* fell roughly midway between *Palmer v. Thompson* and *Washington v. Davis,* both chronologically and in terms of the Court's processual orientation.

Schlesinger v. Ballard,[429] decided the following year, similarly sustained an apparently stereotypical gender classification that materially advantaged women. At issue there was the military promotion system which granted women more time than men to gain promotion or else face discharge. Probably because the law ostensibly benefited women, the majority failed to spot any discrimination, and sustained the statute under minimum rationality review. Justice Brennan, again dissenting, for the first time identified the search for actual legislative purpose as the appropriate task in gender discrimination cases, as it should be under a legislative inputs approach.[430]

Both *Kahn* and *Ballard,* then, appear inconsistent with *Washington v. Davis'* focus on legislative inputs; both decisions sustained legislation ostensibly benefiting women despite the underlying decisionmaking process' grounding in gender stereotypes. Such disparate approaches could not comfortably coexist; the same Term that produced *Ballard* also witnessed the Court's incipient acceptance of a legislative inputs approach to gender discrimination. *Weinberger v. Wiesenfeld*[431] involved a Social Security Act provision entitling widows, but not widowers, to certain survivors' benefits. The Court, correctly spying the work of a dependency stereotype, invalidated the law. In doing so it rejected the clever justificatory argument that the gender classification had been designed to compensate women prospectively for job discrimination likely to be encountered, noting that "mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme."[432] In other words, unconstitutional gender discrimination was defined by illicit purposes and stereotypes — an approach precisely in accord with *Washington v. Davis,* decided the ensuing Term, though not with *Kahn* and

429. 419 U.S. 498 (1975).

430. 419 U.S. at 511 (Brennan, J., dissenting).

431. 420 U.S. 636 (1975).

432. 420 U.S. at 648.

Ballard.[433]

The overriding importance of legislative purpose to the Court's gender discrimination analysis was confirmed by two 1977 decisions. In *Califano v. Goldfarb,*[434] the Court invalidated a different Social Security Act provision granting survivors' benefits automatically to widows, but to widowers only upon proof of dependency. Once again the Court rejected the argument that Congress' intention might have been prospectively to compensate nondependent widows for job discrimination likely to be encountered; only actual purpose mattered, and evidence of a genuinely compensatory motivation was entirely lacking. By way of contrast, just weeks later *Califano v. Webster*[435] sustained a lapsed Social Security Act scheme that had enabled women to exclude three more years of low wages than men in calculating average earnings upon which old age benefits were based. Unlike in *Goldfarb,* the legislative history confirmed a congressional purpose to compensate women for past job discrimination; focusing on actual motivation, the Court sustained the challenged provision.[436] *Goldfarb* and *Webster* thus illustrate the extent of the Burger Court's commitment to the legislative inputs approach in the gender discrimination context; similar statutory provisions suffered different fates owing solely to a shift in Congress' underlying motivation.

The legislative inputs approach explains one additional piece of the Burger Court's gender discrimination puzzle. I observed earlier that *Frontiero* was a reasonably easy case not only because a gender stereotype plainly was at work but also because women service members were materially disadvantaged; thus the Court was able to avoid the apparent oddity of invalidating a law that seemed to *advantage* women. *Weinberger* was no different because, while widows ostensibly benefited from the challenged Social Security Act provision, female

433. It is true that the *Washington v. Davis* issue involves facially neutral laws, whereas the cases discussed in text involved gender *classifications.* That difference does not, however, render these two categories of cases incommensurable. When one asks what makes a facial classification objectionable, the answer seems limited to either illicit purpose or harmful impact — the same two candidates present in the context of facially neutral statutes.

434. 430 U.S. 199 (1977).

435. 430 U.S. 313 (1977) (per curiam).

436. I find an explanation of *Webster* that turns exclusively on legislative purpose more persuasive than the Court's proffered account, under which intermediate scrutiny is applicable to all gender classifications, *regardless* of how motivated. The Court claimed to apply heightened scrutiny in *Webster* even after finding the gender classification to be motivated by a remedial objective, but it is difficult to believe that Congress' broad-brush approach to compensating women for past discrimination could have survived genuine application of a more exacting means/ends nexus requirement. *Cf.* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 507-08 (1989) (intimating, in applying the admittedly more exacting strict scrutiny standard used for racial classifications, that legislative compensation for past discrimination must proceed on an individualized basis).

wage earners plainly were disadvantaged. But the Court soon confronted a variety of laws ostensibly disadvantaging only men — for example, an exclusion of males from a women's nursing school, a requirement that only men pay alimony upon divorce, and a regulation granting liquor access to females at an earlier age than to males.[437] The Court resolved these cases by equating discrimination against males with that against females, and then applying intermediate scrutiny, under which the laws were found wanting. Yet the Court never did explain why males were entitled to extraordinary judicial protection — an explanation that, at least on a political process view of equal protection, would have been virtually impossible to produce.[438] A legislative inputs focus justifies these decisions without requiring one to subscribe to special judicial solicitude for males. All of the laws mentioned above were grounded in conventional gender stereotypes — respectively, that nursing is a female profession, that women are financially dependent upon their husbands, and that young females are less aggressive and more responsible than their male counterparts. These statutes, then, as the products of legislative decisionmaking contaminated by stereotypical thinking, were constitutionally objectionable on a legislative inputs understanding of equal protection.

In sum, the Justices' gradual conversion to a legislative inputs orientation neatly accounts for the bulk of the Burger Court's gender discrimination cases. Put briefly, the thought processes of the enacting legislature were dispositive — was the gender classification motivated by a genuinely compensatory objective or by a "traditional way of thinking about females?" Whether women were ostensibly benefited, harmed, or some of each was of no moment.

D. *Affirmative Action*

The final, and perhaps most vexing, equal protection puzzle of the last two decades has been affirmative action. That issue's intractability, in my view, is attributable to the choice it poses between underlying theories of equal protection. For the first time the Justices have

437. Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982); Orr v. Orr, 440 U.S. 268 (1979); Craig v. Boren, 429 U.S. 190 (1976).

438. I do not mean to suggest that special judicial scrutiny of gender classifications disadvantaging *females* is plainly justifiable on political process grounds. *See* Klarman, *supra* note 7, at 751-52 (arguing that feminists, male and female, suffer no systemic legislative bias). Yet that point is at least arguable, and indeed the Court initially relied in part on political process theory to justify the application of heightened scrutiny to such classifications. *See* Frontiero v. Richardson, 411 U.S. 677, 684-86 (1973) (plurality opinion) (briefly detailing the historical legal disadvantages of women and concluding that they "still face pervasive, although at times more subtle, discrimination . . . in the political arena"). There simply is no argument that males are unable adequately to protect themselves in the political arena.

been forced to choose between a political process theory, which identifies suspect classifications according to criteria of historical discrimination and political impotence, and a more openly normative theory of "relevance," which banishes certain criteria from governmental decisionmaking on the ground that they should be irrelevant. I shall argue that the Court's recent affirmative action jurisprudence demonstrates, though the Justices themselves frequently do not admit it, a clear choice for the relevance approach to equal protection. I hope also to show that the Court's endorsement of this theory conflicts with the strict constructionist constitutional philosophy purportedly subscribed to by the more conservative Justices.

Affirmative action was an open constitutional question when it reached the Court in the 1970s. Prior race discrimination cases were plausibly explicable on the ground either that racial classifications with the purpose and/or effect of harming blacks were presumptively unconstitutional, or that *all* racial classifications, regardless of motivation or impact, were presumptively illegitimate because race should be irrelevant to governmental decisionmaking.[439] The Justices' chaotic early performances confirm that they have found the affirmative action issue particularly troubling. The first encounter in *DeFunis v. Odegaard*[440] yielded an embarrassed evasion of the issue, the case being dismissed as moot. The Court's second affirmative action case, *United Jewish Organizations v. Carey,*[441] involved race-conscious district line-drawing designed to preserve black voting power; the result was a badly splintered Court and a ruling in considerable tension with the Court's next stab at the problem.[442] That was *Regents of the Univer-*

439. *See, e.g.,* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 294 (1978); ARCHIBALD COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 66 (1976); William Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution,* 46 U. CHI. L. REV. 775, 808-10 (1979).

440. 416 U.S. 312 (1974). Those Justices expressing a view on the merits at conference were divided on the constitutionality of the University of Washington's admissions program. *See* Douglas conference notes, *DeFunis v. Odegaard* (Mar. 1, 1974) (LOC, Douglas Papers, Box 1654, case file no. 73-235) (Burger intimating objection to the program; Brennan, White, and Marshall approving it; Blackmun noting "good arguments on both sides"; Powell observing that "race is a factor that can lawfully [be] considered" but expressing "doubt[ ] if educational policy [was] obtained here"; and Douglas, Stewart, and Rehnquist stating no view on the merits).

441. 430 U.S. 144 (1977).

442. *See* 430 U.S. 144 (1977) (plurality opinion); 430 U.S. at 168 (Brennan, J., concurring); 430 U.S. at 179 (Stewart, J., concurring); 430 U.S. at 180 (Burger, C.J., dissenting). In *Bakke* Justice Powell sought to distinguish *United Jewish Organizations (UJO)* on two grounds — that an administrative finding of past discrimination had been made there, and that no innocent persons had been burdened by the use of race-conscious decisionmaking. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 304-05 (1978). Both distinctions involve mischaracterizations of *UJO.* No specific finding of past discrimination had been made there because the Voting Rights Act, which New York invoked to justify its race-conscious gerrymandering, did not require one. *See UJO,* 430 U.S. at 161. And the Hasidic Jews whose voting strength was diluted by the racial gerrymander were entirely innocent victims.

sity of California v. Bakke,[443] involving racial preferences in medical school admissions. The intractability of affirmative action for the *Bakke* Court was manifested both in the unparalleled preconference circulation of memoranda by several Justices, and in the unusual four-one-four split in the Court.[444] Nor did the next four constitutional challenges to affirmative action produce a majority opinion.[445]

Affirmative action has proven so difficult for the Court, I would suggest, because it requires disaggregation of two theories, previously operating in conjunction, that have informed much of the Court's modern equal protection jurisprudence. One important strand in the remarkable expansion of equal protection coverage over the last thirty years has been political process theory, first clearly articulated by Justice Stone in *Carolene Products* footnote four and later elaborated into a full-blown constitutional theory by John Hart Ely in his seminal *Democracy and Distrust.*[446] Equal protection, from a political process perspective, principally concerns judicial solicitude for groups unable to fend for themselves in the political trenches because of disfranchisement, blatant prejudice, negative stereotyping, or some combination thereof.[447] The Burger Court frequently invoked political process concerns to justify equal protection coverage, and noncoverage, of particular groups not among the Framers' intended beneficiaries.[448]

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443. 438 U.S. 265 (1978).

444. *See, e.g.,* Memorandum from Justice Rehnquist to conference (Nov. 10, 1977) (Brennan Papers, Box 465, case file no. 78-811: *Bakke,* file no. 3); *id.,* Memorandum from Chief Justice Burger to conference (Oct. 21, 1977); *id.,* Memorandum from Justice White to conference (Oct. 13, 1977); *id.,* preliminary draft of Justice Brennan memorandum to conference (undated). Four justices did not reach the constitutional question, holding the Davis Medical School admissions policy invalid under Title VI of the 1964 Civil Rights Act, which barred race discrimination by recipients of federal funds. *Bakke,* 438 U.S. at 408 (Stevens, J., concurring and dissenting). The other five justices agreed that Title VI and the Equal Protection Clause imposed identical limits on race-conscious decisionmaking, but disagreed as to what those constraints were. Four justices, in an opinion by Brennan, concluded that intermediate scrutiny was the appropriate standard for evaluating the constitutionality of affirmative action programs, and that the Davis policy survived that test. 438 U.S. at 359-62 (Brennan, J., concurring and dissenting). Justice Powell, however, applied strict scrutiny, and found the Davis admissions scheme wanting in its use of strict quotas, which he thought not closely enough related to the concededly compelling state interest in promoting a diverse student body. 438 U.S. at 291, 315-19 (Powell, J.).

445. United States v. Paradise, 480 U.S. 149 (1987); Local 28, Sheet Metal Workers Intl. Assn. v. EEOC, 478 U.S. 421 (1986); Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986); Fullilove v. Klutznick, 448 U.S. 448 (1980).

446. ELY, *supra* note 38; *see also supra* text accompanying notes 35-51 (*Carolene Products* footnote 4).

447. *See generally* ELY, *supra* note 38, at 105-79. I have endeavored elsewhere to defend political process theory from its critics, arguing that the access, but not the prejudice, prong of *Carolene Products* represents a logically coherent, as well as normatively attractive, theory of constitutional interpretation. *See* Klarman, *supra* note 7, at 772-819.

448. *See, e.g.,* Plyler v. Doe, 457 U.S. 202, 216 n.14 (1982); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973); 411 U.S. at 105 (Marshall, J., dissenting); Graham v. Richardson, 403 U.S. 365, 371-72 (1971).

Another important element in modern equal protection thought, however, has been the notion that certain characteristics, of which race is the prototype, should be simply irrelevant to all, or almost all, governmental decisionmaking, regardless of whether groups bearing those characteristics are capable of protecting themselves politically.[449] The political process and relevance theories of equal protection produce no disjunction in result when applied to racial classifications disadvantaging blacks, but they do with regard to affirmative action.

For political process theory, affirmative action is about the easiest constitutional question a court might wish to find. As the theory's principal modern exponent has stated, "[w]hen the group that controls the decision making process classifies so as to advantage a minority and disadvantage itself, the reasons for being unusually suspicious, and, consequently, employing a stringent brand of review, are lacking."[450] Whites, in other words, who ostensibly bear the brunt of affirmative action, can amply defend themselves in the political arena, and thus should not qualify for special judicial protection. A judge evaluating an affirmative action plan under political process theory, therefore, need only ascertain whether the racial preference was inspired by genuinely benevolent intentions or rather by stereotypical assumptions regarding the inability of racial minorities to succeed on their own effort.[451]

In stating that affirmative action is an easy constitutional issue for a political process theorist, I do not wish to deny the possibility of devising ingenious arguments to the contrary — that is, as to why a political process focus actually mandates strict scrutiny of affirmative action plans; indeed the Court frequently has deployed such arguments. On close examination, though, such contentions inevitably run afoul of other entrenched equal protection rules — most notably, that of *Washington v. Davis.* That the Court nonetheless has made the effort possibly suggests its discomfort with an affirmative action approach that is consistent with only one of the two underlying theories of modern equal protection.

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449. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985); *Plyler*, 457 U.S. at 216 n.14; Michael M. v. Sonoma County Superior Court, 450 U.S. 464, 477-78 (1981) (Stewart, J., concurring); Frontiero v. Richardson, 411 U.S. 677, 686 (1973); Karst, *supra* note 387, at 4, 8, 32, 38-39; Perry, *supra* note 350, at 1030-31, 1050-51, 1084.

450. John H. Ely, *The Constitutionality of Reverse Racial Discrimination,* 41 U. CHI. L. REV. 723, 735 (1974); *see also* Sherry, *supra* note 387, at 114-15 (arguing that affirmative action is "ordinarily not . . . subject to heightened scrutiny at all" under a political process approach).

451. *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 551-53 (1989) (Marshall, J., dissenting); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 360-61 (1978) (Brennan, J., concurring and dissenting).

In *City of Richmond v. J.A. Croson Co.*,[452] the Court considered the constitutionality of a local government's minority set-aside for public construction contracts. Apparently seeking to justify the application of a rigorous review standard without contravening the premises of political process theory, Justice O'Connor's majority opinion portrayed strict scrutiny as a prophylactic against malevolent racial classifications successfully masquerading as benevolent ones.[453] "Absent searching judicial inquiry into the justification for such race-based measures," she declared, "there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics."[454] Concededly, a legislative inputs concern with rooting out illegitimate stereotypes mandates a close look at the actual motivation of affirmative action plans, but application of strict scrutiny seems quite inconsistent with *Washington v. Davis.* That case stands plainly for the proposition that racially discriminatory purposes can be uncovered without the exercise of strict scrutiny. Nor can *Washington v. Davis* successfully be distinguished from the affirmative action issue on the ground that it involved a facially neutral statute. If strict scrutiny cannot be justified to ensure that facially neutral laws producing disparate racial impacts are licitly motivated, why is it necessary to safeguard against malevolently motivated racial preferences masquerading as benevolent ones?[455]

The Court also has sought to reconcile strict scrutiny of affirmative action with political process theory by noting that minority racial preferences, though beneficently intended, nonetheless may disadvantage

452. 488 U.S. 469 (1989).

453. In Metro Broadcasting, Inc. v. FCC, 110 S. Ct. 2997 (1990), a narrow majority of the Court applied intermediate, rather than strict, scrutiny in sustaining a *congressionally* sanctioned minority preference, thus indicating that Congress' express power to enforce the Fourteenth Amendment requires the application of significantly different standards to congressional and state (or local) affirmative action programs. 110 S. Ct. at 3008-09; *see also* 110 S. Ct. at 3044 (O'Connor, J., dissenting) ("The Court has determined, in essence, that Congress and all federal agencies are exempted, to some ill-defined but significant degree, from the Constitution's equal protection requirements.").

454. 488 U.S. at 493; *accord Bakke,* 438 U.S. at 294 n.34 (Powell, J.) (dissenters "offer no principle for deciding whether preferential classifications reflect a benign remedial purpose or a malevolent stigmatic classification"); *UJO,* 430 U.S. at 172-73 (Brennan, J., concurring) (noting difficulty of distinguishing between benign and illicit uses of race); *see also* Van Alstyne, *supra* note 439, at 797-98 (calling for invalidation of all racial classifications partly owing to the difficulty of proving bad purpose). *But see* Ely, *supra* note 450, at 740 (rejecting the prophylactic argument).

455. The argument that the existence of a facial racial classification justifies switching the burden of justification fails as well. Is it not more likely that the disparate racial impact of a facially neutral law was intentional than that a racial preference overwhelmingly favored by the benefited racial minority was malevolently motivated?

blacks by perpetuating a dependency stereotype.[456] That argument as well, though, seems inconsistent with *Washington v. Davis,* which held that purpose is dispositive, and incidental consequences irrelevant, in equal protection.[457] Nor does *Davis* permit the frequently proffered argument that affirmative action should be subject to heightened scrutiny owing to the harm it inflicts upon discrete and insular chunks of the white majority.[458] Unintended adverse consequences, once again, should be irrelevant to a Court committed to the legislative inputs approach to equal protection.

The Court in *Croson* proffered one final argument for reconciling strict scrutiny of affirmative action with political process theory. Justice O'Connor there invoked black control of the Richmond city council that had enacted the challenged racial preference as a justification for applying strict scrutiny. Quoting the process wizard himself, O'Connor noted that "[o]f course it works both ways: a law that favors Blacks over Whites would be suspect if it were enacted by a predominantly Black legislature."[459] One cannot, in my opinion, treat very seriously this invocation of political process theory. For starters, nothing else in the majority opinion suggests that the Court would have applied a less rigorous standard to an affirmative action plan enacted by a white-controlled legislature. Moreover, no plausible constitutional theory could view with suspicion the disadvantaging of all groups not in control of the legislature; political process theory, Justice O'Connor's view notwithstanding, identifies for judicial solicitude those groups historically subjected to widespread discrimination and political exclusion.[460] On O'Connor's view, women and the poor should be entitled to the same judicial protection as the white citizens of Richmond, since these groups nowhere comprise a legislative majority; yet that conclusion obviously cannot be reconciled with current

456. *See, e.g., Croson,* 488 U.S. at 493-94; *Bakke,* 438 U.S. at 298 (Powell, J.); *UJO,* 430 U.S. at 173-74 (Brennan, J., concurring).

457. Nor can one persuasively respond that *Washington v. Davis* involved a facially neutral law, whereas affirmative action involves racial *classifications.* The implicit question in *Washington v. Davis* was whether, and if so why, facially neutral laws producing disparate racial impacts should be constitutionally distinguished from explicit racial classifications. The Court answered with a resounding "yes," relying entirely on the presence of illicit motivation in the latter situation. Thus it is anomalous to constitutionally condemn affirmative action on the basis of its potentially harmful impact on racial minorities.

458. *See, e.g., Bakke,* 438 U.S. at 295-96 (Powell, J.); 438 U.S. at 360-61 (Brennan, J., concurring and dissenting); *UJO,* 430 U.S. at 172-73 (Brennan, J., concurring). For a powerful statement of the view that the Court's willingness in its recent affirmative action decisions to make harmful impact decisive is inconsistent with *Washington v. Davis,* see David Chang, *Discriminatory Impact, Affirmative Action, and Innocent Victims: Judicial Conservatism or Conservative Justices?,* 91 COLUM. L. REV. 790, 803-09 (1991).

459. *Croson,* 488 U.S. at 496 (quoting Ely, *supra* note 450, at 739 n.58).

460. *See* ELY, *supra* note 38, at 151, 152-54.

equal protection law. Moreover, while whites possibly constituted a slight minority of Richmond's population, they enjoyed a secure majority in the state of Virginia, which could amply defend their interests by restricting, or even banning, local affirmative action plans. It is difficult to resist the conclusion, then, that this argument was more of a make-weight than a genuine political process insight with which to analyze the constitutionality of affirmative action.

In sum, political process theory, in a form consistent with other entrenched equal protection rules such as *Washington v. Davis,* cannot generally justify strict scrutiny of affirmative action. Indeed, in occasional moments of candor, when not seeking to defend heightened scrutiny as a prophylactic against malevolently inspired racial preferences or as essential to protecting the putatively oppressed whites of Richmond, the Justices explicitly have rejected political process theory as their guide to equal protection. Thus, for example, the Court occasionally has emphasized that equal protection rights are personal, not group, and that "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color."[461] Such statements necessarily conflict with political process theory, which contemplates that equal protection's meaning will vary across groups according to their differential capacity to protect themselves politically.

In the place of political process theory, the Justices have inserted a very different notion of equal protection — that racial classifications are presumptively unconstitutional because race almost invariably *should be* irrelevant to governmental decisionmaking.[462] The problem

461. *Bakke,* 438 U.S. at 289-90 (Powell, J.); *see also Croson,* 488 U.S. at 493; Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 273 (1986); *cf.* Brennan draft history of *Bakke,* 10-11 (LOC, Brennan Papers, Box 464, case file no. 76-811) (noting that Justice White argued " 'for political reasons' [that] it was essential to label the standard of review as strict scrutiny, though he agreed that its content in the context of remedial programs would be quite different from traditional strict scrutiny").

462. *E.g., Croson,* 488 U.S. at 505-06 (noting "[t]he dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement"); 488 U.S. at 518-19 (Kennedy, J., concurring); 488 U.S. at 520 (Scalia, J., concurring); Fullilove v. Klutznick, 448 U.S. 448, 496 (1980) (Powell, J., concurring); 448 U.S. at 524 (Stewart, J., dissenting).

What the Court means by a right to government decisionmaking free from racial considerations remains unclear after some puzzling discussion in *Croson.* Neither Justice O'Connor nor Justice Scalia apparently would have constitutional qualms about Richmond adopting any number of facially neutral contracting practices for the *purpose* of benefiting racial minorities — for example, relaxation of bonding requirements or financial aid for disadvantaged entrepreneurs of all races. 488 U.S. at 507, 526 (Scalia, J., concurring). Without doubt such facially neutral policies would be unconstitutional if implemented with the purpose of harming blacks. *See* Washington v. Davis, 426 U.S. 229 (1976). One may legitimately wonder why facially race-neutral policies adopted for the purpose of advantaging blacks would not violate this newly proclaimed right to nonracial government decisionmaking just as facial racial preferences were held to do in *Croson.*

with this alternative theory of equal protection, though, is that it appears difficult to reconcile with the constitutional philosophy generally espoused by those Justices who would condemn affirmative action. Strict constructionism, which is the constitutional approach endorsed by these Justices, deploys as its criteria of constitutional interpretation the text, the Framers' intentions, and perhaps a supplementary dose of tradition as well.[463] Affirmative action simply cannot be challenged on these narrow grounds. The language of the Equal Protection Clause is too indefinite to compel the conclusion that all racial classifications are suspect; indeed, as we already have seen, the Court refused for almost a century after enactment of the Fourteenth Amendment to hold even that all racial classifications designed to disadvantage a racial minority were presumptively unconstitutional.[464] The original intent argument against affirmative action is even weaker. The historical record reveals that the same Thirty-ninth Congress that wrote the Fourteenth Amendment contemporaneously enacted race-conscious statutory schemes designed to benefit southern freedmen.[465] Indeed the pro and con arguments regarding race-conscious benefit programs that were bandied about in the Reconstruction Congress were strikingly similar to those voiced in today's affirmative action debate; and precisely the same men who drafted the Fourteenth Amendment rejected the arguments against race-conscious legislation.[466] Finally, as to the argument that American tradition rejects affirmative action, the response is both (1) that so describing our traditions is problematic given that minority racial preferences have not heretofore been on the political agenda (except during Reconstruction, when they were approved), and (2) that our racial history is not unfairly described as one of minority racial *oppression* — a tradition from which it is difficult to elicit a condemnation of minority racial *preferences.*[467]

In sum, the Court's recent hostility towards affirmative action seems difficult to reconcile with political process theory, and the alternative theory of "relevance" that would condemn minority racial preferences seems inconsistent with the strict constructionist

463. *See, e.g.*, Burnham v. Superior Court, 110 S. Ct. 2105, 2115, 2119 n.5 (1990) (plurality opinion by Scalia, J.) (noting that tradition partially defines scope of procedural due process); Stanford v. Kentucky, 492 U.S. 361, 369 (1989) (evolving societal norms partially define scope of Eighth Amendment); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849, 861 (1989).

464. *See supra* section I.B.

465. *See* Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 754, 785 (1985).

466. *Id.* at 765-67, 784.

467. *See* ELY, *supra* note 38, at 61-62.

constitutional philosophy that many of the Justices purport to espouse.

CONCLUSION

The thrust of this project, as noted at the outset, has been positive rather than normative; I have sought to interpret, rather than criticize, the development of modern equal protection thought. At the most general level, I have identified two historical patterns that previously have escaped the notice of constitutional law scholars. First, the Court did not, conventional wisdom to the contrary notwithstanding, embrace a presumptive ban on racial classifications until the 1960s. Prior to *McLaughlin v. Florida*,[468] the Justices struggled to reconcile a general rationality approach to equal protection with an intermittent intuition that racial classifications were objectionable even when not irrational. The Court's equal protection decisions during this period, moreover, remained cabined within the original understanding of the Equal Protection Clause — that is, a prohibition on race discrimination with regard only to particular fundamental rights. One oddity of the Court's failure to arrive earlier at a presumptive constitutional ban on racial discrimination is that political process theory, which both explicitly and implicitly informed much of the Court's work in other constitutional contexts, would have justified such a racial classification rule at that time owing to massive black disfranchisement.[469]

Second, I have argued that a fundamental shift in equal protection thought marked the transition from the Warren to the Burger Court. That change came in the mode of conceptualizing equal protection rights — that is, as checks on deliberate governmental disadvantaging rather than as entitlements to particular government-guaranteed outcomes. In the areas of wealth discrimination, state action, and school desegregation, the Warren Court had gradually gravitated towards the broader notion of rights; the Burger Court decisively reversed that trend.

Finally, this article has alluded to an oddity in constitutional law development that I have elaborated upon elsewhere.[470] The Warren Court's embrace of a racial classification rule and its aggressive protection of voting rights were both plainly justifiable on political process grounds. Many Burger and Rehnquist Court individual rights expansions have not been. Of the developments canvassed here, the Court's

468. 379 U.S. 184 (1964).

469. *See supra* notes 37-51 and accompanying text; Klarman, *supra* note 7, at 750-51, 789-812.

470. *See* Klarman, *supra* note 7, at 748-68.

extension of meaningful equal protection review to gender classifications, and even more plainly, to minority racial preferences, are resistant to political process justification. Thus it appears, puzzlingly, that the individual rights expansions of the activist, politically liberal Warren Court were consonant with political process theory, while the decisions of its putatively strict constructionist, politically more conservative successors have not been.[471] If one happens to believe, as I do, that the political process model is the only constitutional theory capable of reconciling countermajoritarian judicial review with our general political philosophy of democratic governance,[472] this development becomes more than simply anomalous; it is deeply troubling.

Notwithstanding recent creative efforts to the contrary, judicial review cannot easily escape the countermajoritarian difficulty inherent in unelected, relatively unaccountable judges invalidating the policy choices of the more majoritarian branches of government.[473] Political process theory seeks to ameliorate the problem by putting judicial review in the service of democracy, policing the political process for systemic flaws. Thus, for example, the Court's embrace of a presumptive ban against racial classifications disadvantaging minority groups was readily justifiable on the ground that southern blacks were largely disfranchised until the 1960s. But how can the Court justify its close scrutiny of gender classifications given that women (and like-minded men) are entirely capable of pressuring the political process into rejecting outmoded gender stereotypes?[474] Even more problematic is the Court's recent hostility towards affirmative action. Since neither political process theory nor the conservative Justices' favored constitutional theory of strict constructionism condemns affirmative action, one is left wondering why minority racial preferences today are pre-

471. Besides voting rights and school desegregation, the most notable constitutional expansions of the Warren Court came in the criminal procedure context — moves that also were justifiable on political process grounds. *See id.* at 763-66. Individual rights expansions by the Burger and Rehnquist Courts that exceeded the bounds of political process theory, in addition to the equal protection developments noted in the text, included substantive due process recognition of the right to abortion, of a biological family to live in the same household, and of a vegetative patient to terminate her own life; expansion of the First Amendment to safeguard commercial speech and nude dancing; and Fourth Amendment protection against widespread government-mandated drug testing. *See id.* at 755-57, 759-60, 766-68.

472. *See id.* at 768-82.

473. The most imaginative recent effort to elide the countermajoritarian problem has been Bruce Ackerman's. *See* Bruce A. Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453 (1989); Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984). For my critique of Professor Ackerman's enterprise, see Michael J. Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments*, 44 STAN. L. REV. (forthcoming 1992).

474. I have attempted to rebut arguments to the contrary in Klarman, *supra* note 7, at 751-52.

sumptively unconstitutional. The readiest explanation is that the conservative Justices simply regard affirmative action as bad (indeed horrific) social policy.[475] Yet if that hypothesis is correct, it seems that those same Justices' frequent past tirades against liberal judicial activism — as manifested, for example, in *Roe v. Wade*[476] — savor of hypocrisy. And students of constitutional law may then reasonably question whether the conservatives' decades-long clarion call for judicial restraint has been anything other than a historical fortuity, as well as a bit of a canard — that is, simply a reaction against the politically liberal constitutional results achieved by the activist Warren Court, rather than a principled aversion to expansivist constitutional interpretation. In other words, one may legitimately begin to wonder whether we are not about to witness the birth of a new *Lochner* era of judicial activism from the political right.[477]

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475. For elaboration of this argument, see *id.* at 821-24; *see also* Chang, *supra* note 458, at 794, 817, 831 (suggesting that "[p]olitical conservatism, rather than judicial conservatism," explains the Court's recent affirmative action jurisprudence).

476. 410 U.S. 113, 173-74 (1973) (Rehnquist, J., dissenting). For several additional examples of conservative lambasting of liberal judicial activism, see Klarman, *supra* note 7, at 822 n.325 (collecting sources).

477. For a smattering of additional evidence in support of this speculation, see Klarman, *supra* note 7, at 830 n.362 (collecting sources); *see also* Chisom v. Roemer, 59 U.S.L.W. 4696, 4706 (1991) (Kennedy, J., dissenting) (suggesting that the "effects" test of the Voting Rights Act raises a serious constitutional question). For a qualified endorsement of such activism, see Earl M. Maltz, *The Prospects for a Revival of Conservative Activism in Constitutional Jurisprudence*, 24 GA. L. REV. 629 (1990).