

2002

Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century

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Recommended Citation

William N. Eskridge Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062 (2002).

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SOME EFFECTS OF IDENTITY-BASED SOCIAL MOVEMENTS ON CONSTITUTIONAL LAW IN THE TWENTIETH CENTURY

William N. Eskridge, Jr*

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I appreciate the great cooperation of the staff of the Supreme Court Library and of the Manuscripts Division of the Library of Congress. The former made available to me thousands of Supreme Court briefs and dozens of oral arguments. The latter facilitated my use of the Papers of the following Justices: William J. Brennan, Harold Burton, William O. Douglas, and Robert Jackson. I also thank Mrs. William J. Brennan for granting me permission to use and refer to the Brennan Papers.

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What motivated big changes in constitutional law doctrine during the twentieth century? Rarely did important constitutional doctrine or theory change because of formal amendments to the document's text,¹ and rarer still because scholars or judges "discovered" new information about the Constitution's original meaning.² Precedent and common law reasoning were the mechanisms by which changes occurred rather than their driving force. My thesis is that most twentieth century changes in the constitutional protection of individual rights were driven by or in response to the great identity-based social movements ("IBSMs") of the twentieth century.³

Race, sex, and sexual orientation were markers of social inferiority and legal exclusion throughout the twentieth century. People of color, women, and gay⁴ people all came to resist their social and legal disabilities in the civil rights movement seeking to end apartheid; various feminist movements seeking women's control over their own bodies and equal rights with men; and the gay rights movement, seeking equal rights for lesbigay and transgendered people. All these social

1. See David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457 (2001).

2. Although scholars and judges are "discovering" new constitutional meanings all the time, most (maybe almost all) of the "discoveries" rest upon thin historiography. See generally Martin Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523 (1995); Mark Tushnet, *Interdisciplinary Legal Scholarship: The Case of History-in-Law*, 71 CHI.-KENT L. REV. 909 (1996).

3. Social movements have driven most of the big changes in American constitutional law. The American Revolution and the founding period were the products of a generation-based social movement. The Reconstruction amendments were the ultimate fruition of the abolitionist movement. The union movement and reactions against it drove much of constitutional law during the *Lochner* era and overlapped with the civil rights movement that commences the story I am telling in this Article.

4. I use the term "gay people" to refer to lesbians, bisexuals, and gay men. Sometimes, I shall use the term "lesbigay."

movements sought to change positive law and social norms. In both endeavors, constitutional litigation was critically important. Specifically, these IBSMs became involved in constitutional litigation as part of three different kinds of politics in which they were engaged: their own *politics of protection* against state-sponsored threats to the life, liberty, and property of its members; their *politics of recognition*, seeking to end legal discriminations and exclusions of group members and to establish legal protections against private discrimination; and a *politics of remediation*, to rectify material as well as stigmatic legacies of previous state discrimination. At every stage, but particularly the last, these IBSMs were confronted with a *politics of preservation*, whereby countermovements sought to limit or roll back legal protections won or sought by the social movement.⁵ Each kind of politics offered opportunities for different kinds of constitutional arguments. The politics of protection most successfully invoked the First Amendment and the Due Process Clauses of the U.S. Constitution; the politics of recognition and remediation were most closely associated with the Equal Protection Clause; and the politics of preservation invoked arguments based upon constitutional federalism, separation of powers, and various libertarian doctrines.

The first part of this Article will survey the deployment of constitutional doctrine by each IBSM as it engaged in these politics of protection, recognition, and preservation. Its perspective will be that of the constitutional litigators acting on behalf of those social movements.⁶ Accordingly, I shall rely heavily on their own words and ideas, as expressed in appellate briefs and oral arguments, especially those in U.S. Supreme Court cases. What interests me most is how movement lawyers translated the problems and aspirations of women and minorities into constitutional discourse, and how their arguments fared.

The perspective of the second part will be that of the Justices of the Supreme Court, to whom these arguments were ultimately addressed. There, I shall explore the ways in which these social movements affected the evolution of constitutional doctrine. IBSMs and their countermovements brought constitutional litigation that required the Court to apply old constitutional texts and precedents to new circumstances, not just in a single case, but in a string of cases that ran like a chain novel whose audience shifted in the course of narration. Moreover, IBSMs transformed the normative context in which these

5. See William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 468-91 (2001) [hereinafter Eskridge, *Channeling*] (giving a detailed development of this typology).

6. I make no claim that these lawyers or the institutions with which they were associated were "representative" of the people who constituted or benefited from their respective IBSMs. For my discussion of ideological debates among social movement lawyers, see Section III.C.

cases were decided, either by linking the new cases with established norms or by persuading society and its judges to change the normative context in which social traits were evaluated. As to the latter, IBsMs have moved public norms away from understanding race, sex, and sexual orientation as *malign variations* toward understanding them as *tolerable* and (for race and sex) *benign variations*. Finally, as these social movements and countermovements have become institutionalized players in American constitutional litigation and politics, they have become ongoing constituencies for particular ways of thinking about certain provisions of the Constitution. Thus, the oxymoronic notion of “substantive” due process has become an established part of constitutional jurisprudence because of the importance of the privacy right to women and sexual minorities; waves of minority groups’ politics of recognition have transformed the Equal Protection Clause from the last resort to the cutting edge of individual rights claims; and the First Amendment’s imperialism in constitutional law owes much to its ability to protect speech and expressive activities most dear to traditionalists as well as gay people, pro-life protesters as well as pro-choice advocates, and racial segregationists as well as people of color. IBsMs and their allies did not single-handedly work these transformations, but they have provided impetus and then support for judges when they have moved in the direction of those stances.

The story of doctrinal transformation has occurred just as dramatically at less general levels as well. In the course of their litigation campaigns, social movement lawyers came up with a variety of innovative constitutional arguments for advancing their groups’ goals. Some of them were accepted by the judiciary as a basis for new doctrinal rules or exceptions. Many of the Supreme Court’s most radical doctrinal innovations in the last century were originally developed and pressed (often for decades) by social movement or countermovement lawyers:

- *selective incorporation* of criminal procedure rules in the Bill of Rights into the Due Process Clause, especially Fifth, Sixth, and Eighth Amendment rights (Section II.A.1-2);
- *dialectical federalism*, whereby federal courts not only monitor state courts in criminal cases, but also engage in a constitutional dialogue (Section II.A.3);
- the due process *right of sexual privacy*, protecting Americans against state direction of their intimate lives and feelings (Section II.B);
- the equal protection idea of presumptively *suspect classifications* that will trigger heightened judicial scrutiny of statutory distinctions (Section II.C.1), as well as a *sliding scale* for heightened scrutiny that also considers the importance (including the constitutional impor-

tance) of the interests of groups disadvantaged by legislative distinctions (Section II.C.3);

- the relevance of *legislative motivations* in constitutional cases, especially equal protection ones (Section II.C.2);
- the notion that the *death penalty* constitutes *cruel and unusual punishment* (Section II.D);
- the *erosion and displacement of the political question doctrine*, and its demise in voting cases (Section II.E.1);
- the expansion of *congressional authority to enforce the Reconstruction amendments* (Section II.E.2);
- the creation of a *liberalized state action doctrine*, including attribution of responsibility to the state for some actions by private parties and corporations (Section II.E.3);
- the extension of the First Amendment speech and assembly protection to *expressive conduct and expressive association* (Section II.F.1), and to *sexual speech* (Section II.F.2); and
- the *anti-subordination principle* as a way to ameliorate free speech/equal protection clashes (Section II.F.3).

Judges adopting these constitutional transformations have usually not accepted the IBSM perspective uncritically or without amendment, however. Judges have rejected the most radical proposals, such as a bar to the death penalty, and have diluted other proposals, such as a robust de novo review of state criminal convictions by federal judges, an anti-subordination reading of the Equal Protection Clause, and strong First Amendment protection for sexual speech. Even when judges have accepted IBSM constitutional visions and doctrines, the constitutional transformations movement lawyers argued for have had limited utility for actual minority group members. Some IBSM-inspired doctrines have been turned to the advantage of counter-movements. Examples include heightened scrutiny for suspect classifications, which has discouraged open affirmative action measures, and the First Amendment rights of expressive conduct and association, which now protect enclaves of exclusion against state antidiscrimination laws.

The fate of particular proposals and doctrines has depended on context, but one rule stands out: judges are rarely willing to insist on massive transfers of social or economic entitlements in American society, and when they have — as with school desegregation and abortion — they have been incompletely successful. This rule owes much to the institutional limits of the federal judiciary. Judges do not have the resources to undertake initiatives requiring administrative capacity, nor do they have the political legitimacy to engage in much activism not otherwise acceptable to the political system. When, by historical acci-

dent, the Supreme Court was willing to press for redistribution of status and state resources in a number of arenas (1962-69), the political system responded with the elections of Richard Nixon and Ronald Reagan, who appointed Justices who were more institutionally cautious or even hostile to IBSM claims. Nonetheless, it is remarkable that the Burger Court — constituted to go slowly on race matters — engaged in significant activism responding to the women's movements and that the Rehnquist Court — constituted to roll back affirmative action and abortion — has opened up the U.S. Constitution to lesbian and gay people.

In the third part of this Article, I maintain that IBSMs have also contributed to meta-developments in constitutional theory and discourse. Social movement lawyers, by and large, were not legal philosophers, but their work from the field has been fodder for three different stories about American constitutionalism in the last century; each story illustrates the continuing insights of legal realist, legal process, and critical theories of jurisprudence. Thus, consistent with legal realists' predictions, none of the foregoing areas of law developed in ways that would have been predictable from the original intent animating the constitutional provisions or from the precedents existing in 1900. The Supreme Court interpreted all of these constitutional provisions highly dynamically during the twentieth century. IBSMs pioneered the idea of a Living Constitution and inspired and drove the Court's dynamic interpretations by bringing cases that required judges to consider new circumstances for the application of old principles, by motivating judges to reconsider old principles in light of new norms, and by changing the face of the judiciary itself. Dynamic constitutional interpretation has been the death of serious originalism and of Article V as a means for making fundamental changes to the Constitution.

In addition, IBSMs were the key impulse supporting a global shift in the way the Supreme Court applied the Constitution in the twentieth century. The shift was away from the *structural* Constitution of the founding generation and the *vested property/contract rights* Constitution of the *Lochner* era and toward the *Carolene* Constitution, which justified judicial activism along legal process lines. Under the *Carolene* Constitution, the role of the Court is to protect the integrity of the pluralist political process, and especially to check the political process' tendency toward self-perpetuation and persecution or suppression of minorities. This entails protecting despised minority groups against state *Kulturkamps*, assuring groups that are able to organize themselves into mass movements that they will be integrated into the political process, and protecting traditionalists from excessive state burdens once a formerly subordinated minority has become part of the political mainstream.

Finally, the inevitable disappointments of IBSMs in constitutional litigation has fueled a *constitutional skepticism*.⁷ Any viable IBSM ultimately demands full equality from the state (normative recognition that its defining trait is a benign variation) — but any substantial success will generate a countermovement seeking to preserve old forms or new enclaves of segregation (normative recognition that the minority's trait is malign or, at best, tolerable). Through most of the twentieth century, various movements and countermovements were evenly enough balanced, politically, to motivate judges to seek compromises. The typical compromise would recognize only some of the minority's rights or would decline to implement their rights as soon as the minority desired, or both. Although social movement moderates embraced these compromises on pragmatic grounds and even heralded them as "victories," the partiality and, sometimes, the emptiness of the victories has soured many women, people of color, and lesbian people on constitutionalism as an enterprise or, more interestingly, on constitutionalism as defined by Supreme Court decisions. This has given rise to *constitutional law drop-out* as well as *popular constitutionalism* approaches. The mix of constitutional pragmatism, skepticism, and nihilism is the most ambiguous legacy of identity-based social movements for constitutional law in the twentieth century. Among other things, it is headed toward a possible showdown with a Supreme Court that is more aggrandizing today — partly as a result of its past glory in civil rights cases — than at any previous point in our history.

I. CONSTITUTIONAL ARGUMENTS AND STRATEGIES DEPLOYED BY THREE TWENTIETH CENTURY IDENTITY-BASED SOCIAL MOVEMENTS

By 1900, American statutory and common law not only pervasively discriminated against people of color, women, and sexual and gender minorities, but also guaranteed a social and legal structure that committed violence against these citizens. American constitutional law provided little protection against discrimination or violence. Because most of the discrimination and much of the violence was by state and local governments, the checks provided by federalism, national separation of powers, and the Bill of Rights (then considered applicable only to the federal government) did women and minorities no good. Surprisingly, the Reconstruction amendments, protecting people of color against state government oppression, had shown few teeth for these groups. Although the Supreme Court construed the Thirteenth Amendment to protect people of color against state peonage ar-

7. See Robin West, *Constitutional Skepticism*, 72 B.U. L. REV. 765 (1992) [hereinafter West, *Constitutional Skepticism*].

rangements⁸ and the Fourteenth Amendment to protect them against blatantly discriminatory “class legislation,”⁹ the Court also ruled that these amendments permitted the state to require racial segregation in railroad cars and public schools¹⁰ and to impose voting rules that effectively barred almost all people of color from the franchise.¹¹ Laws excluding women from professions and the franchise had from the beginning been upheld against Fourteenth Amendment attack.¹² People of color and feminists in the late nineteenth century did resist their second-class citizenship, but the Supreme Court rejected their constitutional claims and vision.¹³ Laws criminalizing sodomy or the “crime against nature,” lewd behavior, the promulgation of indecent books or plays or movies, the depiction of sexual inversion, public indecency, and cross-dressing were not even subject to serious constitutional challenge at the turn of the twentieth century.¹⁴

As I have argued elsewhere, the existence of pervasive state exclusion, discrimination, and violence was a necessary factor in the formation of the civil rights, women’s, and gay peoples’ mass social movements. For each movement, the law was critical in creating a social identity as “colored,” female, or “homosexual”; the subordinate social role reinforced by law was uncongenial to increasing numbers of women, gay people, and people of color as the nation urbanized, and courts were a natural forum for politically marginalized minorities to resist their subordination; legal actors and institutions were the scenes for traumatic encounters whose publicity transformed elite social movements into mass ones.¹⁵

8. *Bailey v. Alabama*, 219 U.S. 219 (1911).

9. *Yick Wo v. Hopkins*, 118 U.S. 356, 368 (1886); *see also* *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879).

10. *See* *Cumming v. Richmond County Bd. of Educ.*, 175 U.S. 528 (1899) (*arguendo*, public schools); *Plessy v. Ferguson*, 163 U.S. 537 (1896) (railroad cars).

11. *See* *Giles v. Harris*, 189 U.S. 475 (1903).

12. *See* *Minor v. Happersett*, 88 U.S. (21 Wall) 162 (1874) (holding that women have no right to vote); *Bradwell v. Illinois*, 83 U.S. (16 Wall) 130 (1873) (holding that women have no right to practice law).

13. For a striking analysis of the background to *Plessy*, that is, the political struggle by communities of color in post-Reconstruction Louisiana, see Rebecca J. Scott, *Fault Lines, Color Lines, and Party Lines: Race, Labor, and Collective Action in Louisiana and Cuba, 1862-1912*, in *BEYOND SLAVERY: EXPLORATIONS OF RACE, LABOR, AND CITIZENSHIP IN POSTEMANCIPATION SOCIETIES* 61, 65-83 (Frederick Cooper et al. eds., 2000).

14. On the emergence of visible communities of “inverts,” “fairies,” “prostitutes,” and other gender-benders in the late nineteenth and early twentieth centuries, and their constitutional helplessness, see WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* ch. 1 (1999) [hereinafter *ESKRIDGE, GAYLAW*].

15. *See* Eskridge, *Channeling*, *supra* note 5, at 423-59 (2001).

With African Americans leading the way, each group formed institutions of resistance, critique, and normative aspiration.¹⁶ Initially, and before there was mass mobilization, the dominant (but not the only) public goal of those institutions was a *politics of protection*, urging that governmental authorities ought not be able to deploy the apparatus of the state to control the bodies and lives of women and minority peoples. The normative goal of such a politics was to persuade the mainstream that the group-defining trait (color, sex, sexual or gender orientation) was a tolerable variation from the norm and that stigmatized persons ought to have minimal rights. Generally, minority leaders in this phase did not contest the propositions that whiteness, maleness, and heterosexuality were the norm and that color, femininity, and homosexuality merited less social esteem. If the social group was able to show political strength, however, its organizational leaders would move toward a public stance which denied the inferiority of the group's defining trait: there is no material difference between blacks and whites, except those created by society and law; women can perform any social role that men can; gay is as good as straight.

Once this step was taken, the ISBM was engaged in a *politics of recognition*, demanding full respect and equal rights within the polity. To the extent this politics was successful in changing traditional laws and social attitudes, it was succeeded by a *politics of remediation*, whereby the group would seek state correction and even restructuring to "cure" the effects of past discrimination. IBSMs' politics of recognition and remediation inevitably triggered a *politics of preservation*. There, a countermovement would reassert traditional normative and legal baselines and the inferiority of the minority group. Such a politics might ease up if the minority gained acceptance within the nation's social and political pluralist system; although extremists would still insist on traditional baselines and the minority's inferiority, moderates in the countermovement would concede toleration of the minority, but with social and legally protected space for traditional ingroup members to retain their dominance.

For each kind of politics, the social movement's political arguments were translated into constitutional arguments. Even though the doctrinal bases for such arguments did not exist in 1900, movement lawyers ran various doctrinal trial balloons through the century. Many of them were embraced by judges. Although the doctrinal story could have evolved in a variety of different ways, it evolved in the following

16. The model in this paragraph is most obviously applicable to the experience of African Americans, women, and lesbian people (the IBSMs which are the focus of this Part), but is also applicable to other IBSMs that are not my focus here: Asian and Hispanic Americans, people with disabilities, and (to a lesser extent) poor people. I shall take up issues raised by these social movements in the next part of the Article.

thematically sensible way: IBSMs' libertarian politics of protection was confirmed and developed under the banner of the Due Process Clause's protection of "liberty" and the First Amendment's protection of speech, press, and assembly; their egalitarian politics of recognition and remediation gravitated to the Equal Protection Clause; their adversaries' arguments grounded on concepts of localism, majoritarian attachment to tradition, and liberty found voice in constitutional federalism, separation of powers, and freedom of speech and association.

A. *The Civil Rights Movement*

The defining experience for IBSMs in the United States has been that of African Americans, the social group most violently oppressed, most dramatically resistant, and most tragically unsuccessful. The normative triumph of the civil rights movement was the greatest yet most incomplete. Its story is told in riveting detail by a number of authors.¹⁷ All I wish to accomplish here is to show how the movement's lawyers — Moorfield Storey, William Hastie, Charles Houston, Thurgood Marshall, Spottswood Robinson, Constance Baker Motley, Jack Greenberg, Julius Chambers — translated the social, moral, and political goals of the movement into constitutional discourse.

At the outset, three points bear emphasis. First, my survey focuses on the dialogue between civil rights lawyers and judges. The more complex and internally debated normative goals of the social movement itself are secondary to my project, although they are of overriding importance to the larger history of the civil rights movement. Second, the lawyers bringing constitutional cases and arguing constitutional appeals did not "represent" all people of color in the United States; they represented particular organizations which reflected particular stances within communities of color (NAACP) and within the larger society (ACLU). To the extent that the NAACP's lawyers presented an "integrationist" agenda through constitutional attacks on apartheid, they were advancing a norm that was controversial within the African-American community and were deploying a strategy that they themselves realized was incomplete.¹⁸ Third, I am

17. The classic accounts are DAVID J. GARROW, *BEARING THE CROSS: MARTIN LUTHER KING, JR., AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE* (1986) [hereinafter GARROW, *BEARING THE CROSS*]; RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* (1976); ALDON D. MORRIS, *THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT: BLACK COMMUNITIES ORGANIZING FOR CHANGE* (1984). For a briefer and more popular account, see ADAM FAIRCLOUGH, *BETTER DAY COMING: BLACKS AND EQUALITY 1890-2000* (2001).

18. Contrast the NAACP's integrationist and pragmatic philosophy with the more confrontationalist philosophy of organizations such as the International Labor Defense, a radical class-based organization in the 1930s, the Civil Rights Congress in the 1940s, and the

presenting their constitutional politics as a progression of what was the *primary* — but not necessarily the only — goal of the social movement at different points in time: so long as black people were politically impotent in this country, the lawyers mainly sought *protection* for those in their group most brutalized by the state. Once blacks became more politically and socially significant, the lawyers made *recognition* and then *remediation* the overriding item on their agenda, which triggered overt counter-organization by traditionalists insisting on *preservation*.¹⁹

1. *The Politics of Protection, 1913-40*

Notwithstanding the regime of apartheid that settled over much of the nation between 1890 and 1910, many people of color rejected the notion that their race was “inferior” (as apartheid claimed) — and almost all people of color rejected the violence African Americans suffered at the hands of private and public actors. Founded in 1909 by a biracial collection of persons, the National Association for the Advancement of Colored People (“NAACP”) sought to refute erroneous stereotypes about black people and to protect blacks against public and private violence (especially lynching), loss of their rights to vote, and denial of housing where they could flourish.²⁰ From its beginning, the NAACP involved itself in cases where black people’s liberties were threatened by the state (or by private actors usurping state roles). The first case in which the Association became involved arose out of the capital conviction of a black man, Pink Franklin, for killing a police officer while resisting arrest for violating the state peonage law. The NAACP arranged for counsel to take Franklin’s case to the

Student Nonviolent Coordinating Committee of the 1960s; with the economic boycott and protest strategy for reform by grass-roots mobilization reflected in the Southern Christian Leadership Conference of the 1950s and 1960s; and with the black nationalist (separatist) philosophy of the Nation of Islam in the 1960s. All of these groups spoke for many blacks in America, and all sought to change attitudes and laws, but only the NAACP and like-oriented groups (the ACLU, the Committee for Civil Rights Under the Law) regularly spoke for blacks to the Supreme Court in constitutional cases.

19. That there was this kind of rough progression in the lawyers’ presentation and, perhaps, in the priorities of the social movement does not mean that recognition was not important to many minorities during the early stages; that protection did not remain critically important even after the politics of recognition became predominant; or that preservation was not strongly favored by most people in the majority throughout the whole period. That the various politics I describe are overlapping should not obscure my central point, which is that the public debate stimulated by the civil rights movement went through discernible stages of political and constitutional presentation.

20. On the founding of the NAACP, see 1 CHARLES FLINT KELLOGG, *NAACP: A HISTORY OF THE NATIONAL ASSOCIATION OF COLORED PEOPLE* 9-45 (1967); DAVID LEVERING LEWIS, *W.E.B. DUBOIS: BIOGRAPHY OF A RACE 1868-1919* (1993) (biography of an important founding member); JAMES M. MCPHERSON, *THE ABOLITIONIST LEGACY: FROM RECONSTRUCTION TO THE FOUNDING OF THE NAACP* (1975); MARY WARE OVINGTON, *THE WALLS CAME TUMBLING DOWN* (1947) (giving a first-person account).

Supreme Court. Although the peonage statute was a blatant violation of the Thirteenth Amendment, the Court denied Franklin's poorly articulated constitutional appeal that this should have affected his murder conviction.²¹ After this disappointing debut, the NAACP established a formal legal committee that regularly handled or coordinated cases where the liberties — and typically the lives — of African Americans were threatened.

Thus, most of the NAACP's early cases involved criminal prosecutions against black men.²² Some of these were little more than mob-inspired lynchings railroaded through the legal process.²³ *Moore v. Dempsey*,²⁴ an early and important example, involved a habeas appeal of the death sentences meted out to six of the black men convicted in Phillips County, Arkansas for the asserted murder of a white man. His death occurred in the wake of a spree of murders of black men by a hysterical white mob during the Red Summer of 1919. The NAACP presented the Supreme Court with a detailed factual record which showed the outrageous setting of the case: more than 200 blacks were slaughtered without a single indictment, while the death of one white man called forth seventy-nine black scapegoats without credible evidence of their guilt; once arrested, the black men were beaten and tortured by the authorities until some agreed to testify against others; twelve of the remaining defendants were railroaded through a "trial" in which they were perfunctorily represented by an appointed counsel who did not consult them and were convicted by an all-white jury which deliberated for two to three minutes before reaching the verdict of guilty and a penalty of death.²⁵ The only evidence against the defendants was that extracted by torture, and the whole climate was tainted by news reports that they were leaders of an insurrection and by mobs of white men surrounding the courtroom and poised to lynch

21. *Franklin v. South Carolina*, 218 U.S. 161, 170-72 (1910). Eight months later, the Court invalidated an Alabama peonage law similar to the one that indirectly brought the death penalty (later commuted to life in prison) to Pink Franklin. See *Bailey v. Alabama*, 219 U.S. 219 (1911). See generally Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era, Part 2: The Peonage Cases*, 82 COLUM. L. REV. 646 (1982).

22. See *KELLOGG*, *supra* note 20, at 64.

23. An NAACP study documented 3,224 lynchings between 1889 and 1918. See *id.* at 210. See generally *id.* at 209-46 (detailing anti-black violence in the 1910s and the NAACP's legislative and publicity campaign against lynching).

24. 261 U.S. 86 (1923); see also *infra* Section II.A *infra* (discussing *Moore*).

25. See Petition for Writ of Habeas Corpus, reprinted in Record on Appeal at 1-11, *Moore v. Dempsey*, 261 U.S. 86 (1923) (1922 Term, No. 199); Brief for Appellants at 1-33, *Moore* (1922 Term, No. 199) (Moorfield Storey, counsel for appellants); RICHARD C. CORTNER, A MOB INTENT ON DEATH: THE NAACP AND THE ARKANSAS RIOT CASES 5-105 (1988) (providing a detailed account of the riots, the arrests and trials, and the early involvement of the NAACP in defending the men).

them if the verdict had been otherwise than death. Defendants' claim was that because of the outside "mob domination," the "entire trial, verdict, and judgment against them was but an empty ceremony," its resulting death penalty nothing but "judicial murder."²⁶ Given such a damning factual record, the Court agreed, holding that such a trial, "hurried to conviction under the pressure of a mob without any regard for . . . [the defendants'] rights and without according to them due process of law [was void]."²⁷

The Phillips County case was one of the NAACP's greatest triumphs. It was the first of a series of cases where the NAACP not only sought to protect innocent black defendants, but also sought judicial recognition of due process rules that would inure to the benefit of all black defendants. In *Brown v. Mississippi*,²⁸ for example, the Supreme Court overturned three convictions based on confessions obtained by whipping and physical torture. The Court's opinion established as an enduring principle of its due process jurisprudence that compelled confessions cannot be the basis for state court convictions and held that federal courts will enforce this rule even when not timely raised in the state courts.²⁹ *Moore* was also a harbinger of the famous Scottsboro cases, where the NAACP's role was only a supporting one.³⁰ The cases arose in 1931 out of alleged rapes of two white women by nine black youths hitching rides on railway cars in Jackson County, Alabama. Mindful that a proceeding as openly mob-driven as that in *Moore* would trigger federal intervention, the newspapers and the authorities discouraged mobs from forming. Nor was there indication that the accused were tortured, as there would be in other cases. There was still plenty of evidence that the defendants were railroaded to guilty verdicts, with death sentences. As Samuel Liebowitz's Supreme

26. Record on Appeal at 6-7, *Moore* (1922 Term, No. 199); Brief for Appellants at 33, *Moore* (1922 Term, No. 199).

27. *Moore*, 261 U.S. at 87. The actual disposition of the case was a remand to the federal trial court to hold a hearing to determine whether the asserted facts were correct; if so, habeas would be granted. Before the trial court decided the matter, the Governor commuted the six men's death sentences to short prison terms. By 1925, all of the sixty-seven men who had been sentenced to prison for unproven roles in the single white man's death had been released. KELLOGG, *supra* note 20, at 244.

28. 297 U.S. 278 (1936); see also Section II.A.1 (discussing *Brown*); RICHARD C. CORTNER, A "SCOTTSBORO" CASE IN MISSISSIPPI: THE SUPREME COURT AND *BROWN V. MISSISSIPPI* (1986) [hereinafter CORTNER, A "SCOTTSBORO" CASE IN MISSISSIPPI].

29. *Brown*, 297 U.S. at 285-87.

30. Although the NAACP procured lawyers for the "Scottsboro boys," the Communist-affiliated International Labor Defense won their Supreme Court cases with the excellent representation of Samuel Liebowitz. See generally Hugh T. Murray, Jr., *The NAACP versus the Communist Party: The Scottsboro Rape Cases, 1931-32*, in *THE NEGRO IN THE DEPRESSION AND WAR: PRELUDE TO REVOLUTION, 1930-1945*, at 276 (Bernard Sternsher ed., 1969).

Court brief for the Scottsboro defendants maintained, the cases were like *Moore* in that the evidence of guilt was slim and suspect; the defendants were not afforded their choice of counsel and were essentially unrepresented; and people of color were excluded from serving on the jury.³¹ In *Powell v. Alabama*,³² the Court reversed the defendants' convictions on the ground that they were denied due process, which the Court interpreted to require effective representation by counsel before defendants could be sentenced to death for conviction of a capital crime. The defendants were retried and re-convicted, but the trial judge (remarkably) overturned their convictions on the ground that the testimony of their accuser was incredible. Some of them were tried and convicted yet again.

In *Norris v. Alabama*,³³ the Supreme Court reversed these third capital convictions, on the ground that the state had violated the Equal Protection Clause by effectively excluding people of color from the juries. *Norris* was the first case in which the Supreme Court overturned a criminal conviction on grounds of exclusion of blacks from the juries without any admission to that effect by state officials or judges.³⁴ Chief Justice Hughes' opinion for a unanimous Court carefully examined the evidence presented (and probably fabricated) by the local officials, and found that it did not rebut the prima facie case of discrimination made out by the utter absence of black people on juries in Jackson County, Alabama "within the memory of witnesses who had lived there all their lives."³⁵ This precedent proved fruitful for the NAACP as a weapon to challenge death sentences for people of color convicted in southern jurisdictions where blacks had long been excluded de facto from jury service. Not only did the Supreme Court overturn convictions of a number of black defendants on this ground,³⁶ but the Fifth Circuit enforced *Norris* in the 1940s and 1950s, sending

31. See Brief for Petitioners at 36-62, *Powell v. Alabama*, 287 U.S. 45 (1932) (1931 Term, Nos. 98-100). See generally DAN T. CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH (rev. ed. 1969); JAMES GOODMAN, STORIES OF SCOTTSBORO (1994).

32. 287 U.S. 45 (1932); see also *infra* Section II.A.1.b (discussing *Powell*).

33. 294 U.S. 587 (1935); see also *infra* Section II.A.1.c (discussing *Norris*).

34. See Benno C. Schmidt, Jr., *Juries, Jurisdiction, and Race Discrimination: The Lost Promise of Strauder v. West Virginia*, 61 TEXAS L. REV. 1401 (1983) [hereinafter Schmidt, *Juries*]. Compare *Neal v. Delaware*, 103 U.S. 370 (1881) (holding that state cannot exclude people of color from juries as a matter of law; admission of race discrimination by officials meets this test), with *Thomas v. Texas*, 212 U.S. 278 (1909) (rejecting race discrimination claim because state courts had found insufficient proof of such discrimination).

35. *Norris*, 294 U.S. at 591.

36. See *Hill v. Texas*, 316 U.S. 400 (1942); *Smith v. Texas*, 311 U.S. 128 (1940); *Pierre v. Louisiana*, 306 U.S. 354 (1939); *Hale v. Kentucky*, 303 U.S. 613 (1938); *Hollins v. Oklahoma*, 295 U.S. 394 (1935). See generally Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 83 (1990).

an important message to southern jurisdictions that whites-only jury policies were costly.³⁷ *Norris* also saved the remainder of the Scottsboro defendants from death sentences — except (ironically) Clarence Norris, who was convicted in a fourth trial. His death sentence was later commuted, and he emerged from prison in 1950, having lost almost twenty years of his life for what is now considered “the most notorious racial hoax case in our history.”³⁸

The jury cases reflected a broader challenge: knowing that open exclusion of black people by law might be held to violate the Equal Protection Clause, southern officials devised subterfuges that weeded out blacks from jury lists *de facto*.³⁹ They did the same thing with voting: knowing that open exclusion of black people by law might be held to violate the Fifteenth Amendment, southern officials found ways to discourage or exclude blacks from voting lists indirectly. As in the jury cases, the NAACP’s strategy was to document the dearth of black people on voting lists and to show how white officials accomplished their exclusion. Indeed, the NAACP’s first Supreme Court amicus brief was in a voting case, *Guinn v. United States*.⁴⁰ Oklahoma required that citizens pass a literacy test in order to vote; exempted from the test were people who or whose ancestors were entitled to vote in 1866, just before the Fourteenth and Fifteenth Amendments were adopted. The NAACP’s Moorfield Storey argued that this law effectively debarred most people of color from voting because they could not read, without imposing the same disability on illiterate whites, whose ancestors were voters in 1866. The Supreme Court ruled that a literacy test standing alone was permissible, but its joinder with a grandfather clause violated the Fifteenth Amendment’s requirement that the right to vote not be “denied or abridged . . . on account of race, color, or previous condition of servitude.”⁴¹ *Guinn* would seem like an easy case — but only to today’s eyes. During the “progressive” era, it was a rather bold decision because it analyzed the state law in terms of its

37. See John Andrew Martin, *The Fifth Circuit and Jury Selection Cases: The Negro Defendant and His Peerless Jury*, 4 HOUSTON L. REV. 448 (1966).

38. Katherine K. Russell, *The Racial Hoax as Crime: The Law as Affirmation*, 71 IND. L.J. 593, 598 (1996).

39. In *Norris*, for example, the local officials testified that no people of color were qualified to serve on juries; the NAACP produced black men who were obviously well-qualified, and the Supreme Court refused to credit the officials’ “sweeping characterization of the lack of qualifications.” 294 U.S. at 599. Additionally, Norris’s lawyers demonstrated to the Court that officials had tried to cover up their discrimination by adding black names to the rolls after the lawsuit was brought. See Schmidt, *Juries*, *supra* note 34, at 1479.

40. 238 U.S. 347 (1915); see also *infra* Section II.E.1 (discussing *Guinn*). See generally Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era, Part 3: Black Disenfranchisement from the KKK to the Grandfather Clause*, 82 COLUM. L. REV. 835 (1982) [hereinafter Schmidt, *Principle and Prejudice*].

41. *Guinn*, 238 U.S. at 362.

practical application. The decision was only “rather” bold, because Oklahoma’s scheme was more transparent than that followed in any other state, because the Court approved the use of literacy tests generally, and because even Oklahoma evaded the Court’s mandate with a new grandfather clause for two decades.⁴² *Guinn* did not assure that people of color would be able to vote in the South. There were as many subterfuges as there were voters of color.

Deterred by *Guinn* from directly barring people of color from voting in general elections, several southern states barred them from participating in the Democratic Party primary, where electoral decisions were effectively made. The NAACP challenged the Texas statute instantiating a whites-only primary. Although the Supreme Court had ruled that primaries were not “elections” that Congress could regulate under Article I, section 4 and had suggested that voting practices might be political questions, Storey urged the Court to recognize the Texas statute as a “flagrant, unjust discrimination against a citizen solely on account of race and color.”⁴³ Following *Guinn* and essentially ignoring the earlier precedents, the Supreme Court ruled in *Nixon v. Herndon*⁴⁴ that the Fourteenth Amendment prevented Texas from excluding blacks in primary elections. Texas responded by ceding authority over primaries to the State Democratic Convention of Texas, which maintained that it was not a state actor accountable under the Fourteenth and Fifteenth Amendments. The NAACP challenged this scheme as an unconstitutional subterfuge,⁴⁵ but the Supreme Court permitted the practice in 1935.⁴⁶

The NAACP got a second shot at the issue after the reconstituted New Deal Court ruled in *United States v. Classic*⁴⁷ that interference with the right to vote in a primary involves a right “secured or protected by the Constitution and laws of the United States.” Arguing

42. See *Lane v. Wilson*, 307 U.S. 268 (1939) (invalidating Oklahoma’s next voting law, which gave people of color eleven days in May 1916 to register or suffer permanent loss of their franchise).

43. Brief for Plaintiff-in-Error at 31, *Nixon v. Herndon*, 273 U.S. 536 (1927) (1926 Term, No. 117) (distinguishing *Newberry v. United States*, 256 U.S. 232 (1921), stating that Congress’s power to prescribe the manner for holding “Elections” for its members does not include authority over primaries); Reply Brief for Plaintiff-in-Error at 19-23, *Nixon* (1926 Term, No. 117) (distinguishing *Giles v. Harris*, 189 U.S. 475 (1903) and refusing to entertain claim for injunction in voting rights case).

44. 273 U.S. 536 (1927); see also *infra* Sections II.C.1 and II.E.1 (discussing *Nixon*).

45. Brief on the Merits [for the Petitioner] at 12-19, *Grove v. Townsend*, 295 U.S. 45 (1935) (1934 Term, No. 563).

46. The Supreme Court initially declined to accept the state’s claim that the Democratic Party rather than the state was responsible for the exclusion, *Nixon v. Condon*, 286 U.S. 73 (1932), but once that matter was clarified the Court ruled that the state was no longer responsible. *Grove v. Townsend*, 295 U.S. 45 (1935).

47. 313 U.S. 299 (1941).

that the Texas white primary set-up was a patent effort to disenfranchise people of color and that *Classic* required the state to be held responsible, the NAACP, joined now by the ACLU, persuaded the Court to overrule the earlier precedent in *Smith v. Allwright*.⁴⁸ This decision, handed down in 1943, had more tangible consequences than the Court's earlier decisions. Only three percent of southern blacks were registered to vote in 1940, but twenty percent were registered by 1952 — in part due to the NAACP's post-*Allwright* litigation campaign against white primaries and the willingness of judges to enforce *Allwright* broadly.⁴⁹ The voting cases, even more than the mob pressure and the jury cases, pressed the Court to look beneath the formally neutral rules and find the underlying exclusionary project for which the state bore responsibility.

By the time the NAACP was founded, apartheid was well-established in the South, and it probably would have been futile to challenge it in the period before World War II, especially given the Association's limited resources. But the NAACP was alert to local efforts expanding the reach of legal segregation of the races. It was not until 1910 that a major city (Baltimore) legally restricted black people to residing in designated ghettos.⁵⁰ The Baltimore branch of the NAACP thrice challenged the 1910 ordinance and its two successors as a violation of the Due Process Clause. Twice the Maryland Court of Appeals invalidated the ordinance; it held the third appeal pending the NAACP's challenge to a similar Louisville ordinance before the Supreme Court.⁵¹ Moorfield Storey's brief in the Louisville case maintained that the ordinance invaded vested property rights in violation of the due process, equal protection, and privileges and immunities clauses of the Fourteenth Amendment. He distinguished *Plessy* and the public school cases, where:

it is possible to say that no harm is suffered through the separation of the races, if the facilities enjoyed by either race are the same as those enjoyed by the other. In the case at bar, no such argument can be made, because every parcel of land has qualities peculiar to itself One of the

48. 321 U.S. 649 (1943) (overruling the Court's unanimous opinion in *Grovey*). The Court followed and extended *Allwright* in *Terry v. Adams*, 345 U.S. 461 (1953) (the Jaybird case, where the Court invalidated yet another elaborate subterfuge to disenfranchise black voters). See also Section II.E.3 (discussing *Terry*).

49. See, e.g., *Mitchell v. Wright*, 154 F.2d 924 (5th Cir. 1946); *Dean v. Thomas*, 93 F. Supp. 129 (E.D. La. 1950); *Adams v. Whittaker*, 195 S.W.2d 634 (Ark. 1946). See generally J. MORGAN KOUSSER, *COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION* (1999).

50. See Garrett Power, *Apartheid Baltimore Style: The Residential Segregation Ordinances of 1910-1913*, 42 MD. L. REV. 289 (1983); R.L. Rice, *Residential Segregation by Law, 1910-1917*, 34 J. SO. HIST. 179 (1968).

51. See KELLOGG, *supra* note 20, at 184; George C. Wright, *The NAACP and Residential Segregation in Louisville, Kentucky, 1914-1917*, 78 REG. KY. HIST. SOC. 39 (1980).

first essentials of a free government is the right of every citizen to establish his residence where he sees fit and to move from place to place at pleasure. Such an ordinance as that now in question does not affect simply the convenience and comfort of those citizens to whom it applies, but strikes at their right to live at all.⁵²

Storey closed his brief with a bold echo of Justice Harlan's dissenting opinion in *Plessy*, charging that the innovative ordinance would "provoke conflict between the races and [could] reduce negro citizens to a position of inferiority."⁵³ Also far-sighted and a bit radical was an amicus brief filed by Wells H. Blodgett and Frederick Lehmann, American Bar Association moguls who insisted "strenuously . . . upon a single and undivided American citizenship — no hyphens."⁵⁴ Innovations such as the Louisville ordinance would generate a spiral of race animosity, for "[t]he prejudice of race grows by what it feeds upon. Its appetite is insatiable."⁵⁵

Deciding *Buchanan v. Warley*,⁵⁶ the Supreme Court agreed, refusing to extend *Plessy* to permit legally required residential segregation. Because the ordinance destroyed the right of the individual to acquire, enjoy, and dispose of his property, it violated the Due Process Clause. Justice Day's opinion for the Court did not follow the radical rhetoric of the NAACP briefs, nor did it actually protect people of color against housing discrimination. After *Buchanan*, segregationists relied on discriminatory zoning ordinances and racially restrictive covenants in leases to preserve racially segregated housing patterns. Defending a white homeowner wanting to sell to a black purchaser in the District of Columbia, the NAACP challenged racially restrictive covenants as inconsistent with *Buchanan*. The District's court of appeals upheld an injunction against the sale. The Supreme Court dismissed the appeal in *Corrigan v. Buckley*,⁵⁷ with a written opinion ruling that the Equal Protection Clause is applicable to public but not private discrimination; hence, the discriminatory terms of the owner's lease were not constitutionally reviewable. The Court did not address the NAACP's argument that a judicial decree enforcing the racially restrictive cove-

52. Brief for Plaintiff in Error at 35-36, *Buchanan v. Warley*, 245 U.S. 60 (1917) (1915 Term, No. 33).

53. *Id.* at 44.

54. Brief of Amici Curiae Wells H. Blodgett and Frederick W. Lehmann at 7, *Buchanan v. Warley*, 245 U.S. 60 (1917) (1915 Term, No. 33).

55. *Id.* at 8.

56. 245 U.S. 60 (1917); see also *infra* Section II.C.1 (discussing *Buchanan*).

57. 271 U.S. 323 (1926). Even after *Corrigan*, the Court continued to apply *Buchanan*'s rule against ordinances requiring housing segregation. *E.g.*, *Harmon v. Tyler*, 273 U.S. 668 (1927) (affirming lower court decision invalidating ordinance requiring consent of a majority of community homeowners before a black person could establish a home there); *Richmond v. Deans*, 281 U.S. 704 (1930) (similar).

nant was state action, on the ground that the issue was not properly presented on appeal. Although the Supreme Court would later revisit the constitutional status of racially restrictive covenants, state and federal courts read *Corrigan* as placing racially restrictive covenants beyond the scope of the Fourteenth Amendment.⁵⁸ Such covenants were widely deployed, and residential segregation was the practical result almost everywhere in the United States.

From the NAACP's point of view, the greatest price of *Plessy* was segregated education. The Association believed that opportunities for black people could not be realized without education and literacy. Most of its early efforts focused on publicizing the poor quality of education for blacks in the South and lobbying for funds to remedy that,⁵⁹ but in the early 1930s the NAACP challenged the inadequate resources through constitutional litigation. Between 1933 and 1950, the Association brought or supported litigation to desegregate graduate and professional schools and to equalize the salaries and facilities in white and black primary and secondary schools.⁶⁰ As to the latter, litigation was most successful when a strong attorney was in charge of the cases and had the support of a well-organized black community and a potentially receptive community of white moderates. The classic success story was Thurgood Marshall's work with the community in Maryland, a moderate state in racial politics.⁶¹ As to the former, the NAACP maintained that states offering black citizens no graduate school opportunities — not even meaningful separate ones — was open discrimination that even *Plessy* did not justify.⁶² Charles Houston litigated a number of these cases, and won a significant victory in *Missouri ex rel. Gaines v. Canada*.⁶³ The NAACP's brief objected to the state's complete exclusion of blacks from its professional schools and documented their under-representation as a systematic problem in the South. The Supreme Court agreed. After this victory, the NAACP established a separate NAACP Legal Defense and Educa-

58. See CLEMENT E. VOSE, CAUCASIANS ONLY: THE SUPREME COURT, THE NAACP, AND THE RESTRICTIVE COVENANT CASES 19 (1959); *id.* at 22-24 (*Corrigan* was consistent with the liberty of contract ideology of the era).

59. See KELLOGG, *supra* note 20, at 187-99.

60. MARK V. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950, at 34 (1987). Tushnet's account of the education litigation is a less triumphalist interpretation than that in what is still the main authority, KLUGER, *supra* note 17.

61. See TUSHNET, *supra* note 60, at 34-69.

62. See *McCabe v. Atchison, Topeka & Santa Fe Ry.*, 235 U.S. 151 (1914) (invalidating an Oklahoma law excluding blacks from dining and sleeping cars, without providing comparable accommodations of any sort).

63. 305 U.S. 337 (1938); see TUSHNET, *supra* note 60, at 70-81 (providing an account of this litigation).

tional Fund, Inc. (“Inc. Fund”), which pressed the Association to a new level of constitutional discourse.

2. *The Politics of Recognition and Some Remediation, 1940-72*

Although the NAACP’s agenda in its early years was dominated by efforts to protect the lives, liberties, and property rights of African Americans against state-sanctioned violence and discrimination, the Association was also committed to “complete equality before the law” for people of color.⁶⁴ This aspiration reflected a nascent, albeit little-fulfilled, politics of recognition. I view the 1930s as a transitional decade, during which that politics began to overtake the still-necessary politics of protection. The Texas primary cases, culminating in the triumph in *Allwright*, reflected this transition: the right to vote was important to assure that local politics would be even somewhat protective of black people’s safety and needs, but was also symbolically important to both people of color and the judiciary. The full citizenship promised by the Reconstruction amendments was an empty promise without the franchise, and a democracy that formally excluded people because of their race looked more than a little like Nazi Germany.

The civil rights movement’s shift from a politics of protection to a politics of recognition was formally made when the NAACP changed its constitutional stance toward apartheid. During the period described above, its lawyers pressed constitutional arguments from within the *Plessy* framework, whereby the state had no obligation to correct social prejudice or force unwilling whites to associate with blacks, but did have an obligation not to be a conduit through which prejudiced whites could deprive blacks of their lives (*Moore, Powell*), fundamental liberties (*Norris*), or property rights (*Buchanan*). Tangible even if limited gains accompanied and may have resulted in part from this litigation: new apartheid laws had been stopped in their tracks even as old ones remained in place; black literacy had soared to eighty percent and the black-white ratio of teachers’ salaries had risen to sixty-five percent (the teacher salary cases); lynching and state execution of black people for crimes had fallen off significantly; blacks for the first time in the century were able to register and vote in primary and general elections.⁶⁵ All of these gains were affected and generally accelerated by the nation’s experiences in and around World War II. At this point, *Plessy* itself came under siege on all fronts.

64. Brief for Petitioner at 3, *NAACP v. Alabama*, 357 U.S. 449 (1958) (1957 Term, No. 91) (quoting the NAACP’s articles of incorporation).

65. See TUSHNET, *supra* note 60, at 103 (teachers’ salaries).

In 1941, A. Philip Randolph and other prominent black leaders organized a March on Washington Movement (“MOWM”) insisting that the federal government desegregate: if people of color were going to be asked to die for their country, their country was obliged to afford them equal dignity and respect.⁶⁶ Gunnar Myrdal’s *An American Dilemma*, published in 1944, rubbed America’s public face in the hypocrisy of demonizing the Nazis as racist while practicing racial segregation at home. In the Japanese curfew and evacuation cases decided in 1943-44, the Supreme Court announced that race-based classifications were odious to a free people, even as the Justices upheld race-based liberty deprivations against Japanese-American citizens (to vigorous critique after the war).⁶⁷ At the urging of the Solicitor General, the Supreme Court interpreted the Railway Labor Act to bar race-based employment discrimination by railroad unions.⁶⁸

World War II cemented the case against racist policies. Not only did Asian as well as African Americans serve valorously during the war, but whites as well as people of color noticed the incongruity of their returning to an apartheid society after fighting a war against “the apostles of racism.” This was the term the NAACP used in its brief successfully urging the Supreme Court to strike down a state law requiring race segregation in interstate bus trips.⁶⁹ The war also accelerated the demographic shift of blacks from the rural south to urban areas in the north. The NAACP’s membership soared tenfold,⁷⁰ giving its leaders greater political credibility in national politics. *To Secure These Rights*, the 1947 report of President Truman’s Committee on Civil Rights, called for “the elimination of segregation . . . from American life.”⁷¹ In 1948, Truman issued an executive order requiring

66. In response to the movement, President Roosevelt issued Executive Order 8802, which prohibited race-based discrimination in federal government employment (but not in the armed services) as well as in defense industries doing business with the government. After the order, which was tepidly carried out, the MOWM fizzled. See FAIRCLOUGH, *supra* note 17, at 152-59.

67. See *Korematsu v. United States*, 323 U.S. 214, 216 (1944); *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943); see also *infra* Section II.C.1 (discussing *Korematsu*).

68. *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944).

69. Brief for Appellant at 28, *Morgan v. Virginia*, 328 U.S. 373 (1946) (1945 Term, No. 704); see [ACLU’s] Motion for Leave to File Brief as Amicus Curiae and Brief in Support Thereof at 14-15, *Morgan* (1945 Term, No. 704) (arguing that race-based categories are inherently stigmatic in our society). The Supreme Court struck down the state law in *Morgan v. Virginia*, 328 U.S. 373 (1946). See also *Mitchell v. United States*, 313 U.S. 80, 97 (1941) (holding that forcing a black customer with a first-class ticket to ride second-class violates the Interstate Commerce Act).

70. FAIRCLOUGH, *supra* note 17, at 182 (NAACP membership went from 50,000 in 1940 to 500,000 in 1946).

71. TO SECURE THESE RIGHTS: THE REPORT OF THE PRESIDENT’S COMMISSION ON CIVIL RIGHTS 166 (1947) (urging the elimination of racial segregation from the armed forces, public transport, housing, health care, and education).

desegregation in the armed forces. Public norms had changed; support for state-imposed segregation outside the South was waning. In the same year as Truman's order, the NAACP's Board of Directors officially endorsed Thurgood Marshall's position that the Association "not undertake any case or cooperate in any case which recognizes or purports to recognize the validity of segregation statutes or ordinances"⁷²

During the 1947 Term, Marshall pressed the NAACP's new position in *Sipuel v. Board of Regents*,⁷³ another graduate school case. The Inc. Fund, for the first time, urged the Court to re-examine the separate but equal doctrine and overrule *Plessy*.⁷⁴ Although the Court invalidated the state's program on the narrower ground that it was grossly unequal, the Justices were moving toward a renunciation of apartheid, albeit sensitive that they not be perceived as moving too precipitously or writing their opinions provocatively.⁷⁵ Both the NAACP and the Court got a push from private litigants that same Term, when *Shelley v. Kraemer*⁷⁶ presented the Court with the constitutionality of judicial enforcement of racially restrictive covenants in property contracts. At the urging of the NAACP, the Solicitor General filed an amicus brief invoking the report of the President's Committee on Civil Rights to support forceful judicial anti-discrimination rules and to criticize the destructiveness of housing segregation in particular.⁷⁷ Abrogating the broad reading of *Corrigan* by most lower courts, the Supreme Court unanimously held that judicial enforcement of the covenants was state action violating the Equal Protection Clause.⁷⁸ That the Court was willing to fill the doctrinal loophole left open in *Buchanan* was cheering to civil rights lawyers, encouraging them to press ahead with an anti-apartheid campaign that

72. TUSHNET, *supra* note 60, at 115 (quoting resolution).

73. 332 U.S. 631 (1948).

74. Brief for Petitioner at 18-51, *Sipuel v. Bd. of Regents*, 332 U.S. 631 (1948) (1947 Term, No. 369).

75. See Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958*, 68 GEO. L.J. 1, 4-13 (1979) (discussing *Sipuel* and several other race cases of the 1947 Term).

76. 334 U.S. 1 (1948); see also Section II.E.1 (discussing *Shelley*). See generally VOSE, *supra* note 58, at 158-96 (providing a detailed examination of NAACP's and amici's arguments in *Shelley*); Louis Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473 (1962).

77. Brief of Amicus Curiae United States at 1-25, *Shelley v. Kraemer*, 334 U.S. 1 (1948) (1947 Term, Nos. 72, 87, 290 & 291) (arguing that the interest of the United States is in preventing racial ghettos and an international image of apartheid); see also *id.* at 92-103 (arguing that the enforcement of racially restrictive covenants is contrary to the public policy of the United States).

78. *Shelley*, 334 U.S. at 14-18 (state action); *id.* at 18-23 (equal protection violation).

clearly had the support of both the Solicitor General's Office⁷⁹ and a growing number of amici. Fifteen amicus briefs supported the Inc. Fund in *Shelley* — many more than had ever been filed in any civil rights case before 1948.⁸⁰ Virtually sealing the case against apartheid, the Court in 1948 struck down two state laws discriminating on the basis of Asian race or ethnicity.⁸¹

Within the Court, the Justices were struggling to find the right strategy and the best pace for leading the country away from the race-based policies of apartheid.⁸² During the 1949 Term, the Court heard three NAACP challenges to state segregation. In two graduate school cases, the NAACP and supporting amici urged the Court either to overrule *Plessy* or to hold its principle inapplicable to public education.⁸³ The United States filed amicus briefs in both cases questioning *Plessy* and insisting that it not be extended to public graduate education.⁸⁴ In the NAACP's third case of the Term, *Henderson v. United States*,⁸⁵ Solicitor General Philip Perlman (representing the respondent) confessed error, and for the first time the United States directly urged the Court to overrule *Plessy*.⁸⁶ "Segregation of Negroes, as prac-

79. See Philip Elman, *The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation, 1946-1960: An Oral History*, 100 HARV. L. REV. 817 (1987) (reporting that the Solicitor General's Office informally cooperated with NAACP and with Justice Frankfurter within the Court during this period).

80. In addition to the United States, other supportive amici included the ACLU, the AFL, the CIO, the American Jewish Committee, and the National Bar Association. *Shelley*, 334 U.S. at 3-4. Three amici supported the restrictive covenants. *Id.* at 4.

81. See *Oyama v. California*, 332 U.S. 633 (1948) (invalidating law barring Japanese aliens from holding land through their minor children who were American citizens); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948) (striking down law barring the issuance of fishing licenses to aliens ineligible for citizenship (a category limited to Asians)); see also Section II.C.1 (discussing *Oyama*). In both cases, Justice Murphy wrote pointed concurring opinions linking the challenged statutes to western prejudice against Japanese immigrants. *Oyama*, 332 U.S. at 650; *Takahashi*, 334 U.S. at 422-27.

82. Justices Murphy and Rutledge favored sharp anti-racism rhetoric and swift doctrinal action; Chief Justice Vinson and Justices Frankfurter, Reed, and Jackson favored a slow but sure approach; Justices Black, Douglas, and Burton were between these warring groups. See Hutchinson, *supra* note 75, at 8-13.

83. Brief for Petitioner at 44-52, *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950) (1949 Term, No. 34) (urging the Court to overrule *Plessy*); *id.* at 36 (differentiating public transportation in *Plessy* from public education in *McLaurin*); Brief for Appellant at 5, *Sweat v. Painter*, 339 U.S. 629 (1950) (1949 Term, No. 44) (similar); see also Brief for Amici Curiae [Committee of Law Teachers Against Segregation in Legal Education] in Support of Petition for Certiorari at 4, *Sweat* (1949 Term, No. 44) (arguing that *Plessy* is flatly inconsistent with the Equal Protection Clause and should be overruled). There was significant support within the Court for the NAACP's point. See Hutchinson, *supra* note 75, at 15-17, 19-21.

84. Memorandum of Amicus Curiae United States at 14, *McLaurin* (1949 Term, No. 34); Memorandum of Amicus Curiae United States at 4-5, *Sweat* (1949 Term, No. 44).

85. 339 U.S. 816 (1950).

86. Brief for the United States at 40, *Henderson v. United States*, 339 U.S. 816 (1950) (1949 Term, No. 25) ("[T]he legal and factual assumptions" of *Plessy* "have been under-

ticed in this country, is universally understood as imposing on them a badge of inferiority. . . . Forbidding this group of American citizens 'to associate with other citizens in the ordinary course of daily living creates inequality by imposing a caste status on the minority group.'⁸⁷ The government's argument in *Henderson* stirred up discussion within the Court as to how broadly to decide the graduate school cases. According to Dennis Hutchinson's careful reconstruction, the Justices were almost unanimous in their determination to overrule segregation in all three cases but were fearful that a broad rationale might trigger a firestorm of protest in the South.⁸⁸ Under these circumstances, the Court found equal protection violations in the graduate school cases, based upon intangible differences marking the black graduate school as insufficient.⁸⁹ In *Henderson*, the Court did not reach the constitutional issue and simply ruled that the Interstate Commerce Act barred racial discrimination in railroad dining cars.⁹⁰ Although *Plessy* had survived, its days were numbered — a prospect that filled the Justices with anxiety.

Marshall and the Inc. Fund persuaded the Court to take five public school cases in 1952 that, they hoped, would repudiate *Plessy*. *Brown v. Board of Education* and its associated cases were both the Austerlitz and the Waterloo of the NAACP's strategy of deploying constitutional law to advance the status and condition of black people.⁹¹ On the one hand, the school segregation cases represented the apotheosis of blacks' politics of recognition. Supported by the Solicitor General, the ACLU, and four other hefty amici, the NAACP carefully developed the constitutional case for full and unequivocal equality.

The Inc. Fund's briefs in the cases made three kinds of arguments for overruling *Plessy*, at least insofar as public education was concerned. First, they maintained that the purpose of the Fourteenth

mined and refuted" and the " 'separate but equal' doctrine should now be overruled and discarded.").

87. *Id.* at 27-28. Attorney General J. Howard McGrath argued the case along the same lines: "Segregation signifies and is intended to signify that a member of the colored race is not equal to a member of the white race."

88. See Hutchinson, *supra* note 75, at 19-30 (providing a detailed account of the Justices' deliberations in the 1949 Term Cases).

89. *Sweatt v. Painter*, 339 U.S. 629 (1950); *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950).

90. 339 U.S. at 826.

91. On the Austerlitz (triumphal) part, see KLUGER, *supra* note 17; TUSHNET, *supra* note 60 (less triumphalist). On the Waterloo part, see JACQUELINE IRVINE, *BLACK STUDENTS AND SCHOOL FAILURE: POLICIES, PRACTICES, AND PRESCRIPTIONS* (1990); GERALD ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991) (no); Sonia Jarvis, *Brown and the Afrocentric Curriculum*, 101 *YALE L.J.* 1285 (1992). For something of both, see DERRICK BELL, JR., *RACE, RACISM, AND AMERICAN LAW* (3d ed. 1992).

Amendment was “to eliminate race distinctions from American law,” specifically including race-based segregation of public schools.⁹² The early cases had enforced this understanding, but later cases like *Plessy* confused the Equal Protection Clause’s reasonable distinction approach, applicable to the general run of statutes, with its intended “prohibition of color differentiation.”⁹³ Second, the civil rights lawyers argued that the more recent cases had returned to the Fourteenth Amendment’s original goal and its intended bar to race-based classifications. Justice Holmes’ opinion in *Herndon* had it right when he found it “too clear for extended argument that color cannot be made the basis of a statutory classification affecting the right set up in this case.”⁹⁴ The brief carefully laid out for the Court the steps it had already taken to limit and trim back *Plessy* and argued that it was only a short step to overruling the precedent altogether.⁹⁵

Third, and most important for my purposes, the Inc. Fund briefs emphasized normative arguments for the moral, social, and political evils of apartheid. This was most explicit in the appendix to its opening brief, “The Effects of Segregation and the Consequences of Desegregation: A Social Science Statement.”⁹⁶ The central point of the statement was the pervasive and harmful psychological effects of law-endorsed segregation on its objects, namely, people of color, especially schoolchildren. Such laws signal their inferiority because of race and

92. See Brief for Appellants at 79-120, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (1953 Term, Nos. 1, 2, 4, 5, 10) (general purpose); *id.* at 120-89 (specific intent of Congress and ratifying states to bar racially segregated schools). These materials were developed in response to the Court’s order for reargument of the cases.

93. *Id.* at 45-46.

94. *Id.* at 46 (quoting *Nixon v. Herndon*, 273 U.S. 536, 541 (1927)). It is odd that the NAACP did not emphasize dicta in the Japanese war cases, where the Court said that race-based classifications of all sorts were presumptively unconstitutional. See *supra* note 67 and accompanying text. That the Court in both cases upheld race-based directives in time of war perhaps made these authorities particularly unsavory for the NAACP, which had not participated in them. In any event, other briefs in the case did rely on those earlier precedents to argue that race-based discrimination is all but prohibited by the Equal Protection Clause. See Brief of Amici Curiae American Veterans Comm. at 4-5, 12-13, *Brown* (1953 Term, No. 8).

95. Brief for Appellants at 47-50, *Brown* (1953 Term, Nos. 1, 2, 4, 5, 10). The Inc. Fund argued that *Buchanan* refused to extend *Plessy* to property and housing segregation, a refusal dramatically extended in *Shelley*. Even in the arena of transportation, subsequent cases — *McCabe*, *Henderson* — trimmed back *Plessy*’s ambit, and *Morgan v. Virginia* overruled its application to interstate transportation. In the education arena, the Court had never thoroughly considered the application of *Plessy*, and the intangible benefits rationale of the graduate school cases — *Gaines*, *Stipuel*, *Sweatt*, *McLaurin* — provided a sound reason to reject *Plessy* in elementary and secondary schools as well.

96. The Statement was appended to the first set of Appellants’ Briefs, *Brown* (1953 Term, Nos. 8, 101, 191) [hereinafter Social Science Statement]. It was signed by thirty-two eminent scientists, including Gordon Allport, Kenneth and Mamie Clark, Robert Merton, and Samuel Stouffer.

undermine their ability to see “their own dignity as human beings.”⁹⁷ Racial segregation also contributes to rigid and authoritarian personalities among white schoolchildren and gives them a “distorted sense of social reality,”⁹⁸ perpetuates absurd stereotypes and “leads to a blockage in the communications and interaction between the two groups,”⁹⁹ and contributes to interracial violence and discord. This part of the statement supported the NAACP’s longstanding position that segregation denied black people the respect they deserved as human beings and the full rights of citizenship guaranteed by the Fourteenth Amendment. In this stance, the Inc. Fund was powerfully backed up by the amicus brief for the United States, which asserted that apartheid was profoundly undemocratic.¹⁰⁰ The latter half of the NAACP’s supplemental statement maintained that racial variation is benign from a scientific point of view.¹⁰¹ From a policy perspective, not only does segregation contribute to psychological and social turmoil, but “[u]nder certain circumstances desegregation not only proceeds without major difficulties, but has been observed to lead to the emergence of more favorable attitudes and friendlier relations between races.”¹⁰²

Most of the Justices accepted the NAACP’s normative arguments, but several were uncertain that they were decisive as to the constitutional issues, and all were fearful of the political turmoil they believed would follow any decision requiring desegregation of public schools.¹⁰³ After reargument, and much soul-searching, a surprisingly unanimous Court in *Brown v. Board of Education* (“*Brown I*”)¹⁰⁴ accepted the Inc. Fund’s invitation to declare that race-based segregation in public schools violated the Equal Protection Clause. In *Bolling v. Sharpe*,¹⁰⁵ the Court reached the same result for schools in the District of Columbia, under the Due Process Clause of the Fifth Amendment. Chief Justice Warren’s *Brown* opinion invoked the importance of edu-

97. *Id.* at 4.

98. *Id.* at 6-7.

99. *Id.* at 8.

100. Brief of Amicus Curiae United States at 2-8, *Brown* (1952 Term, Nos. 8, 101, 191, 412, 448).

101. Social Science Statement, *supra* note 96, at 12.

102. *Id.* at 15.

103. The Court’s internal deliberations, including several conferences, two rearguments, and the deft work of Chief Justice Warren (who joined the Court between the first argument (1952 Term) and the second (1953 Term)), are comprehensively set forth in KLUGER, *supra* note 17, at 543-747; Hutchinson, *supra* note 75, at 34-44; Mark Tushnet & Katya Lezin, *What Really Happened in Brown v. Board of Education*, 91 COLUM. L. REV. 1867 (1991).

104. 347 U.S. 483 (1954); *see infra* Sections II.C.1 and III.A. (discussing *Brown I*).

105. 347 U.S. 497 (1954).

cation to citizenship, the demonstrated harms that segregated education visited on minority schoolchildren, and the intangible as well as tangible ways that a segregated school system could not deliver equal education.¹⁰⁶ The opinion did not exactly overrule *Plessy* and only disavowed its reasoning to the extent inconsistent with its own rationale.¹⁰⁷ Nonetheless, lower courts immediately agreed with the NAACP that *Brown's* disapproval of racial segregation extended beyond education. In a series of per curiam opinions, the Supreme Court silently affirmed those decisions.¹⁰⁸ *Brown I* was a great victory for the NAACP.

One year later, the Court decided *Brown v. Board of Education* (“*Brown II*”),¹⁰⁹ where the Court announced its remedy for the violations found in *Brown I*. This was not a victory for the NAACP. The Inc. Fund argued for “immediate” relief once the Court invalidated apartheid and for decrees requiring desegregation “as quickly as prerequisite administrative and mechanical procedures can be completed.”¹¹⁰ The Eisenhower Administration argued for remands to the various local courts where the cases originated, “with directions to carry out this Court’s decision as rapidly as the particular circumstances permit[.]”¹¹¹ Most of the states of the South submitted amicus briefs to the Court arguing for “a gradual adjustment” away from segregated schools, so as to accommodate the needs of school administrators and of those people unwilling to send their children to integrated public schools.¹¹² The Supreme Court took the middle road, following the Eisenhower Administration and not the NAACP. *Brown II* remanded the cases to their originating courts to fashion injunctive relief

106. *Brown I*, 347 U.S. at 493-94.

107. *Id.* at 495.

108. See *New Orleans City Park Improvement Ass’n v. Detiege*, 358 U.S. 54 (1958) (per curiam) (invalidating segregation in municipal parks and golf course); *Gayle v. Browder*, 352 U.S. 903 (1956) (per curiam) (city buses); *Mayor & City Council of Baltimore City v. Dawson*, 350 U.S. 877 (1955) (per curiam) (public bathhouses and beaches); *Holmes v. Atlanta*, 350 U.S. 879 (1955) (per curiam) (municipal golf course).

109. *Brown v. Board of Educ.*, 349 U.S. 294 (1955).

110. Brief for Appellants in Nos. 1, 2, and 3 and for Respondents in No. 5 on Further Reargument at 10-24, *Brown v. Board of Educ.*, 349 U.S. 294 (1955) (1954 Term, No. 1).

111. Brief for the United States on the Further Argument of the Questions of Relief at 27-29, *Brown II* (1954 Term, No. 1).

112. See, e.g., Brief of Amicus Curiae John Ben Shepperd Attorney General of Texas at 3-4, *Brown* (1954 Term, Nos. 1, 2, 3, 4); Brief of Amicus Curiae Harry McMullan Attorney General of North Carolina at 13-18, *Brown II* (1954 Term, Nos. 1, 2, 3, 4); Brief of Amicus Curiae Attorney General of Florida Richard W. Ervin at 3-56, *Brown II* (1954 Term, Nos. 1, 2, 3, 5) (justifying the “gradual adjustment” criterion by reference to an empirical survey by the state); Brief of Amicus Curiae Attorney General of Arkansas Tom Gentry at 13-21, *Brown II* (1954 Term, Nos. 1, 2, 3, 5), (arguing that the remedy in the case should be left to Congress, legislating pursuant to its authority under § 5 of the Fourteenth Amendment).

through “such orders and decrees . . . as are necessary and proper to admit to public schools on a racially nondiscriminatory basis and with all deliberate speed the parties to these cases.”¹¹³ What I am calling a politics of remediation got off to an exceedingly slow start with *Brown II*. As discussed below, the NAACP’s petition that the Equal Protection Clause required an integrated restructuring of American public education had a very uneven reception by judges in the half century since *Brown*.

At the same time the NAACP was closing in on its ambiguous victory in *Brown*, other grass-roots groups of African Americans were pursuing other kinds of campaigns against apartheid. The most famous were boycotts and sit-ins seeking to pressure private as well as public institutions to desegregate. The Montgomery bus boycott of 1955-56 was a grass-roots movement of black citizens who organized themselves to overturn racially segregated bus service. The boycott campaign not only revealed the power of grass-roots organizing (a fact well-appreciated by the NAACP as key features of its equal pay/facilities and desegregation litigations), but brought regional and then national publicity to the struggle of African Americans and to their leaders, Dr. Martin Luther King, Jr. and the new Southern Christian Leadership Conference (“SCLC”).¹¹⁴ The civil rights movement became a truly mass social movement. Although the SCLC and NAACP enjoyed a rivalrous relationship, they were both dedicated to a politics of recognition similar to that articulated in the NAACP’s constitutional briefs. The Inc. Fund’s victory in *Brown I* not only gave people of color tangible hope and inspiration that their normative vision was both right and achievable, but also gave them valuable white allies in their specific activities.¹¹⁵ For example, the boycotters in Montgomery were able to snatch victory from the jaws of defeat when the Supreme Court affirmed a lower court order declaring segregated municipal bus service unconstitutional under *Brown I*.¹¹⁶

Triumph in *Brown I* and Montgomery not only fueled a mass social movement of African Americans and their allies, but also triggered a politically intense “states rights” countermovement of whites

113. *Brown II*, 349 U.S. at 301.

114. See generally TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS 1954-63 (1988); GARROW, BEARING THE CROSS, *supra* note 17; ALDON D. MORRIS, THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT: BLACK COMMUNITIES ORGANIZING FOR CHANGE (1984).

115. See David J. Garrow, *Hopelessly Hollow History: Revisionist Devaluing of Brown v. Board of Education*, 80 VA. L. REV. 151, 152-57 (1994) (responding to Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7 (1994), and ROSENBERG, *supra* note 91).

116. See *Gayle v. Browder*, 352 U.S. 903 (1956) (per curiam); MORRIS, *supra* note 114, at 63.

opposed to racial integration.¹¹⁷ The negative political reaction anticipated by the NAACP and the Supreme Court slowly but inexorably grew into a regional revolt. Southern whites not only denounced *Brown I* with increasing fervor, but many of them openly argued for nullifying it, and not a few resorted to violence.¹¹⁸ The result was a series of confrontations between black people's politics of recognition and southern white people's politics of preservation. The confrontations took the form of official defiance or refusal to desegregate public schools, state laws barring or harassing the NAACP and other groups, and (in the early 1960s) mass arrests of peaceful black protesters by sometimes violent white police.¹¹⁹

The most apparent manifestation of southern resistance was the almost complete refusal of southern school districts to desegregate in compliance with *Brown I* and *Brown II*. Most of this resistance was passive, whereby school districts ignored *Brown II* or made minimal gestures toward token compliance, but much resistance was open and aggressive.¹²⁰ For a famous example of the latter, the governor and legislature of Arkansas directed the Little Rock school district to defy *Brown*, but the federal appeals court rejected this as a basis for delaying desegregation. In *Cooper v. Aaron*,¹²¹ the Supreme Court not only held the district to the terms of the lawful court decree, as the NAACP and Solicitor General urged, but went beyond the briefs to say that state officials had an obligation to obey the Constitution as it was construed by the Court.¹²² The Eisenhower Administration reluctantly supported the Court in Little Rock, and Congress in 1957 gave the Court further support by authorizing, in the first civil rights legislation since 1875, the Department of Justice to initiate litigation to support voting and other civil rights against recalcitrant localities. In *Griffin v. County School Board*,¹²³ the Court held that Prince Edward

117. See generally NUMAN V. BARTLEY, *THE RISE OF MASSIVE RESISTANCE* (1969); BENJAMIN MUSE, *VIRGINIA'S MASSIVE RESISTANCE* (1961); FRANCIS M. WILHOIT, *THE POLITICS OF MASSIVE RESISTANCE* (1973).

118. NEIL R. McMILLEN, *THE CITIZENS' COUNCIL: ORGANIZED RESISTANCE TO THE SECOND RECONSTRUCTION, 1954-64* (1971).

119. For detailed accounts of these and other means of segregationist resistance, see BARTLEY, *supra* note 117; ROSENBERG, *supra* note 91, at 107-56.

120. J. HARVIE WILKINSON III, *FROM BROWN TO BAKKE: THE SUPREME COURT AND SCHOOL INTEGRATION, 1954-1978*, at 79-102 (1979); cf. Mary Dudziak, *The Limits of Good Faith: Desegregation in Topeka, Kansas: 1950-1956*, 5 *LAW & HIST. REV.* 351 (1987) (noting that there was little integration even in Topeka).

121. 358 U.S. 1 (1958) (signed by all nine Justices); see also Daniel A. Farber, *The Supreme Court and the Rule of Law: Cooper v. Aaron Revisited*, 1982 *U. ILL. L. REV.* 387; Section II.E.1 (discussing *Cooper*).

122. *Cooper*, 358 U.S. at 18-19.

123. 377 U.S. 218 (1964).

County could not close down its public schools in an effort to evade *Brown's* mandate.

Southern states also lashed out at the persons and groups supporting civil rights for people of color. A number of states adopted laws aimed at the NAACP.¹²⁴ For example, Alabama adopted a law requiring the NAACP to register and reveal its membership lists, and then prosecuted and fined the Association for failing to comply. The NAACP challenged the state action as inconsistent with the "free speech and free association" rights guaranteed by the First Amendment.¹²⁵ This freedom, the NAACP maintained, was essential to the peaceful political "[s]olution of the American race problem."¹²⁶ The Supreme Court unanimously agreed in *NAACP v. Alabama*,¹²⁷ holding that the state could not interfere with the NAACP's politics of recognition. Crippled by local penalties, the NAACP was able to survive in the South only because of these constitutional protections.¹²⁸

Starting in 1960, civil rights activism took the form of peaceful sit-ins at segregated lunch counters and protest marches objecting to apartheid. Although the protesters were uniformly peaceful, they were often arrested for violating ordinances prohibiting breaches of the peace, disorderly conduct, obstruction of sidewalks, or parading without licenses. One after another, convictions of civil rights protesters rolled through southern state courts — only to be reversed by the U.S. Supreme Court.¹²⁹ The constitutional policy animating the reversals was that local authorities were treating civil rights dissenters differently than they would have treated any other group. Doctrinally, the reversals depended upon the facts of the different cases. Some went off on the due process ground that there was not sufficient evidence to

124. See Walter Murphy, *The South Counterattacks: The Anti-NAACP Laws*, 12 W. POL. Q. 371 (1959).

125. See Brief for Petitioner at 21-25, *NAACP v. Alabama*, 357 U.S. 449 (1958) (1957 Term, No. 91).

126. *Id.* at 21.

127. 357 U.S. 449 (1958).

128. The NAACP successfully relied on the *Alabama* precedent to challenge other indirect harassments in *Bates v. Little Rock*, 361 U.S. 516 (1960), *NAACP v. Button*, 371 U.S. 415 (1963), and *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539 (1963). See also Section II.F.1 (discussing these precedents).

129. See William J. Brennan Papers, Library of Congress, Container I: 77, Folder 6 [hereinafter Brennan Papers]. About two dozen appeals or petitions for certiorari by sit-in defendants, convicted by courts in seven southern states, came to the Court during the 1962 Term. In a series of memoranda to the Conference, the Chief Justice summarized each of the cases and presented a preliminary constitutional analysis. The Court reversed six convictions in opinions issued on May 23, 1963, and the remainder were subsequently reversed, for the most part summarily.

meet the statutory criteria for punishment,¹³⁰ others on the equal protection ground that protesters were discriminated against because of their race,¹³¹ and a good many on the First Amendment ground that the state was unreasonably regulating expressive activity.¹³²

Even without constitutional protections, the protests and marches of the early 1960s would have transformed America, for the international news coverage displayed images of idealistic black bodies pommelled by bigoted white clubs and firehoses.¹³³ Dr. King's pivotal Birmingham campaign energized the civil rights movement.¹³⁴ Within ten weeks of the city's capitulation to the SCLC's demands in May 1963, as many as 758 demonstrations occurred in 186 cities throughout the South.¹³⁵ Within six months, the movement had triumphed in its bold March on Washington, where Dr. King's "I Have a Dream" speech (a classic articulation of the politics of recognition) inspired a generation.¹³⁶ Less than a year after the march, President Johnson signed the Civil Rights Act of 1964, which provided federal enforcement mechanisms, including the withholding of funds from discriminatory programs, as a means for finally making actual progress against public segregation and further established rules against discrimination by private employers and accommodations as well.¹³⁷ A year after that, Johnson signed the Voting Rights Act of 1965, which gave teeth to the NAACP's arguments in *Guinn* and *Allwright* by establishing strong

130. *E.g.*, *Garner v. Louisiana*, 368 U.S. 157 (1961) (relying on the principle of *Thompson v. City of Louisville*, 362 U.S. 199 (1960)).

131. *E.g.*, *Peterson v. City of Greenville*, 373 U.S. 244 (1963); *see also* Section II.E.3 (discussing *Peterson*).

132. *E.g.*, *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969); *Cox v. Louisiana*, 379 U.S. 559 (1965); *Edwards v. South Carolina*, 372 U.S. 229 (1963). *But see* *Walker v. City of Birmingham*, 388 U.S. 307 (1969) (upholding conviction of protesters for violating state court injunction, even though based upon ordinance invalidated in *Shuttlesworth*). *See also* Section II.F.1 (discussing *Shuttlesworth*, *Cox*, and *Edwards*).

133. *See* Michael J. Klarman, *Civil Rights Law: Who Made It and How Much Did It Matter?*, 83 GEO. L.J. 433 (1994) (arguing that *Brown I* contributed indirectly to public rejection of apartheid, by galvanizing a series of confrontations between heroic blacks and idiotic whites which provoked international shock) [hereinafter Klarman, *Civil Rights Law*].

134. *See* GLENN ESKEW, *BUT FOR BIRMINGHAM: THE LOCAL AND NATIONAL MOVEMENTS IN THE CIVIL RIGHTS STRUGGLE* (1997).

135. THOMAS R. BROOKS, *WALLS COME TUMBLING DOWN: A HISTORY OF THE CIVIL RIGHTS MOVEMENT 1940-1970* at 210 (1974).

136. *See* TAYLOR BRANCH, *PILLAR OF FIRE: AMERICA IN THE KING YEARS, 1963-65* (1998); GARROW, *BEARING THE CROSS*, *supra* note 17, at 277-86.

137. 42 U.S.C. § 2000a-h (2000). On the background of the CRA and the critical importance of civil rights activism, *see* HUGH DAVIS GRAHAM, *THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY, 1960-1972* (1990).

direct as well as prophylactic protections against efforts to deny people of color their right to vote.¹³⁸

The political energy released by these developments pressed the civil rights agenda in many different directions. One was the completion of the NAACP's politics of recognition: invalidation of laws barring or criminalizing different-race marriages and cohabitation. The Supreme Court had ducked the issue in the 1950s,¹³⁹ presumably because white hysteria about interracial sexuality would have explosively mobilized further hostility to *Brown I*.¹⁴⁰ The NAACP renewed its objections in 1964, when it challenged the Court to strike down a Florida law criminalizing different-race cohabitation. Invoking the Japanese curfew and evacuation cases as well as *Brown I*, the Inc. Fund maintained that the statute was per se invidious; race must henceforth be "irrelevant" to statutory policies.¹⁴¹ The civil rights lawyers also directly challenged the normative coherence of the state's "racial purity" justification for the policy: scientists have debunked the idea of pure races and have shown that there are no relevant differences among the races, except perhaps for some superficial physical features; racial variation is not only benign, but Florida's treatment of it as a matter of consequence is a legacy of slavery that the Reconstruction amendments were centrally aimed at eradicating.¹⁴² A unanimous Court agreed with the NAACP in *McLaughlin v. Florida*,¹⁴³ and at the Inc. Fund's further petition the Court declared unconstitutional laws barring different-race marriages in *Loving v. Virginia*.¹⁴⁴ Part I of Chief Justice Warren's opinion for the unanimous

138. 42 U.S.C. § 1973a-p (2000). On the background of the VRA and the critical importance of civil rights activism, see DAVID J. GARROW, *PROTEST AT SELMA: MARTIN LUTHER KING, JR. AND THE VOTING RIGHTS ACT OF 1965* (1978). The best compilation of primary source material appears in 1 RACE, VOTING, REDISTRICTING AND THE CONSTITUTION: SOURCES AND EXPLORATIONS ON THE FIFTEENTH AMENDMENT 73-248 (Marsha J. Tyson Darling ed., 2001).

139. *Naim v. Naim*, 350 U.S. 985 (mem) (1956) (declining to review the Virginia Supreme Court decision, 87 S.E.2d 749 (Va. 1955), which upheld Virginia's racist anti-miscegenation law).

140. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 174 (1962) [hereinafter BICKEL, *LEAST DANGEROUS BRANCH*]; cf. Herbert Hovenkamp, *Social Science and Segregation Before Brown*, 1985 DUKE L.J. 624 (arguing that hysteria about interracial sexuality was at the heart of southern devotion to racial segregation generally).

141. Brief for Appellants at 12-13, *McLaughlin v. Florida*, 379 U.S. 184 (1964) (1964 Term, No. 11).

142. See *id.* at 20-26.

143. 379 U.S. 184 (1964) (overruling *Pace v. Alabama*, 106 U.S. 583 (1883)); see also *Anderson v. Martin*, 375 U.S. 399 (1964) (striking down Louisiana law requiring that election ballots signify race of candidates).

144. 388 U.S. 1 (1967); see Brief for Appellants, *Loving v. Virginia*, 388 U.S. 1 (1967) (1966 Term, No. 395) (making same arguments as the Inc. Fund's brief in *McLaughlin*).

Loving Court reasoned that racial classifications resting upon policies of white purity or, even worse, white supremacy were per se invalid under the Equal Protection Clause.¹⁴⁵

A second consequence of the new political support for civil rights was that there was finally progress toward the post-*Brown* politics of remediation for public school segregation. After enactment of the Civil Rights Act, the nation seemed publicly committed to the norm of desegregation, and the financial and legal resources of the federal government provided critical pressure on school districts to desegregate with more speed than deliberateness.¹⁴⁶ The new political climate emboldened the Inc. Fund to argue more insistently for transitions from *dual* systems of black and white schools to *unitary* systems of fully integrated schools. Judge John Minor Wisdom of the Fifth Circuit accepted the NAACP's understanding of *Brown* in a series of decisions culminating in *United States v. Jefferson County Board of Education*.¹⁴⁷ "[T]he only adequate redress for a previously overt system-wide policy of segregation directed against Negroes as a collective entity is a system-wide policy of integration."¹⁴⁸ Systemic injury required a systemic remedy. Wisdom directed that a strong remedial decree be entered, setting forth in detail how the school districts were to proceed in order to make the transition to a unitary system.¹⁴⁹

The Inc. Fund and the Johnson Administration's Solicitor General Erwin Griswold pressed *Jefferson* and the idea of immediate systemic remediation onto the Supreme Court in *Green v. County School Board*.¹⁵⁰ After leaving district courts with virtually no guidance as to what steps *Brown II* required segregated school districts to take, the Court interpreted *Brown II* to impose an "affirmative duty to take whatever steps might be necessary to convert to a unitary system in

145. *Loving*, 388 U.S. at 9-12; see also Section II.C.1 (discussing *Loving*).

146. Frank Read, *Judicial Evolution and the Law of School Integration Since Brown v. Board of Education*, 39 LAW & CONTEMP. PROBS. 7 (Winter 1975). The Act authorized the Justice Department to bring school desegregation lawsuits, which relieved the Inc. Fund of the full burden of litigating the cases. Pub. L. No. 88-352, § 407(a), codified at 42 U.S.C. § 2000c-6(a). The same law also barred federal monies from going to programs discriminating on the basis of race, under which HEW in 1965-66 promulgated tough guidelines requiring segregated school districts to improve their numbers if they wanted to receive federal funds. *Id.*; see also James Dunn, *Title VI, the Guidelines and School Desegregation in the South*, 53 VA. L. REV. 42 (1967).

147. 372 F.2d 836 (5th Cir. 1966).

148. *Id.* at 869.

149. *Id.* at 897-900.

150. 391 U.S. 430 (1968) (striking down a freedom-of-choice plan). See Brief for Petitioners at 28, *Green v. County School Bd.*, 391 U.S. 430 (1968) (1967 Term, No. 695); Memorandum of Amicus Curiae United States at 4-5, *Green* (1967 Term, No. 695).

which racial discrimination would be eliminated root and branch.”¹⁵¹ The duty of root and branch reform would, the Court suggested, be measured by results: if most black students were left in segregated schools by a plan, that was probably not a unitary system.

A third feature of the invigorated civil rights agenda was a more ambitious version of the old politics of protection that included some lessons from the newer politics of remediation. The NAACP and a growing array of allied groups continued to challenge state efforts to deprive people of color of their liberties, especially their electoral and criminal procedural rights.¹⁵² But the Association and its allies (like the ACLU) now conceptualized their objections more broadly and posed structural solutions to repeated rights violations. Thus, various civil rights groups pressed for elimination of poll taxes and other facially race-neutral means of black disenfranchisement.¹⁵³ They worked with the Department of Justice to craft the Voting Rights Act, which not only protected against discrimination, but also established tough prophylactic measures to assure federal monitoring of southern voting practices and rules. Lawsuits challenged a whole array of structures that assertedly undermined equal service of blacks on juries, and in 1964 the NAACP persuaded the Supreme Court to allow weak judicial monitoring of prosecutors’ use of peremptory challenges that excluded blacks from juries.¹⁵⁴ In 1963, the NAACP initiated a campaign against the death penalty, which had long been applied in a racially discriminatory manner. (Section II.D discusses this campaign in some detail.)

3. *The Politics of Remediation and the New Politics of Preservation, 1972-Present*

Before World War II, most white opposition to desegregation or racial equality was driven by open commitments to a natural law philosophy in which racial differences were viewed as profound and ma-

151. *Green*, 391 U.S. at 437-38. This was a burden on the school board “to come forward with a plan that promises realistically to work, and promises realistically to work *now*.” *Id.* at 439.

152. *See, e.g.*, *United States v. Mississippi*, 380 U.S. 128 (1965) (striking down literacy tests applied in a racially discriminatory manner); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (invalidating a gerrymander designed to minimize black voting); *see infra* Section II.E.1 (discussing *Gomillion*).

153. *See* U.S. CONST. amend. XXIV, § 1 (barring poll taxes); *Carter v. Jury Comm’n*, 396 U.S. 320 (1970) (challenging a structure for jury selection that yielded discriminatory patterns).

154. *See Swain v. Alabama*, 380 U.S. 202 (1965).

lignant and the white race's purity was threatened by racial mixing.¹⁵⁵ Such natural law attitudes were the primary engine for southern white "massive resistance" to *Brown I* and any form of racial integration in the 1950s.¹⁵⁶ As the civil rights movement gained political support outside the South, a more moderate oppositionist stance developed: denying that they viewed racial differences as malignant and sometimes conceding that change must come to the South, moderates opposed legal or constitutional requirements on pragmatic grounds — they were not needed, they would not work, they would be counterproductive, and so forth.¹⁵⁷ Whereas natural law conservatives sought to preserve as much of an enclave for racial segregation as they could, pragmatic conservatives did not publicly claim segregation as a goal, but instead argued against remedial responses that were "excessive" from the community's perspective.

Although driven by different substantive commitments and presentation, both natural law and pragmatic preservationists invoked the Constitution. For them, desegregation imposed by judges in Washington, D.C. was at war with (1) the federalist structure, where states were entitled to set local policy, without interference from the national government; (2) the constitutional separation of powers, whereby the popularly elected legislature is both the most legitimate and the most institutionally competent state organ to handle complex, polycentric issues of educational policy; and (3) the liberties of white people, such as their right not to associate with black people (and vice versa) and their right not to be subject to "reverse discrimination."¹⁵⁸

However expressed, the politics of preservation was a losing reactionary cause in the 1950s and early 1960s, when its "massive resistance" was dominated by natural law extremists who stubbornly insisted on formal apartheid. Once the civil rights agenda shifted in the

155. See Hovenkamp, *supra* note 140, at 627-37. This kind of thinking remained popular in the South after the war. See, e.g., DAN T. CARTER, *THE POLITICS OF RAGE: GEORGE WALLACE, THE ORIGINS OF THE NEW CONSERVATISM, AND THE TRANSFORMATION OF AMERICAN POLITICS* (1995) [hereinafter CARTER, *POLITICS OF RAGE*].

156. See BARTLEY, *supra* note 117, at 237-39, 320-22, 326-32 (providing detailed reporting of stated opposition to integration grounded in natural law); MCMILLEN, *supra* note 118, at 161-88 (giving a complicated description of the "scientific," religious, historical, and sociological strands of local oppositionists' natural law attitudes).

157. See BARTLEY, *supra* note 117, at 338-39 (documenting the decline of massive resistance and ascendance of pragmatic opposition); ROBERT A. CARO, *THE YEARS OF LYNDON JOHNSON: MASTER OF THE SENATE 182-201* (2002) (contrasting old-style segregationists like Theodore Bilbo with pragmatic segregationist Richard Russell, but icily demonstrating that Russell was privately just as racist as Bilbo).

158. For examples of these constitutionalized arguments against integration "forced" by federal judges upon unwilling states, see CARTER, *POLITICS OF RAGE*, *supra* note 155, at 136-38, 157-58 (Governor George Wallace); WILKINSON, *supra* note 120, at 80-84 (southern state court judges, mainly hysterical opponents).

late 1960s, from the virtually completed recognition phase (*Loving v. Virginia*) to a serious process of remediation, the politics of preservation shifted its focus to pragmatic arguments and gained support from moderates and nonracists. Once people of color could no longer claim that the state was openly disrespecting their equal citizenship, moderate whites were less impressed with the urgency of their claims. And when their constitutional demands shifted from formal equality to actual equality, preservationists could emphasize practical rather than dignitary arguments. The white audience was particularly receptive to pragmatic claims that black people's remedial demands would impose significant costs on the white community — not just the monetary costs of implementation, but more fundamentally (and speculatively) degradation in public schooling, reallocation of economic entitlements, and intrusions of federal bureaucrats and judges into local matters.¹⁵⁹ Elected President in 1968, Richard Nixon appealed to the new centrist politics of preservation: his campaign reaffirmed the anti-apartheid norm but aligned Nixon with southern and blue-collar whites by endorsing localism and equality of opportunity, shibboleths for the new opposition to civil rights.¹⁶⁰ Nixon's four Supreme Court appointments (1969-71) echoed his civil rights pragmatism. Always reasserting formal equality for Americans of all races and ethnicities, the Burger Court between 1970 and 1978 set forth limits to the Warren Court's potentially expansive constitutional protections for people of color.¹⁶¹ A moderate politics of preservation won an even bigger victory when Ronald Reagan was elected president in 1980. Prodded by post-civil rights federalists, the Reagan Court has more vigorously protected the racial status quo against civil rights perturbation, under the same doctrinal flags (localism, institutional competence, and white people's rights), but more aggressively waved.

The dialectic between a civil rights politics of remediation and

159. See generally Jonathan Rieder, *The Rise of the Silent Majority*, in *THE RISE AND FALL OF THE NEW DEAL ORDER, 1930-1980*, at 243-66 (Steve Fraser & Gary Gerstle eds., 1989). On the changing white opposition to the civil rights movement after the 1950s, see HOWARD SCHUMAN ET AL., *RACIAL ATTITUDES IN AMERICA: TRENDS AND INTERPRETATIONS* 99-170 (1997); ROBERT C. SMITH, *RACISM IN THE POST-CIVIL RIGHTS ERA: NOW YOU SEE IT, NOW YOU DON'T* (1995); DAVID T. WELLMAN, *PORTRAITS OF WHITE RACISM* 27-62, 223-47 (1993).

160. See CARTER, *POLITICS OF RAGE*, *supra* note 155, at 326-31, 349-51, 386-99; DEAN J. KOTLOWSKI, *NIXON'S CIVIL RIGHTS* (2001); STEVEN F. LAWSON, *IN PURSUIT OF POWER: SOUTHERN BLACKS AND ELECTORAL POLITICS, 1965-1982* at 121-57 (1985) (describing Nixon's "southern strategy" in 1968).

161. The relationship of the Burger Court to the Warren Court is complicated. The Burger Court expanded many Warren Court initiatives (criminal procedure, see Section II.A.1; the death penalty, see Section II.D), but on matters touching racial justice the Burger Court typically drew the line at issues settled by the Warren Court and refused to proceed further (see this Section, Section II.C, and Section II.E).

preservationist objections played out most dramatically in the *Brown II* cases. As public schools were actually integrated, often through federal busing orders, white communities often accepted pragmatic arguments that the civil rights remedy was undermining public education and that their own children were being harmed. Because moderates were unwilling to retreat from *Brown I*, the open battleground was what *Brown II* and *Green* required. Similar debates resulted from the civil rights movement's demands that the state revisit allocational policies that were racially neutral on their face but had racially discriminatory effects and that governments engage in affirmative action to integrate state workforces and public works projects. Although the doctrinal playing out of the constitutional arguments differed, the school desegregation, discriminatory effects, and affirmative action cases all illustrated the normative debate between the civil rights vision of an actually integrated America and the preservationist vision of a formally colorblind America.

a. *Busing and the School Desegregation Decrees.* As suggested above, the NAACP's politics of remediation insisted on more than formal desegregation of public schools, and the Supreme Court seemed to accept that vision in *Green*. After *Green*, district judges developed detailed decrees for actual school integration, usually in consultation with education experts and the school districts. For rural districts such as the one in *Green*, remediation was fairly straightforward, as there were few schools and students could be shifted around without much physical difficulty. Larger urban districts presented harder remedial trade-offs, for segregated housing patterns meant that more ambitious changes would have to occur — and the plans yielding the most integration were those requiring busing of students away from their neighborhood schools. The most famous effort was that of Judge James McMillan, whose decree reconfigured the Charlotte-Mecklenburg (North Carolina) school system, pervasively reassigned teachers and students with an eye toward achieving racial balance, and required that thousands of students be bused to school every day. The Fourth Circuit reversed this ambitious decree as overenforcing *Brown II*. The Supreme Court reinstated Judge McMillan's decree in *Swann v. Charlotte-Mecklenburg Board of Education*.¹⁶²

The briefs in the case reflected the shift in preservationist constitutionalism toward pragmatic arguments for going slowly, and away from abrasive claims of absolute entitlement. In *Green*, the state had argued that integration such as that pressed by the Inc. Fund was at war with the “fundamental right of parents to direct the education of

162. 402 U.S. 1 (1971). For a detailed account of the Justices' deliberation, see BERNARD SCHWARTZ, *SWANN'S WAY: THE SCHOOL BUSING CASE AND THE SUPREME COURT* (1986) [hereinafter SCHWARTZ, *SWANN'S WAY*].

their children” and with the deference courts should show to local educators.¹⁶³ The briefs in *Swann* hardly neglected these themes, but the most sophisticated brief, authored by Richmond attorney Lewis Powell, emphasized pragmatic reasons why Judge McMillan should not have required massive busing. On the one hand, Powell emphasized the enormous costs of busing — the psychic harms to children removed from familiar environments and the loss of the huge advantages of neighborhood schools.¹⁶⁴ On the other hand, he argued that the apparent advantage of busing — actual school integration — was unrealistic, because in the longer term busing would accelerate the flight of white parents and their children toward private schools or schools in areas without busing orders.¹⁶⁵

Powell’s argument appealed to Chief Justice Burger, who sought to impose federalism and cost-benefit limits on trial judges crafting *Green* remedial decrees. But Burger’s colleagues insisted on revisions to his draft opinions that were so extensive that the final, unanimous opinion in *Swann* was a complete triumph for the Inc. Fund.¹⁶⁶ Its central holding was that once a *Brown I* violation had been shown, the federal district court has broad equitable powers to remedy the violation. The opinion in *Swann* praised Judge McMillan and affirmed his decree, including his goal of achieving a 71/29 white/black balance in as many schools as possible. Although this remedy was explicitly race-based, the Court construed it as not imposing a rigid quota onto the school system and justified it as a flexible goal.¹⁶⁷ As a warning to judges in other cases, the Court admonished that *Brown* violations warranted “a presumption against schools that are substantially disproportionate in their racial composition.”¹⁶⁸ Finally, the Court upheld the busing requirement, based upon the trial judge’s finding that it was necessary to remedy the *Brown* violations and notwithstanding the

163. Brief for Respondents at 26, *Green v. County School Bd.*, 391 U.S. 430 (1968) (1967 Term, No. 695). This brief, in turn, was much more moderate than the fervent appeal to states rights and freedom of association in Brief for the Board of Supervisors of Prince Edward County, *Griffin v. County School Bd.*, 377 U.S. 218 (1964) (1963 Term, No. 592).

164. Brief of Amicus Curiae Commonwealth of Virginia at 22-25, *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (1970 Term, Nos. 281, 349).

165. *Id.* at 16.

166. Although Burger assigned the opinion for the Court to himself, Justices Brennan and Stewart engineered a palace coup that essentially took over the opinion-drafting process. See SCHWARTZ, *SWANN’S WAY*, *supra* note 162, at 100-84.

167. *Swann*, 402 U.S. at 22-25.

168. *Id.* at 26.

cost-benefit, federalism, and separation of powers objections raised by the various briefs.¹⁶⁹

As had earlier cases, *Swann* came from a southern or border state, but segregated schools were a national phenomenon. *Keyes v. School District No. 1*¹⁷⁰ was the first post-*Brown* Supreme Court desegregation case outside the South. Part of the Denver school system had been manipulated to achieve racially segregated schools in violation of *Brown I*, and the issue presented was whether that justified a city-wide remedy under *Green*. The Court was narrowly divided but inclined to follow Justice Brennan's proposal of a remand with instructions to consider city-wide busing. There was a complication. Lewis Powell, the pragmatic advocate in *Swann* but a Justice in *Keyes*, proposed that the Court extend *Green*'s broad remedial obligations beyond districts that had been segregated de jure to those that were segregated de facto. Powell's biographer maintains that there was a Court majority for his position, but because Powell parted company with these colleagues on the busing issue he was unwilling to join forces with Brennan to write his de facto segregation views into law.¹⁷¹ Because the Court never revisited the issue, the de jure/de facto distinction serendipitously became a controlling principle of law in the school desegregation cases.

In *Milliken v. Bradley*,¹⁷² Justice Powell's pragmatic preservationism placed an important limit on the *Green-Swann* remedial juggernaut. The issue was whether a finding of de jure school segregation in one school district (Detroit) justified a remedial order extending to other districts (the suburbs) if the district court found that racial integration was not possible otherwise. The state objected that this broad a remedy not only violated the due process rights of the non-culpable districts, but was at war with the principle of local control of public education.¹⁷³ The Nixon Justices, joined by Stewart, rested on a legal-

169. *Id.* at 29-31; *cf. id.* at 17-18 (noting that Title IV precluded the Justice Department from seeking busing as a remedy for school segregation but disclaiming that as a limitation on judicial orders).

170. 413 U.S. 189 (1973).

171. According to JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 302-05 (1994) [hereinafter JEFFRIES, JUSTICE POWELL], Brennan offered to redraft his opinion to discard the de facto-de jure distinction, but not at the cost of diluting *Swann*'s approval of busing. Because he was so opposed to busing for pragmatic reasons, *Keyes*, 413 U.S. at 237-52 (Powell, J., concurring in part and dissenting in part), Powell went his own way, and his attack on the distinction, *id.* at 223-36, drew the support only of Justice Douglas in the end. *Id.* at 214-17 (Douglas, J.).

172. 418 U.S. 717 (1974).

173. See Brief for Petitioners at 82-85, *Milliken v. Bradley*, 418 U.S. 717 (1974) (No. 73-434) (citing *Wright v. Council of the City of Emporia*, 407 U.S. 451, 469 (1972), and *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 49-50, 54 (1973) (Powell, J.)); see also Section II.C (discussing *Rodriguez*).

ism (the remedy should match the violation) but also endorsed Powell's pragmatic concerns with busing. "No single tradition in public education is more deeply rooted than local control over the operation of schools," wrote the Chief Justice; "local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process."¹⁷⁴ Although the Supreme Court, often over the dissents of Powell and Rehnquist, sometimes approved broad remedial orders sought by the Inc. Fund and other civil rights lawyers,¹⁷⁵ the tide turned with *Milliken*: for reasons of both federalism and pragmatism, local control of schools was a value that had to be considered alongside the rights of black schoolchildren.¹⁷⁶

Milliken can be viewed as a self-fulfilling prophecy: once white parents could count on the Supreme Court to respect district lines, they could predictably avoid integration by moving across those lines. And they did, in large numbers.¹⁷⁷ The complex interaction between private choice and public policy that generated white flight posed a dilemma for both the civil rights movement and the Supreme Court. The former pressed for ever-expanding (and expensive) remedial orders, which federal judges often issued, and which the Court sometimes affirmed, but only after soul-searching as to whether the orders struck the right balance between the goal of integration and the costs accompanying movement away from neighborhood schools.¹⁷⁸ Experience with this process has moved public debate beyond Brennan's faith in the efficacy of remedial injunctions (*Green*) and Powell's nostalgia for the neighborhood school (*Milliken*).

In the last decades of the millennium, the Inc. Fund maintained that white flight and ongoing school (re)segregation were in part a consequence of a multitude of public policies (especially housing) that

174. *Milliken*, 418 U.S. at 741-42 (citing the same cases as the state).

175. See, e.g., *Hills v. Gautreaux*, 425 U.S. 284 (1976).

176. See, e.g., *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 410 (1977); *Pasadena Bd. of Educ. v. Spangler*, 427 U.S. 424 (1976).

177. See JAMES COLEMAN ET AL., *TRENDS IN SCHOOL SEGREGATION, 1968-73* (1975) (laying out and supporting white flight thesis); RAYMOND WOLTERS, *THE BURDEN OF BROWN: THIRTY YEARS OF DESEGREGATION* (1984) (documenting the effects of white flight to resegregate the school districts involved in the *Brown* litigation). But see GARY ORFIELD, *THE GROWTH OF SEGREGATION IN AMERICAN SCHOOLS: CHANGING PATTERNS OF SEPARATION AND POVERTY SINCE 1968*, at 6 (1994) (disputing "white flight" thesis).

178. Divided Courts upheld broad and expensive remedial orders in *Missouri v. Jenkins*, 495 U.S. 33 (1990), and *Milliken v. Bradley*, 433 U.S. 267 (1977) ("*Milliken II*"), but even great expenditures of money toward magnet schools and other integrative measures have generated disappointing levels of actual integration.

influenced private choices.¹⁷⁹ Hence, civil rights attorneys defended not only extensive remedial decrees embodying attractive and comprehensive educational reform, but also housing desegregation, as people's preferences changed in response to new government programs.¹⁸⁰ In the same period, neo-federalists opposing further judicial remediation of a resegregated status quo denied the relevance of such a complex chain of causation or the capacity of remedial decrees to break that chain. Moreover, they questioned whether school districts in the 1990s had any continuing accountability for segregationist policies that ended in the 1960s.¹⁸¹ They insisted that, because primary accountability for educational policy must rest with state and local governments, district courts must tailor their remedial orders so as to protect the "local autonomy" of the school district.¹⁸² Populated by Reagan-Bush Justices, the Supreme Court has cautiously moved in the neo-federalist direction.¹⁸³ As Justice Kennedy put it, "[r]eturning schools to the control of local authorities at the earliest practicable date is essential to restore their true accountability in our governmental system."¹⁸⁴ The Rehnquist Court's message is that once local governments resume full control of school systems, they will be responsive to their obligation to preserve a unitary school system. That remains to be seen.

b. The Disparate Impact Cases. Well before *Loving*, the NAACP recognized that, even as apartheid was dying as a formal matter, its legacy remained strong as a functional matter. Especially in the South, many policies that did not deploy race as a classification still had strong race-based effects, either because they were devised or en-

179. See "School Segregation and Residential Segregation: A Social Science Statement," appendix to Brief for Respondents at app. 1a-28a, *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979) (No. 78-610).

180. See "School Desegregation: A Social Science Statement," appendix to Brief of Amici Curiae NAACP et al. in Support of Respondents, *Freeman v. Pitts*, 503 U.S. 467 (1992) (No. 89-1290) (signed by fifty-two eminent social scientists).

181. Brief for the United States as Amicus Curiae at 28-29, *Board of Educ. v. Dowell*, 498 U.S. 237 (1991) (No. 89-1080) [hereinafter U.S. Amicus Brief in *Dowell*] (signed by Bush Administration Solicitor General Kenneth Starr); accord Brief of the DeKalb County Board of Education as Amicus Curiae in Support of Petitioner at 24-28, *Bd. of Educ. v. Dowell*, 498 U.S. 237 (1991) (No. 89-1080) (signed by former Reagan Administration Solicitor General Rex Lee).

182. U.S. Amicus Brief in *Dowell*, *supra* note 181, at 21-24.

183. See *Freeman v. Pitts*, 503 U.S. 467 (1992) (holding that the district court has *Swann*-based discretion to order partial withdrawal of its jurisdiction once it finds local authorities have remedied the de jure violations, even though de facto segregation may persist); *Board of Educ. v. Dowell*, 498 U.S. 237, 238 (1991) (holding that the principle of local control requires dissolution of a *Green* remedial decree "after the local authorities have operated in compliance with it for a reasonable period [of time]").

184. *Freeman*, 503 U.S. at 490; see *id.* at 506-07 (Scalia, J., concurring) (ridiculing the notion that school districts have responsibility for continuing segregation).

forced in a race-based way or because they impacted people of color disproportionately for some other reason, such as poverty or joblessness, that could be understood as a legacy of apartheid.¹⁸⁵ In the early 1960s, the NAACP initiated constitutional litigation against the death penalty and the poll tax because they systematically disadvantaged people of color as a class.¹⁸⁶ These campaigns were relatively successful because they spoke to important deprivations that were historically tied to the policy of white supremacy and because remediation was not considered costly.

In the late 1960s, the Inc. Fund and other groups turned their attention to state and local policies allocating resources to government services and social welfare. Allocative policies that were formally race-neutral often operated in racially discriminatory ways, and civil rights attorneys argued that state and local governments were constitutionally obliged to revamp their policies to erase or ameliorate the race-based effects. Note the parallel with *Keyes*' de jure/de facto distinction. As in the school desegregation cases, preservationists and their allies were able to refocus the debate. When the state was not deploying a race-based classification, it was harder to understand its action as a violation of *Brown* and easier to worry about the costs of remediation. Because any remedy would explicitly redistribute resources away from white people to people of color, the former were especially open to objections. Supported by a cost-conscious Nixon Administration, state and local governments strongly resisted civil rights challenges to their allocative policies. As with school desegregation cases, state and local governments invoked principles of federalism and their own superior competence to make allocational choices.

These arguments first showed up in constitutional challenges to policies by which states apportioned welfare benefits.¹⁸⁷ In *Dandridge v. Williams*,¹⁸⁸ the Supreme Court rejected an equal protection attack on Maryland's policy of capping family grants irregardless of the size of the family. Justice Stewart's opinion for the Court found the policy indistinguishable from other social and economic regulations routinely afforded lenient judicial scrutiny but recognized that welfare laws "infected with a racially discriminatory purpose or effect" would be "in-

185. See Charles Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

186. Brief for Appellants at 19-22, *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966) (1965 Term, No. 48) (poll tax); Section II.D (death penalty).

187. On the welfare rights movement, see MARTHA F. DAVIS, *BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960-1973* (1993).

188. 397 U.S. 471 (1970).

herently suspect” and therefore subject to heightened scrutiny.¹⁸⁹ This dictum triggered a challenge to Texas’s welfare program, which included a computation procedure which funded recipients of Aid for Families with Dependent Children (“AFDC”) benefits at 75% of their recognized need, whereas recipients of other, adult-only programs were funded at 95-100% of their recognized need. Professor Ed Sparer’s brief for the challengers demonstrated in painful detail that the three advantaged programs had largely white beneficiaries, while the disadvantaged program (AFDC) was 85% minority (45% black, 40% latino).¹⁹⁰ The state claimed that governments could not reasonably be held liable for racially disparate consequences of their policies, unless there was evidence of discriminatory motives (none in the Texas case). Sparer responded that legislative motive was irrelevant: it was hard to prove, especially after *Loving* exposed any kind of race-based preference to lethal review; the reason for discrimination had little bearing on its effect on racial minorities deprived of needed state benefits and confronted with legislative indifference to their plight; if legislative motive were key, then the legislature could easily fix old discriminatory policies by reenacting them under a clean record.¹⁹¹

The four Nixon Justices were unreceptive to Sparer’s arguments; they and Justice White lined up behind Chief Justice Burger’s view that “Texas’ allocation among the groups is beyond our reach absent invidious discrimination,” namely, a showing of discriminatory intent.¹⁹² Justice Rehnquist’s opinion for the Court in *Jefferson v. Hackney*¹⁹³ ruled that, notwithstanding the significantly different racial impact, Texas’s allocation scheme was legitimate under the Equal Protection Clause, so long as it was “lacking in racial motivation” and was otherwise rational. Rehnquist’s reasoning was institutional: any allocative state program is going to affect different racial groups differently, and so heightened scrutiny for disparate racial impacts, as Sparer was arguing, would inject the Court into “‘intractable economic, social, and even philosophical problems presented by public

189. *Id.* at 485 n.17; *see also* *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (interpreting Title VII to regulate employment policies having racially disparate impacts unless they can be justified by business necessity).

190. Brief for Appellants at 29, *Jefferson v. Hackney*, 406 U.S. 535 (1972) (No. 70-5064).

191. *Id.* at 49-51 (elaborating on the Court’s holding and reasoning in *Palmer v. Thompson*, 403 U.S. 217 (1971) (holding legislative intent irrelevant to show city closed down swimming pools rather than integrate them)).

192. Douglas Conference Notes for *Jefferson v. Hackney* (Feb. 25, 1972), in William O. Douglas Papers, Library of Congress, Container 1559 (O.T. 1971, Opinions, Misc. Memos. No. 70-5064) [hereinafter Douglas Papers].

193. 406 U.S. 535, 548 (1972).

welfare assistance programs [which] are not the business of this Court.’¹⁹⁴

Following immediately on the heels of *Hackney* was a challenge to Texas’s system for financing public schools, *San Antonio Independent School District v. Rodriguez*.¹⁹⁵ Plaintiffs’ main argument was that the neediest districts were shortchanged by the Texas system because of their poverty, but they and their amici (including the Inc. Fund and the ACLU) more broadly argued that the Texas system was subject to heightened scrutiny because it was grounded upon wealth-based classifications *or* had strong race-based effects; the education deficit assured by the financing inequities fell mostly on latino and black schoolchildren.¹⁹⁶ Justice Powell’s opinion for the Court (the Nixon Justices plus Stewart) ignored the racial impact argument but, tellingly, responded to the wealth argument with the admonition, citing *Hackney*, that the challengers had failed to show that “the financing system is *designed* to operate to the peculiar disadvantage of the comparatively poor.”¹⁹⁷ At the same time the Court was embracing a restrictive view of judicial review of policies having race-based effects in *Rodriguez*, it was accepting the importance of the *de jure/de facto* distinction for school segregation in *Keyes*. The die was cast against vigilant judicial scrutiny of public policies with disproportionate effects on people of color by the end of 1973.

Before the Inc. Fund could engineer a better test case for its view that state policies bearing disproportionately on people of color should be subjected to heightened scrutiny, the Court seized upon a statutory case to settle the issue. *Washington v. Davis*.¹⁹⁸ involved claims that the District of Columbia’s reading test for police officers excluded a disproportionate number of black applicants. Plaintiffs’ original complaint alleged a constitutional violation, but the lower court granted relief under Title VII, which went into effect after the complaint had been filed. On appeal to the Supreme Court, the parties treated this as a Title VII case. Even after constant (almost comical)

194. *Id.* at 551 (quoting *Dandridge v. Williams*, 397 U.S. 471, 487). Three Justices dissented from this constitutional analysis. *Id.* at 551 (Douglas, Brennan, J.J. dissenting); *id.* at 558 (Marshall, Brennan, J.J., dissenting).

195. 411 U.S. 1 (1973).

196. This was an ancillary point in the Brief for Appellees at 16-17, *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973) (No. 71-1332), but was the lead argument in Brief [Amici Curiae] of ACLU [et al.] at 14-23, *Rodriguez* (No. 71-1332), and Brief of Amicus Curiae NAACP Legal Defense Fund and Educational Fund, Inc. at 3-9, *Rodriguez* (No. 71-1332).

197. *Rodriguez*, 411 U.S. at 26 (emphasis added); *see also id.* at 27 n.62 (citing *Jefferson v. Hackney*, 406 U.S. 535 547-49 (1972), and John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1258-59 (1970)).

198. 426 U.S. 229 (1976).

prompting from the Nixon Justices to take a harder line, both federal and D.C. respondents repeatedly conceded at oral argument that Title VII applied and that its disparate impact approach was the same as the equal protection approach.¹⁹⁹ Undeterred by lack of support from the government, the Court ruled that it would not apply heightened scrutiny to a state policy having a racially discriminatory impact unless the policy was also racially motivated.²⁰⁰ The reasons were the same institutional process ones given in *Hackney*.

Although they did not litigate any of these cases (and participated only in *Rodriguez*, as an amicus), the Inc. Fund and its allies found its subsequent disparate impact challenges doomed by the difficulties in proving racial motivation. Precisely as Sparer had predicted in *Hackney*, racial motivation has been all but impossible to prove in most cases, because everyone now knows not to make public racist statements and most government decisions are complicated enough that they can be plausibly defended along non-racial lines. Accordingly, serious challenges, backed up by impressive statistics, have failed against racially disparate public housing policies,²⁰¹ sentencing for drug crimes,²⁰² and impositions of the death penalty.²⁰³ Moreover, neo-federalists have deployed *Washington v. Davis* to support their restrictive understanding of state responsibility for continuing school segregation: once the local government has taken steps to end de jure segregation, courts should not impose further responsibility on it unless there is evidence of discriminatory intent.²⁰⁴

c. The Affirmative Action Cases. Even under the regime of *Washington v. Davis*, public as well as private institutions had incentives to integrate and to do so in a non-token manner.²⁰⁵ These incen-

199. See Oral Argument in *Washington v. Davis*, 426 U.S. 229 (1976), in 88 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 355, 362, 366-67, 380-81 (Philip B. Kurland & Gerhard Casper eds., 1977) [hereinafter LANDMARK BRIEFS]. After Mark Evans, representing the federal respondents, made this concession, *id.* at 369, Justice Rehnquist tossed *Jefferson v. Hackney* in his face — and Evans still backed away from the argument that won him the case! *Id.* at 370-71.

200. *Washington v. Davis*, 426 U.S. at 239-45.

201. *Village of Arlington Heights v. Metro. Hous. Dev. Co.*, 429 U.S. 252 (1977).

202. *United States v. Armstrong*, 517 U.S. 456 (1996). The equal protection issue is exhaustively discussed in RANDALL KENNEDY, RACE, CRIME, AND THE LAW 357-59, 364-86 (1997) [hereinafter KENNEDY, RACE, CRIME]; David Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283 (1995).

203. *McCleskey v. Kemp*, 481 U.S. 279 (1987); see also KENNEDY, *supra* note 202, at 328-50 (exhaustively discussing *McCleskey*); Section II.D (discussing *McCleskey*).

204. See U.S. Amicus Brief in *Dowell*, *supra* note 181, at 19-20, 27-29 (submitted by Bush Administration Solicitor General Kenneth Starr).

205. (1) Many of the institutions had a history of racial discrimination and so were vulnerable to challenges under *Washington v. Davis*. (2) After 1972, Title VII applied to federal, state, and local employers, which risked *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971),

tives generated a variety of policies using race as a basis for preference or even a quota for allocating jobs, college spots, and government contracts. Although there was some diversity of opinion, most civil rights leaders favored affirmative state action as a swift, and perhaps necessary, mechanism to integrate state colleges, workforces, and public programs. Were these policies constitutional? The Court in *Swann* had approved remedial uses of race-based classifications by trial judges crafting *Green* decrees.²⁰⁶ But the “benign” use of race in allocating scarce benefits posed more intense political and constitutional issues.²⁰⁷ “Affirmative action” was an object of a civil rights politics of remediation — but “reverse discrimination” became an intense focus of a new post-apartheid politics of preservation, because it was an issue that infuriated extremists who hated the idea of integration, irked pragmatists who supported integration only so long as it was costless, and disturbed liberals who believed in the “colorblind constitution.”²⁰⁸

The multifaceted opposition to affirmative action showed up in the first major Supreme Court case, *DeFunis v. Odegaard*.²⁰⁹ Marco DeFunis, a Sephardic Jew, was denied admission to the University of Washington School of Law, while people of color with lower test scores were admitted under an affirmative action plan. DeFunis’s lawyers argued that affirmative action violated the colorblindness requirement of *Loving* and created “special privileges” for blacks while it denied whites “fundamental” rights.²¹⁰ Writing for amicus B’nai B’rith, Professors Alexander Bickel of Yale and Philip Kurland of Chicago took a broader oppositionist view. Linking quotas for blacks with the *numerus clausus* that has traditionally been deployed to ex-

lawsuits if their workforces were racially imbalanced. (3) Most important, social norms had changed in many locales: diversity within the institution was increasingly considered a positive goal, not just something the institution “had” to do.

206. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971) (holding that it is allowable for school officials to aim at a racial balance in assigning students and teachers to various schools, “in order to prepare students to live in a pluralistic society[.]” and that trial judges have “broad power to fashion a remedy that will assure a unitary school system”).

207. Note that the use of race in redistricting also raises identity politics as well as constitutional issues. The Supreme Court upheld state decisions challenged on race grounds, see *United Jewish Orgs. v. Carey*, 430 U.S. 144 (1977), until *Shaw v. Reno*, 509 U.S. 630 (1993), and its progeny. See also Section II.E.1 (discussing gerrymandering cases).

208. For intense opposition from legal liberals, see Lino A. Graglia, *Special Admission of the “Culturally Deprived” to Law School*, 119 U. PA. L. REV. 351 (1970); John Kaplan, *Equal Justice in an Unequal World: Equality for the Negro — The Problem of Special Treatment*, 61 NW. U. L. REV. 363 (1966).

209. 416 U.S. 312 (1974).

210. Petitioners’ Opening Brief at 12, 14, *DeFunis v. Odegaard*, 416 U.S. 312 (1974) (No. 73-235) (emphasis in original).

clude Jews, they objected that affirmative action was inconsistent with the fundamental values of a liberal society: "For a quota is not merely a racial classification. It is an attribution of status — of caste — fixed by race. A quota necessarily legislates not equality, but a governmental rule of racial differences without regard to an individual's attributes or merits."²¹¹ The state's position was that affirmative action in service of racial integration was "benign" and therefore not unconstitutional under *Loving*; considering race was a means to undermine racism, not support it. Civil rights amici argued that race-based preferences were not "invidious" when they were deployed for remedial purposes, to implement long-overdue integration and overcome historical racial disadvantages.²¹² Bickel and Kurland responded that a "quota system is admittedly not 'benign' so far as the excluded [white] majority applicants are concerned" — nor was there any basis for denying that it is " 'invidious' and 'stigmatizing' for the category of applicant labeled by race as incapable of meeting the standards applied to others."²¹³ Quotas would tar all people of color, as a symbolic statement that " '*black people just don't have it* ' " and need special government help.²¹⁴ In short, race-based preferences are unconstitutional for two interrelated reasons: preferring a black person because of her race deprives the white person of his right to be treated fairly *and* promotes rather than undermines racist stereotypes and prejudices.

Reflecting their collective uncertainty, the Court dismissed the appeal as moot.²¹⁵ Only Justice Douglas reached the merits; he agreed with Bickel and Kurland that the race-based preference should be subjected to strict scrutiny and invalidated.²¹⁶ The issue returned to the Court when Allan Bakke challenged the racial quota program for admission to the University of California (Davis) School of Medicine. By 1978, people's views on affirmative action had hardened, and it had

211. Brief of Amicus Curiae Anti-Defamation League of B'nai B'rith at 19, *DeFunis v. Odegaard*, 416 U.S. 312 (1974) (No. 73-235) [hereinafter Brief of Anti-Defamation League in *DeFunis*].

212. Brief of The Lawyers' Committee for Civil Rights Under Law as Amicus Curiae in Support of the Decision Below at 9-20, *DeFunis v. Odegaard*, 416 U.S. 312 (1974) (No. 73-235); *accord* Brief of NAACP Legal Defense and Educational Fund, Inc., as Amicus Curiae, *DeFunis* (No. 73-235); Motion of the EEOC for Leave to File a Memorandum as Amicus Curiae and Memorandum, *DeFunis* (No. 73-235).

213. Brief of Anti-Defamation League in *DeFunis*, *supra* note 211, at 24 (citing Lino A. Graglia, *Special Admission of the "Culturally Deprived" to Law School*, 119 U. PA. L. REV. 351, 353-59 (1970)).

214. *Id.* at 25 (quoting THOMAS SOWELL, *BLACK EDUCATION, MYTHS AND TRAGEDIES* 292 (1972)).

215. *DeFunis*, 416 U.S. at 319-20; *cf. id.* at 348 (Brennan, J., dissenting) (finding, with three other Justices, the case not moot).

216. *Id.* at 333-44 (Douglas, J. dissenting).

become a highly polarizing issue: liberals were for it, whatever misgivings they had previously; conservatives were against it, as a violation of white people's rights and as a promotion of race divisions; and ambivalent moderates searched for mediating solutions that accommodated different interests and did not exacerbate racial divisions.

Accordingly, *Regents of the University of California v. Bakke*²¹⁷ attracted more amicus briefs than any previous civil rights case, and the briefs were more apocalyptic than in *DeFunis*. The state and the amicus briefs for the ABA, ACLU, the NAACP, and various college and university groups emphasized the discretion universities needed to admit racial minorities for either remedial or diversity purposes. In an ironic twist, the Inc. Fund emphasized that judicial activism against affirmative action was inconsistent with the original intent of the Fourteenth Amendment's framers.²¹⁸ The challenger and his amici (including Professor Kurland's brief for B'nai B'rith) argued that the quota system violated white men's equality rights and promoted race divisions.

A highly polarized Court agonized all term over *Bakke* (Section II.C.3). Its Solomonian resolution was delivered by Justice Powell, who subjected the race-based quota to strict scrutiny and invalidated it — but with a roadmap that the government could use to craft policies that would pass muster.²¹⁹ Powell accepted the preservationist arguments for strict scrutiny, namely, that race-based quotas not only violated white people's rights, but also promoted race animosity.²²⁰ But he also accepted the civil rights argument that remediation of past discrimination or the attainment of a diverse student body could justify race-based affirmative action, albeit (for Powell) only if the program were narrowly tailored.²²¹ Although Powell's solo opinion did not for-

217. 438 U.S. 265 (1978); see also Section II.C.3 (discussing *Bakke*). The leading account is BERNARD SCHWARTZ, *BEHIND BAKKE: AFFIRMATIVE ACTION AND THE SUPREME COURT* (1988). See also HOWARD BALL, *THE BAKKE CASE: RACE, EDUCATION, AND AFFIRMATIVE ACTION* (2000); JEFFRIES, *JUSTICE POWELL*, *supra* note 171, at 455-501.

218. Brief of Amicus Curiae NAACP Legal Defense and Educational Fund, Inc. at 10-53, *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (No. 76-811). This is ironic because the Inc. Fund believed in a dynamic Equal Protection Clause and because the Justices most interested in original intent (Burger and Rehnquist) were least open to the Inc. Fund's position.

219. Technically, Powell delivered the judgment of the Court, but he spoke only for himself on the constitutional issue. Four Justices (Burger, Stewart, Rehnquist, Stevens) believed the preference program violated Title VI of the 1964 Civil Rights Act; four other Justices (Brennan, White, Marshall, Blackmun) believed the program consistent with both Title VI and the Constitution.

220. *Bakke*, 438 U.S. at 294-95 n.34 (Powell, J.).

221. *Id.* at 307-10 (accepting the remediation goal); *id.* at 311-15 (accepting the diverse student body goal). *But see id.* at 315-19 (finding that this odd quota program was not narrowly tailored to the diversity goal in *Bakke's* case). Procedurally, Powell made a point not suggested by the parties, that it ought to make a difference which governmental body

mally resolve the affirmative action issue, it held out that possibility. A divided Court more or less followed Powell's roadmap in *Fullilove v. Klutznick*,²²² which upheld a set-aside program for federal contracts to racial minorities. The Chief Justice's plurality opinion found the racial quotas defensible because they were adopted by Congress after full debate and persuasive findings that the program was needed to remedy past discrimination against minority contractors.²²³

An emboldened politics of preservation in the 1980s challenged Powell's pragmatic compromise. Although traditionalist and civil rights groups generated few new arguments beyond those already developed in *DeFunis* and *Bakke*,²²⁴ the former gained ground politically and, as a result, judicially. The Reagan Administration's Solicitor General Charles Fried powerfully supported the critics of affirmative action in *Wygant v. Jackson Board of Education*²²⁵ and *City of Richmond v. J.A. Croson Co.*²²⁶ The *Wygant* brief is a preservationist classic. It led with the idea that affirmative action is an unfortunate retreat from the NAACP's correct argument in *Brown* that the Constitution "prohibits a state from making racial distinctions in the exercise of governmental power."²²⁷ The NAACP's Inc. Fund, of

adopted the affirmative action program. Thus, an unelected group of administrators is not the most legitimate body to decide this important issue; the considered judgment, with factual findings, of a state or (better yet) national legislature is entitled to greater constitutional leeway. *Id.* at 308-10.

222. 448 U.S. 448 (1980).

223. *Id.* at 475-77 (Burger, C.J., joined by White & Powell, JJ.) (holding that Congress has authority to adopt set-aside legislation and its findings support the remediation of past discrimination goal); *id.* at 480-92 (finding that set-aside law's means are reasonably related to the remediation goal); *id.* at 496-517 (Powell, J., concurring) (explaining why the congressional set-aside program met all the procedural findings by a legitimate policy organ and substantive remediation requirements of his *Bakke* roadmap); *see also id.* at 517-21 (Marshall, J., joined by Brennan & Blackmun, JJ, concurring) (federal program satisfies the intermediate scrutiny standard followed by these Justices in *Bakke*).

224. The briefs for all sides in *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1989), *City of Richmond v. Croson*, 488 U.S. 469 (1989), and *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), were more voluminous, less original, and more repetitious than the briefs in the earlier cases. By the 1990s, there were a number of talented empiricists working on affirmative action issues, but their work cut in several different directions and conclusions were mired in controversy. *See, e.g., Symposium: The Law and Economics of Racial Discrimination in Employment*, 79 GEO. L.J. 1619 (1991) (providing an excellent survey of, and contributing to, the empirical literature).

225. 476 U.S. 267 (1986).

226. 488 U.S. 469 (1989).

227. Brief for Amicus Curiae United States in Support of Petitioners at 4, *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (No. 84-1340) (quoting Brief for Appellants in Nos. 1, 2, and 4 and Respondent in No. 10 at 21, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)) [hereinafter U.S. *Wygant* Brief]. To the same effect was Brief for the United States as Amicus Curiae Supporting Appellee, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (No. 87-998).

course, did not believe its argument in *Brown* supported the same level of scrutiny for remedial racial preferences, to which Fried responded that a neutral-as-to-beneficiary approach was required by the original intent of the Fourteenth Amendment's framers, by the Court's precedents (starting with *Hirabayashi* and including the Court's sex discrimination precedents), and by the nation's political experience, which revealed that racial minorities were no longer politically powerless.²²⁸ In closing, Fried set the prestige of the Department of Justice behind Bickel and Kurland's "promotion of racism" argument — remedial preferences just as easily reinforce stereotypes and deepen hostility as reduce the same.²²⁹ The punch line: the state cannot use race-based preferences.

The Court struck down the racial preference in *Wygant*, but again, as in *Bakke* and *Fullilove*, without a majority opinion. Once four Reagan Justices were in place (Rehnquist [elevated to Chief Justice, 1986], O'Connor [1981], Scalia [1986], and Kennedy [1988]), there was a Court. *Croson* ruled that any race-based classification — whatever its motivation — would be subject to strict scrutiny and that the state can justify some race-based preference with nothing less than a showing that the underrepresentation of minorities is a product of past discrimination.²³⁰ Writing for the Court, Justice O'Connor concluded that generalized assertions of past discrimination constitute no sufficient justification for a race-based preference, and quotas are generally not reasonable remedies even when there has been a showing of past discrimination.²³¹

The politics of preservation scored a further triumph in *Adarand Constructors, Inc. v. Peña*.²³² Not only did a majority — the four Reagan Justices and Bush appointee Clarence Thomas — announce the same strict scrutiny for federal race-based set-aside programs, overruling or narrowing *Fullilove*,²³³ but Justices Scalia and Thomas issued statements urging a completely colorblind Constitution. Scalia's

228. See U.S. *Wygant* Brief, *supra* note 227, at 8-10 (arguing that precedent requires the same approach); *id.* at 11-15 (arguing that original intent requires the same approach); *id.* at 16-20 (arguing that political theory requires the same approach).

229. *Id.* at 20-21.

230. *Croson*, 488 U.S. at 493-98 (O'Connor, J., joined by Rehnquist, C.J., and White & Kennedy, JJ.); see *id.* at 520-25 (Scalia, J., concurring) (endorsing strict scrutiny as well, but stricter than O'Connor).

231. *Id.* at 498-99 (O'Connor, J., for the Court).

232. 515 U.S. 200 (1995).

233. See *id.* at 213-27. Justice O'Connor spoke for the Court here, except insofar as her opinion was inconsistent with Justice Scalia's concurrence. See *id.* at 239 (Scalia, J., concurring). Justice O'Connor's opinion for the Court, *id.* at 227, overruled in part *Metro Broadcasting Inc. v. FCC*, 497 U.S. 547 (1990), which held that intermediate scrutiny is the standard required for judicial review of federal "benign" racial preferences.

statement, “[i]n the eyes of the government, we are just one race here. It is American[,]”²³⁴ is half schmaltz, half inspiration. Thomas’s was a new voice of color, giving greater authenticity to the promotion of racism argument: “racial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination Inevitably . . . [benign discrimination] programs engender attitudes of superiority or, alternatively, provoke resentment among those who believe that they have been wronged by the government’s use of race.”²³⁵

B. *Women’s Rights Movements*

White women were disadvantaged differently than African Americans at the end of the nineteenth century. They were of course the largest group in the population. Men did not fear and hate them in the same way they feared and hated people of color; women were differently situated by biology in a way black men were not, for they and they alone bore the promise and the costs of pregnancy. Violence against white women was within the intimate reserves of the family, including marital rape and unwanted pregnancies. Where people of color were subordinated by the white supremacy ideology, enforced through public segregation and anti-miscegenation laws, women were subordinated by the ideology of separate spheres, enforced through their legal exclusion from voting, jury service, military service, and public and private employment. Black women, of course, suffered under both kinds of discrimination: they were denigrated by both apartheid and by women’s exclusions.²³⁶ Also unlike the cause of civil rights, which seemed all but crushed in the first decades of the new century, women’s causes were flourishing: the women’s temperance movement won ratification of the Eighteenth Amendment instantiating Prohibition, and the Nineteenth Amendment gave women the right to vote in 1920.²³⁷ Yet once they had won the franchise, feminist

234. *Adarand*, 515 U.S. at 239 (Scalia, J., concurring in part and in the judgment).

235. *Id.* at 240-41 (Thomas, J., concurring in part and in the judgment).

236. See generally ANGELA Y. DAVIS, *WOMEN, RACE, AND CLASS* (1981); GLENDA GILMORE, *GENDER AND JIM CROW* (1996); ROSALYN TERBORG-PENN, *AFRICAN AMERICAN WOMEN IN THE STRUGGLE FOR THE VOTE, 1850-1920* (1998).

237. On these remarkable but different feminist campaigns, see JOSEPH GUSFIELD, *SYMBOLIC CRUSADE: STATUS POLITICS AND THE AMERICAN TEMPERANCE MOVEMENT* (1986) (discussing the Eighteenth Amendment); Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 960-1022 (2001) [hereinafter Siegel, *She the People*] (discussing the Nineteenth Amendment).

politics went into partial hibernation, at exactly the same time when blacks were becoming more politically and constitutionally active.²³⁸

Notwithstanding these and other differences, women's movements shared a core similarity with civil rights ones: their politics, including their constitutional politics, was driven by the traits (race and sex) that set them apart from "the norm" (white males). Like blacks, women objected that the state not only failed to protect them against private violence, but was itself an instrument of violence against them. Just as the state tolerated violence, including lynching, against black men, so it tolerated rape, including marital rape, against women. And the state was a direct instrument of violence against women insofar as it criminalized medical technologies by which women could control the terms of their pregnancies, specifically, the promulgation of articles of contraception and the practice of abortion. Like increasing numbers of black people, increasing numbers of women objected that the law unfairly disrespected them as well as denied them tangible opportunities. If apartheid laws effectively excluded people of color from full citizenship because of their race, sex-exclusionary laws did the same for women. The disrespect and exclusion were normatively indefensible: just as people of color ought to have all the opportunities and duties as white people, so women ought to have the same opportunities and duties as men. Sex, like race, is a benign variation, largely irrelevant to state policy.

Inspired by the successes of the civil rights movement, women engaged in a similar politics of recognition, sweeping away most state discriminations on the basis of sex in Supreme Court opinions of the 1970s — at the very same time the country was debating and ultimately rejecting the Equal Rights Amendment. Also like the civil rights movement, the women's rights movement focused on issues of affirmative state remediation as soon as it had significantly achieved its equality goals; many of women's remedial measures have been successfully blocked by traditionalists, however. The biggest differences between the constitutional experiences of blacks and women relate to abortion. Although initially conceived as a matter of protecting women against health dangers and economic depletion, the politics of abortion was reconceived as a matter of women's equal citizenship, followed by the view that the state has an affirmative duty to provide women with support for their family planning choices. Viewing the fetus as a human person, the politics of preservation saw matters exactly the other way: its members were protecting fetuses, seeking recogni-

238. See NANCY F. COTT, *THE GROUNDING OF MODERN FEMINISM* 96-97 (1987); ELEANOR FLEXNER, *CENTURY OF STRUGGLE: THE WOMAN'S RIGHTS MOVEMENT IN THE UNITED STATES* 222-345 (2d ed. 1975); AILEEN S. KRADITOR, *THE IDEAS OF THE WOMAN SUFFRAGE MOVEMENT, 1890-1920*, at 261-64 (1965).

tion of the value of human life, and opposing any policy that promoted abortion as a method of family planning.

1. *The Politics of Protection: Women's Control of Their Own Bodies, 1916-72*

After ratification of the Nineteenth Amendment, various politics of protection dominated public discourse about women's rights for the next half-century. There were three kinds of politics that sought to protect women against harm; only one of these was to emerge as a vigorous feminist politics, however. To begin with, there was a modest *sexual politics* that sought better enforcement of existing rape laws and reform of the many loopholes that effectively immunized much sexual assault from legal prosecution. Although rape reform was a matter of feminist and legislative attention throughout the twentieth century,²³⁹ it was not notably successful in changing the law to protect women's interests until the 1970s.²⁴⁰

In contrast, a *paternalist politics* of protection was highly successful, albeit ambiguously feminist. Such politics created special rules for women's participation in the workplace, protecting them and their families against dangerous or excessive work.²⁴¹ Progressives successfully defended these laws against charges that they violated the liberty of contract judges found in the Due Process Clause. Less than three years after *Lochner* struck down a state law setting maximum hours for bakery employees, *Muller v. Oregon*²⁴² evaluated a state law setting maximum hours for female employees. A unanimous Supreme Court

239. See generally SUSAN ESTRICH, *REAL RAPE* (1992) (tracing the slow evolution of rape law in the twentieth century); Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CAL. L. REV. 1373 (2000) (detailing women's resistance to the criminal law's exemption for marital rape, starting in the nineteenth century but not successfully nullifying or even modifying such exemptions until the late twentieth).

240. See, e.g., *People v. Liberta*, 474 N.E.2d 567 (N.Y. 1984) (invalidating marital rape exemption as constituting an invidious discrimination against women and resting upon "archaic notions" of the family). See generally William E. Nelson, *Criminality and Sexual Morality in New York, 1920-1980*, 5 YALE J.L. & HUMAN. 265, 301-11, 318-32 (1993) (providing a detailed case study of sex laws and women's interests in New York).

241. The classic description is Elizabeth Brandeis, *Labor Legislation*, in 3 HISTORY OF LABOR IN THE UNITED STATES, 1896-1932, at 399, 457-66 (John Commons ed., 1935). For modern feminist analyses critical of such laws, see JUDITH BAER, *THE CHAINS OF PROTECTION: THE JUDICIAL RESPONSE TO WOMEN'S LABOR LEGISLATION* (1978), and ALICE KESSLER-HARRIS, *OUT TO WORK: A HISTORY OF WAGE-EARNING WOMEN IN THE UNITED STATES* (1982). Also, compare Brief of Amici Curiae ACLU et al., *California Saving & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987) (No. 85-494) (critical of women's "protective" legislation), with Brief of Amici Curiae Coalition for Reproductive Equality in the Workplace et al., *Guerra* (No. 85-494) (supporting protective legislation when it remedies women's disadvantages in the workplace).

242. 208 U.S. 412 (1908).

upheld the Oregon law, based upon the data presented in an amicus brief drafted by Louis Brandeis. The original “Brandeis brief” demonstrated not only that such protective legislation was universal in western culture, but that its rationale was a happy wedding of modern science and traditional mores: “The reasons for the reduction of the working day to ten hours — (a) the physical organization of women, (b) her maternal functions, (c) the rearing and education of the children, (d) the maintenance of the home — are all so important and so far reaching that the need for such reduction need hardly be discussed.’ ”²⁴³ Justice Brewer’s opinion for the Court ruled that women, like minors, should be treated by the courts “as needing especial care.”²⁴⁴

Most feminists as well as progressives supported this kind of protective legislation, but the voices of women were underrepresented and often absent in legislative debates and legal briefs. They could more often be found in the printed records of the cases. In *Radice v. New York*,²⁴⁵ involving a liberty of contract challenge to a law barring nightwork by women in urban restaurants, working class women testified at trial that such work was both congenial and necessary for them. “It is easier to work in a restaurant than it is to do housework.”²⁴⁶ The Court nevertheless upheld the law. After World War II, during which women did virtually every kind of work men had done and under similar circumstances, women spoke for themselves and often objected to laws cutting off economic opportunities for them. Attorney Anne Davidow challenged a Michigan law barring women from acting as bartenders unless they were wives or daughters of male owners in *Goesaert v. Cleary*.²⁴⁷ Two dozen women testified at trial that they were barmaids who needed the job to support families and were with-

243. *Id.* at 420 n.1 (quoting from the Brandeis brief); *see id.* at 421 (“[H]istory discloses the fact that woman has always been dependent upon man.”).

244. *Id.* at 421. The Court later upheld similar statutes. *See Radice v. New York*, 264 U.S. 292 (1924) (Brandeis filed a brief as a supplement to the state’s brief by Carl Sherman in this case); *Miller v. Wilson*, 236 U.S. 373 (1915) (Brandeis filed a brief in support of the state); *Bosley v. McLaughlin*, 236 U.S. 385 (1915) (same); *see also Quong Wing v. Kirkendall*, 223 U.S. 59 (1912) (upholding law exempting laundries run by women from a tax). The Court eventually struck down this line of “protective” reasoning in *Adkins v. Children’s Hospital*, 261 U.S. 525 (1923) (Felix Frankfurter, Brandeis’s protégé, filed a brief in support of the restrictive statute).

245. 264 U.S. 292 (1924).

246. Record on Appeal at 39, *Radice v. New York*, 264 U.S. 292 (1924) (1923 Term, No. 176) (testimony of Anna Schmitt). On redirect examination, Schmitt was asked, “There was nothing in the work which you did . . . which a man could not have done, was there?” *Id.* at 41.

247. 335 U.S. 464 (1948).

out other skills.²⁴⁸ Notwithstanding the seriousness of these women's plight and of Davidow's arguments, the Supreme Court spent only a few minutes discussing the case at conference.²⁴⁹ Justice Frankfurter's opinion for the Court treated the challenge as a lark, playfully recalling "the alewife, sprightly and ribald, in Shakespeare" and dishing off the women's challenges in three pages of the United States Reports.²⁵⁰ Nonetheless, *Goesaert* reflects the social fact that many women no longer considered such legislation truly "protective" of their interests.

At the same time some women were turning against the kind of "protective" legislation illustrated by *Muller* and *Goesaert*, a large number were turning against morals laws that laid much more striking burdens on women. Between 1850 and 1880, most states adopted laws criminalizing abortion.²⁵¹ The federal Comstock Act of 1873 made it an obscenity crime to sell or distribute articles of contraception or abortion; to send such articles in the federal mail system; or to import such articles from abroad.²⁵² By 1885, twenty-four states had enacted their own versions of the Comstock Act, many of which were more stringent than the federal law.²⁵³ These laws bore harshly on women, who assumed most burdens of unwanted pregnancies. Many of those women mobilized in a *politics of pregnancy* that was both feminist (unlike some of the labor protections) and successful (unlike rape reform). The most articulate voices for their concerns were those of Emma Goldman and her follower Margaret Sanger. Goldman's philosophy was that women should have life opportunities of their own

248. Record on Appeal at 18-39, *Goesaert v. Cleary*, 335 U.S. 464 (1948) (1948 Term, No. 49).

249. I make the observation in text based upon the perfunctory comments in the conference notes for both Justices Douglas (who took detailed notes) and Burton.

250. *Goesaert*, 335 U.S. at 465-67. Davidow did win the votes of three dissenting Justices. *Id.* at 467-68 (Rutledge, J., dissenting).

251. See JANET FARRELL BRODIE, *CONTRACEPTION AND ABORTION IN NINETEENTH-CENTURY AMERICA* (1994); JAMES C. MOHR, *ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY, 1800-1900* (1978); LESLIE REAGAN, *WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1967-1973* (1997). For nineteenth century documents, see 2 *ABORTION LAW IN THE UNITED STATES* (Jenni Parrish ed., 1995).

252. 17 Stat. 598 (1873), codified at 18 U.S.C. § 1461 *et seq.*; 19 U.S.C. § 1305 *et seq.* ("An Act for the Suppression of Trade in, and Circulation of, obscene Literature and Articles of immoral Use"). See generally BRODIE, *supra* note 251, at 255-56, 263-66, 281-88; HEYWOOD BROUN & MARGARET LEECH, *ANTHONY COMSTOCK: ROUNDSMAN OF THE LORD* (1927); ROBERT W. HANEY, *COMSTOCKERY IN AMERICA: PATTERNS OF CENSORSHIP AND CONTROL* (1960).

253. See BRODIE, *supra* note 251, at 257 (stating that fourteen states barred any speech providing information on contraception and abortion; eleven states criminalized possession of such information; seventeen states barred doctors from discussing contraception with their patients); see also C. THOMAS DIENES, *LAW, POLITICS, AND BIRTH CONTROL* 33-48 (1972).

choosing — and not those dictated by their fathers, husbands, children, or the state.²⁵⁴

If Goldman was the theorist of a new women's politics of claiming control over their own bodies, Sanger was the organizer and implementer.²⁵⁵ The government censored both women: Goldman was deported for her antiwar speech in 1917; Sanger left the country after she was arrested for violating the Comstock Act in August 1914.²⁵⁶ The trial of her husband William in September 1915 for distributing copies of *Woman Rebel* inflamed public opinion sufficiently to impel the U.S. Attorney to drop all charges against Margaret, who returned triumphantly in 1916.²⁵⁷ She then opened the nation's first birth control clinic, in Brooklyn, New York. The New York police arrested Sanger and her sister, Ethel Byrne, for violating a pre-Comstock state law prohibiting circulation of "articles of indecent or immoral use," including articles "for the prevention of conception."²⁵⁸ The sisters were both convicted in well-publicized trials and went to jail as martyrs for the new cause.

The New York Court of Appeals affirmed Sanger's conviction,²⁵⁹ and she appealed to the U.S. Supreme Court. Jonah Goldstein's brief, including a supplement (compiled by Sanger) on the medical and sociological "Case for Birth Control," is a landmark in the history of women's rights litigation. The brief's central normative point was a wedding of women's sexual politics of rape and their politics of pregnancy: "*The State has no more right to compel 'motherhood' than the*

254. Emma Goldman, *Marriage and Love* (1910), reprinted in *WOMEN'S RIGHTS IN THE UNITED STATES: A DOCUMENTARY HISTORY 207-08* (Winston E. Langley & Vivian C. Fox eds., 1994) (criticizing marriage because it "makes a parasite of a woman, an absolute dependent"); see BRODIE, *supra* note 251, at 36 (stating that Goldman advocated contraception because it would free women to enjoy sex without worrying about pregnancy); Hasday, *supra* note 239, at 1413-33 (finding the roots of Goldman's arguments in nineteenth-century feminism).

255. There are many excellent pieces on Sanger and the birth control movement. See ELLEN CHESLER, *WOMAN OF VALOR: MARGARET SANGER AND THE BIRTH CONTROL MOVEMENT IN AMERICA* (1992); LINDA GORDON, *WOMAN'S BODY, WOMAN'S RIGHT: A SOCIAL HISTORY OF BIRTH CONTROL IN AMERICA* (1976); DAVID M. KENNEDY, *BIRTH CONTROL IN AMERICA: THE CAREER OF MARGARET SANGER* (1970); JAMES REED, *THE BIRTH CONTROL MOVEMENT AND AMERICAN SOCIETY: FROM PRIVATE VICE TO PUBLIC VIRTUE* (1984). There are outstanding sources on the legal and litigation features of the birth control movement as well. See CHESLER, *supra*; DAVID J. GARROW, *LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE 1-269* (1994) [hereinafter GARROW, *LIBERTY AND SEXUALITY*].

256. See CHESLER, *supra* note 255, at 99. In 1913, the Post Office refused to mail *The Call* because of Sanger's feminist libertarian column but relented after Sanger went to court with a First Amendment claim. See *id.* at 65-66.

257. See *id.* at 127-29, 138-40.

258. N.Y. Penal Law § 1142.

259. *People v. Sanger*, 118 N.E. 637 (N.Y. 1918).

*individual to compel [sexual] relations.*²⁶⁰ The state's suppression of contraceptive devices and information was a severe and unacceptable intrusion into a married woman's personal liberty protected by the Due Process Clause.²⁶¹ "In this enlightened age, when we are accustomed to listen to the discussion of the rights of women to economic freedom and independence . . . does it not appear most unreasonable that she be deprived of the freedom of her person?"²⁶² The brief also powerfully argued that the breadth of the state's prohibition was often a deprivation of life as well as liberty, because pregnancy for many women was life-threatening. By barring even dissemination of information that could be life-saving to these women, the state was placing their lives at risk.²⁶³ Finally, Goldstein's brief maintained that the statute was irrational in its effect and, therefore, unconstitutional even if no fundamental interest were involved. That is, the state's bar served no legitimate state interest and, indeed, undermined many legitimate ones, such as the health and safety of women, families, and children.²⁶⁴

Goldstein's and Sanger's massively documented and normatively charged brief was met by one argument from the state: the social and economic aspects of the birth control issue are subject to reasonable debate which should either be left to the legislature or should be resolved in favor of regulation, as most states and the federal government had precisely the same kind of laws.²⁶⁵ This argument apparently prevailed with the Supreme Court, which dismissed Sanger's appeal as raising no substantial federal question.²⁶⁶ The *Lochner*-era Court was not receptive to an interpretation of due process protecting sexual as opposed to family liberty.²⁶⁷ On the constitutional front, *Sanger v. New*

260. Brief on Behalf of the Plaintiff-in-Error at 31, *Sanger v. New York*, 251 U.S. 537 (1919) (1919 Term, No. 75) (emphasis in original); see *id.* at 39 ("[A] married woman has the fundamental right to determine whether she shall or shall not conceive and when she shall not conceive."); *id.* at 43 (stating that men and women have a "natural right to say how many children they will bring into the world and when").

261. See *id.* at 43-48 (relying on *Lochner v. New York*, 198 U.S. 45 (1905), among other authorities).

262. *Id.* at 45.

263. See *id.* at 50-57; cf. *id.* at 51-52 (this problem is not solved by the statutory allowance for physicians to prescribe articles for the "cure or prevention of disease"). The brief argued that a law barring abortions would still violate the Due Process Clause if it did not include an exception for situations where the mother's life was at stake. *Id.* at 54-55.

264. See *id.* at 33-34 (arguing that "too frequent pregnancies" injure women's health and decrease the "virility of the children"); *id.* at 35-36 (positing that the statutory bar to useful information leads many women to resort to celibacy and abortion, harmful to both women and society) *id.* at 36-38 (statute contributes to poverty, overcrowding, illegitimacy, high infant mortality, and increased numbers of "unwanted" and "feeble-minded" children).

265. See Brief for Defendant-in-Error at 9-12, *Sanger* (1919 Term, No. 75).

266. *Sanger v. New York*, 251 U.S. 537 (1919) (per curiam).

267. See *Buck v. Bell*, 274 U.S. 200 (1927) (upholding state sterilization law).

York failed in the short term. But the constitutional failure begat a statutory success, for in *Sanger* the New York Court of Appeals construed its state law as authorizing physicians to prescribe contraceptives for their patients to treat “disease,” which the court broadly defined to include any “alteration in the state of body . . . [which] caus[ed] or threaten[ed] pain and sickness.”²⁶⁸ As a practical matter, that decision opened up a strategy by which birth control clinics could operate in New York, and Sanger created a clinic run by doctors in New York City and in 1922 founded the American Birth Control League. Harassment by authorities, and a raid by the police in 1929, only fueled public support for the birth control movement. By 1935, local leagues existed in more than half the states, and there were as many as 300 clinics, typically run by doctors.²⁶⁹

Because birth control advocates were not able to bestir Congress to repeal the federal Comstock Act,²⁷⁰ that law remained a potential problem, which activists attacked in court as violating the then-anemic First Amendment. Mary Dennett was prosecuted under the Comstock Act for mailing sex education materials. Following Morris Ernst’s brief for Dennett, Judge Augustus Hand of the Second Circuit refused to interpret the statute to apply to “serious instruction regarding sex matters unless the terms in which the information is conveyed are clearly indecent.”²⁷¹ Judge Swan applied similar reasoning to rule, in a trademark case, that contraceptives could be legally imported into the United States, so long as they might be capable of legitimate use.²⁷² The judicial evisceration of the Act was completed in *United States v. One Package*.²⁷³ Judge Hand’s opinion reasoned that Congress did not intend to bar importation of diaphragms by Dr. Hannah Stone, who ran Sanger’s clinic in New York City; a doctor’s goal of promoting health and saving lives was surely not “immoral” within the legislative intent.²⁷⁴ The experience of birth control advocates with the Comstock Act was echoed at the state level: they were able to gain

268. *People v. Sanger*, 118 N.E. 637, 638 (N.Y. 1918) (quoting Webster’s Dictionary).

269. See CHESLER, *supra* note 255, at 231.

270. On birth control advocates’ inability to move Congress to repeal the Comstock Act, see *id.* at 232-33 (detailing Dennett’s 1923 effort), and *id.* at 341-48 (detailing Sanger’s 1934 effort).

271. *United States v. Dennett*, 39 F.2d 564, 569 (2d Cir.1930); see Appellant’s Brief at 11-13, 32-33, *Dennett* (No. 238).

272. *Youngs Rubber Corp. v. C.I. Lee & Co.*, 45 F.2d 103 (2d Cir. 1930); see also *Davis v. United States*, 62 F.2d 473 (6th Cir. 1933) (following *Youngs Rubber*).

273. 86 F.2d 737 (2d Cir. 1936).

274. *Id.* at 739-40; *cf. id.* at 740 (Learned Hand, J., concurring) (remarking on the highly dynamic reading of the statute by his cousin). Again, the court’s judgment carefully tracked Morris Ernst’s Brief for Claimant-Appellee at 7-11, 19-23, 38, *One Package* (No. 62).

administrative and judicial acquiescence of advice and distribution of contraceptives under the auspices of doctors' prescriptions. By the beginning of World War II, thirty-six states had medically-supervised birth control clinics supported at least in part by public funds, and another ten allowed such clinics to operate privately because of statutory loopholes allowing contraceptives by prescription.²⁷⁵

Sanger and her allies were not satisfied with this progress, in part because the medical-exception strategy left many poor and working class women, as well as single women, without sufficient access to contraceptives. Also, this strategy failed in Roman Catholic Connecticut and Massachusetts, whose judiciaries refused to construe their anti-contraceptive statutes to allow a broad medical-needs exception.²⁷⁶ These decisions closed down the flourishing birth control clinics in those states, and activists resorted to constitutional claims, just as they had in response to earlier setbacks. In 1941, Dr. Wilder Tileston sued to nullify Connecticut's anti-contraception law on the ground that it unconstitutionally barred him from prescribing contraceptives needed to protect the health and lives of his female patients. The state courts rejected his claims on the merits, and the U.S. Supreme Court dismissed the constitutional appeal in *Tileston v. Ullman*,²⁷⁷ on the ground that the doctor had no standing to raise the life and liberty deprivations of his patients.

Planned Parenthood (as Sanger's birth control organization was renamed in 1942) of Connecticut remained interested in challenges to Connecticut's law. Director Estelle Griswold worked with Professor Fowler Harper of the Yale Law School and lawyer Catherine Roraback to bring a new challenge on behalf of several patients (including a married couple) and a doctor in *Poe v. Ullman*.²⁷⁸ Planned Parenthood, the ACLU, and several dozen doctors argued that the married couple enjoyed a right of privacy protecting their intimate relations.²⁷⁹ A majority of the internally fragmented Court went along with a per curiam opinion dismissing the appeal. Justices Douglas and

275. See Brief of Appellants app. C at 30, *Tileston v. Ullman*, 318 U.S. 44 (1943) (1942 Term, No. 420) (map of "States Having Contraceptive Services Under Medical Supervision").

276. *State v. Nelson*, 11 A.2d 856 (Conn. 1940); *Commonwealth v. Gardner*, 15 N.E.2d 222 (Mass. 1938); see also GARROW, LIBERTY AND SEXUALITY, *supra* note 255, at 44-78 (providing a detailed account of the litigation and strategic context of these cases).

277. 318 U.S. 44 (1943) (per curiam); see also GARROW, LIBERTY AND SEXUALITY, *supra* note 255, at 94-106 (providing a detailed account of the *Tileston* litigation).

278. 367 U.S. 497 (1961) (dismissing appeal of *Buxton v. Ullman*, 156 A.2d 508 (Conn. 1959)); see also GARROW, LIBERTY AND SEXUALITY, *supra* note 255, at 152-95 (providing detailed account of the *Poe* litigation).

279. See Section II.B (discussing the briefs in *Poe*, *Griswold*, *Eisenstadt*, and *Roe v. Wade*).

Harlan wrote impassioned dissenting opinions, arguing that there was a justiciable case and that the statute was unconstitutional.²⁸⁰

Poe's odd disposition was a bit of a fluke, and the Yale professors and Planned Parenthood pressed one final challenge. In 1965, the Supreme Court finally struck down the Connecticut contraception law in *Griswold v. Connecticut*.²⁸¹ Five Justices joined Douglas's opinion for the Court, which carved a "zone of privacy" for married couples out of the "penumbras" of various guarantees in the Bill of Rights;²⁸² three of the majority Justices also relied on the Ninth Amendment to support the recognition of a nontextual right of privacy;²⁸³ two Justices concurred in the judgment on the ground that the law deprived plaintiffs of their liberty without due process;²⁸⁴ and two Justices dissented.²⁸⁵ Notwithstanding the doctrinal diversity, at least six Justices spoke clearly to this effect: married couples have a fundamental right to plan their families and enjoy consensual sexual intercourse without interference from the state.

In spite of its narrow and offbeat reasoning, *Griswold* was a sensational vindication of Margaret Sanger's politics of protection.²⁸⁶ Massachusetts amended its law to allow married couples (but not single persons) to obtain contraceptives with a doctor's prescription. A divided Supreme Court expanded *Griswold* to strike down that state's discrimination between married and unmarried couples in *Eisenstadt v. Baird*.²⁸⁷ Justice Brennan's majority opinion for a seven-Justice Court ruled that, "[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."²⁸⁸ Even more

280. *Poe*, 367 U.S. at 509 (Douglas, J., dissenting); *id.* at 522 (Harlan, J., dissenting).

281. 381 U.S. 479 (1965); *see also* GARROW, LIBERTY AND SEXUALITY, *supra* note 255, at 196-269 (providing a detailed account of the *Griswold* litigation).

282. *Griswold*, 381 U.S. at 484 (Douglas, J., for the Court).

283. *Id.* at 486-99 (Goldberg, J., joined by Warren, C.J., and Brennan, J., concurring).

284. *Id.* at 500-02 (Harlan, J., concurring in the judgment); *id.* at 502-07 (White, J., concurring in the judgment).

285. *Id.* at 507-27 (Black, J., dissenting); *id.* at 527-31 (Stewart, J., dissenting).

286. On the very positive reception of the *Griswold* result and its privacy right, *see, e.g.*, GARROW, LIBERTY AND SEXUALITY, *supra* note 255, at 263-67; Lackland H. Bloom, Jr., *The Legacy of Griswold*, 16 OHIO N.U.L. REV. 511, 527 (1989); *Symposium on the Griswold Case and the Right of Privacy*, 64 MICH. L. REV. 197 (1965). Between 1963 and 1965, popular support for the proposition, "Should birth control information be available to anyone that wants it?" went up from 74% to 81% (from 53% to 78% among Catholics). GEORGE H. GALLUP, THE GALLUP POLL, 1935-1971, at 1823, 1915-16 (1972).

287. 405 U.S. 438 (1972).

288. *Id.* at 453. Brennan spoke for himself and Justices Douglas, Stewart, and Marshall. Justices White and Blackmun concurred in the result on narrow grounds, and Chief Justice Burger dissented. (Newly appointed Justices Rehnquist and Powell did not participate.)

momentous was *Griswold's* effect on another dimension of women's maturing politics of protection: the right not only to prevent pregnancy, but also to terminate it.

Many early birth control advocates (including Goldman and Sanger) had personally favored a woman's freedom to choose abortion, but that issue was purposely downplayed in the campaign to liberalize contraception laws.²⁸⁹ During the 1950s and 1960s, there was growing interest in liberalizing nineteenth century abortion laws, and by the late 1960s large numbers of women and doctors were organized as a new "pro-choice" movement for repeal rather than just liberalization of laws prohibiting abortions.²⁹⁰ Unlike the birth control movement, the pro-choice movement achieved immediate successes in some state legislatures, in part because large numbers of women were allied with the medical establishment (whose members feared prosecution under the older laws). By 1970, four states — Hawaii, Alaska, New York, and Washington — had decriminalized abortion, and twelve others (including California) had liberalized their laws. Buoyed by Planned Parenthood's success in the courts, the pro-choice movement immediately sought to constitutionalize its members' claims. Courts all over the United States read *Griswold* to protect single women seeking to abort unwanted pregnancies. Abortion statutes — liberalized laws as well as archaic ones — fell right and left.²⁹¹

The Supreme Court granted review in two of the cases, one involving Texas's nineteenth century law, which had no exception for the mother's health, and one involving Georgia's recent law, allowing abortions if approved by the mother's doctor and two others on a hospital panel. Sarah Weddington, the lawyer for "Jane Roe" in the Texas

289. See Brief on Behalf of the Plaintiff-in-Error at 35, *Sanger v. New York*, 251 U.S. 537 (1919) (1919 Term, No. 75) (arguing that anti-contraception laws lead to more "dangerous abortions"); Morris Ernst & Harriet Pilpel, *Release from the Comstock Era*, BIRTH CONTROL REV., Dec. 1939 at 24 (sharply distinguishing abortion as "the antithesis of contraception").

290. There is a formidable literature on the evolving legislative and judicial campaigns of the early pro-choice movement. See GARROW, LIBERTY AND SEXUALITY, *supra* note 255, at 270-334 (providing an account of early voices, from 1933 to 1967); *id.* at 335-88 (providing an account from reform to repeal, 1967 to 1969); LAWRENCE LADER, ABORTION II: MAKING THE REVOLUTION (1973); KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD (1984); ROSEMARY NOSSIFF, BEFORE ROE: ABORTION POLICY IN THE STATES 35-37, 65-68 (2001) (examining the different tactics of the ALI, NOW, and radical feminists); SUZANNE STAGGENBORG, THE PRO-CHOICE MOVEMENT: ORGANIZATION AND ACTIVISM IN THE ABORTION CONFLICT (1991); REAGAN, *supra* note 251, at 216-34.

291. See *Abele v. Markle*, 369 F. Supp. 807 (D. Conn. 1973); *Doe v. Scott*, 321 F. Supp. 1385 (N.D. Ill. 1971); *Roe v. Wade*, 314 F. Supp. 1217 (N.D. Tex. 1970), *aff'd*, 410 U.S. 113 (1973); *Doe v. Bolton*, 319 F. Supp. 1048 (N.D. Ga. 1970), *aff'd in part*, 410 U.S. 179 (1973); *People v. Belous*, 458 P.2d 194 (Cal. 1969), *cert. denied*, 397 U.S. 915 (1970): *see also* *United States v. Vuitch*, 305 F. Supp. 1032 (D.D.C. 1969) (striking down D.C. abortion law as vague), *rev'd*, 402 U.S. 62 (1971) (upholding statute based upon liberal construction of allowance for abortion to protect mother's "health").

case, argued that “pregnancy to a woman is perhaps one of the most determinative aspects of her life. It disrupts her body. It disrupts her education. It disrupts her employment.” Because of this impact, this is a “matter which is of such fundamental and basic concern to the woman . . . that she should be allowed to make the choice as to whether to continue or terminate her pregnancy.”²⁹² The state objected that the controversy was not justiciable and, if justiciable, that the rights of the human fetus trumped those of the mother.²⁹³ After re-argument, the Supreme Court achieved a surprising consensus. Justice Blackmun’s opinion for a seven-Justice Court ruled in *Roe v. Wade*²⁹⁴ that the Texas law unconstitutionally burdened a woman’s due process liberty to control her body and choose an abortion in the first trimester. In *Doe v. Bolton*,²⁹⁵ Justice Blackmun’s opinion focused on the decision of the mother made in consultation with her doctor and struck down most of the other procedural and substantive obstacles Georgia’s recent law imposed on the mother. The Court’s decisions in the abortion cases were an international sensation, but for my purposes they are the near-apotheosis of women’s politics of protection as it concerned pregnancy: after 1973, the constitutional baseline was that a woman is, as a matter of constitutional law, the primary decision-maker as to issues of conceiving and bearing a child.

2. *Feminists’ Politics of Recognition, 1961-76*

Like people of color, but more successfully, women engaged in a vigorous politics of recognition during the late nineteenth century.²⁹⁶ Unlike people of color’s, their politics won some notable victories early in the twentieth. The Nineteenth Amendment was adopted against traditionalist arguments that women’s role should be limited to the domestic sphere, and it advanced the norm that women’s abilities were on a par with men’s.²⁹⁷ The early birth control movement was part of such a politics. Emma Goldman maintained that

292. Oral Argument, *Roe v. Wade*, 410 U.S. 113 (1973), in 75 LANDMARK BRIEFS, *supra* note 199, at 787; see Brief for Appellants at 99-115, *Roe v. Wade*, 410 U.S. 113 (1973) (No. 70-18); see also *id.* at 94-99 (relying on a right to receive medical care for the protection of the mother’s health as well).

293. Brief for Appellee at 9-20, *Roe* (No. 70-18) (arguing that the issue is nonjusticiable); *id.* at 26-54 (arguing that the rights of the fetus trump those of the mother).

294. 410 U.S. 113 (1973); see also Sections II.A.3 & II.B (discussing the Court’s deliberations in *Roe*). See generally GARROW, LIBERTY AND SEXUALITY, *supra* note 255, at 389-599 (providing a detailed account of the *Roe* litigation and the Court’s internal deliberations).

295. 410 U.S. 179 (1973).

296. See Ellen Carol Du Bois, *Outgrowing the Compact of the Fathers: Equal Rights, Woman Suffrage, and the United States Constitution, 1820-1878*, 74 J. AM. HIST. 836 (1987).

297. See Siegel, *She the People*, *supra* note 237.

[a woman's] development, her freedom, her independence, must come from and through herself. First, by asserting herself as a personality, and not as a sex commodity. Second, by refusing to bear children, unless she wants them, by refusing to be a servant to God, the State, society, the husband, the family etc., by making her life simpler, but deeper and richer.²⁹⁸

Potentially important for women's politics of recognition was the proposed Equal Rights Amendment ("ERA"), first introduced in Congress in 1923. Yet many feminists were appalled by Goldman's call for sexual liberation and opposed the ERA on the grounds that it would preempt labor-protective legislation²⁹⁹ or wrongfully denied women's genuine difference from men.³⁰⁰ These were among the reasons the feminist politics of recognition stalled or slowed down after the Nineteenth Amendment.³⁰¹ It did not disappear, however. The ERA continued to be debated among feminists and within Congress in the 1940s and 1950s.³⁰² Most states eased their exclusions of women from juries, either placing their service on a par with men's or allowing them to serve unless they opted out. Although masked for the most part during the 1930s, the birth control movement continued to be animated, in part, by an insistence that women have the freedom that Goldman had asserted.

Women's politics of recognition picked up speed after World War II, and the renewed interest showed up immediately in constitutional cases such as *Goesaert*.³⁰³ Women who had proved themselves fully equal to men during the war were often unwilling to re-assume their subordinate status after the war. In constitutional law, this attitude was displayed most clearly in the cases challenging women's exclusion or exemption from jury service. Women generally did not serve on ju-

298. Emma Goldman, *Woman Suffrage*, WOMAN REBEL, June 1914, at 4; see also CANDACE FALK, LOVE, ANARCHY, AND EMMA GOLDMAN (1985); EMMA GOLDMAN, *The Tragedy of Woman's Emancipation*, in ANARCHISM AND OTHER ESSAYS 219, 237 (1910).

299. The League of Women's Voters and the Women's Bureau opposed the ERA for this reason. GLADYS HARRISON, NATIONAL LEAGUE OF WOMEN VOTERS, AGAINST "EQUAL RIGHTS" BY CONSTITUTIONAL AMENDMENT 11-12 (1928); see RUTH ROSEN, THE WORLD SPLIT OPEN: HOW THE MODERN WOMEN'S MOVEMENT CHANGED AMERICA 27, 66 (2000) [hereinafter ROSEN, THE WORLD SPLIT OPEN].

300. See JOSEPHINE DONOVAN, FEMINIST THEORY: THE INTELLECTUAL TRADITIONS OF AMERICAN FEMINISM 75-76 (2001); Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex From Gender*, 144 U. PA. L. REV. 1, 16 (1995).

301. See generally Verta Taylor, *Social Movement Continuity: The Women's Movement in Abeyance*, 54 AM. SOC. REV. 761 (1989).

302. See CYNTHIA HARRISON, ON ACCOUNT OF SEX: THE POLITICS OF WOMEN'S ISSUES, 1945-1968, at 3-38 (1988) [hereinafter HARRISON, ON ACCOUNT OF SEX].

303. Anne Davidow's brief in that case argued that the barmaid law was an "unfair discrimination against women owners of bars" and "women bartenders." Brief of Appellants at 6, *Goesaert v. Cleary*, 335 U.S. 464 (1948) (1947 Term, No. 49).

ries before World War I. Once women gained the right to vote, some state courts construed their state jury service laws to include women because the laws tied jury venires to voting lists. Nonetheless, as the nation entered World War II, only thirteen states required the same jury service of women that they required of men; fifteen states allowed women to opt out of compulsory jury service; twenty states disqualified women as a class.³⁰⁴

After the war, the situation shifted rapidly, and the Supreme Court gave it a push in 1946. Relying on a federal statute, the Court overturned the conviction of Edna and Donald Ballard for promotion of a fraudulent religious program, because the federal judge excluded women from the jury venire in *Ballard v. United States*.³⁰⁵ In response to the government's argument that the admittedly erroneous discrimination was not prejudicial to defendants' jury trial rights, Justice Douglas responded that women and men are "not fungible; a community made up exclusively of one is different from a community composed of both." He then posed the question: "[I]f the shoe were on the other foot, who would claim that a jury was truly representative of the community if all men were intentionally and systematically excluded from the panel?"³⁰⁶ A Court majority declined to constitutionalize that principle in *Fay v. New York*,³⁰⁷ but four dissenters in that case maintained that a "blue ribbon" jury substantially excluding women and working class people violated the Equal Protection Clause.³⁰⁸

After *Ballard* and *Fay*, the complete exclusion of women dropped away. By 1961, only three states retained complete exclusions. Of the forty-seven states where women were eligible, twenty-one states had no special gender-based rules, eight states allowed women to be excused if their service would create hardships for their families, fifteen states and the District of Columbia allowed women to opt out for any reason, and three states permitted women to serve only if they opted in.³⁰⁹ Gwendolyn Hoyt killed her husband in Florida, one of the states in the last group. A jury of twelve men found her guilty of murder, and

304. REPORT TO THE JUDICIAL CONFERENCE OF THE COMMITTEE ON SELECTION OF JURORS 23 (1942), noted in *Fay v. New York*, 332 U.S. 261, 289 & n.31 (1947).

305. 329 U.S. 187 (1946).

306. *Id.* at 193. The federal statute, 28 U.S.C. § 411, required that jurors in federal court should have the same qualifications as those of the state in which the court was sitting (California, which did allow women to serve on juries). The Court had construed the statute as reflecting a design to make the jury "a cross-section of the community" and representative of it. *Glasser v. United States*, 315 U.S. 60, 86 (1942).

307. 332 U.S. 261 (1947).

308. *Id.* at 296-300 (Murphy, J., joined by Black, Douglas & Rutledge, JJ., dissenting).

309. See *Hoyt v. Florida*, 368 U.S. 57, 62-63 (1961). For more background, see LINDA K. KERBER, NO CONSTITUTIONAL RIGHT TO BE LADIES (1998).

she appealed on the ground that the Equal Protection Clause prohibited the exclusion of women from the jury that convicted her. Her counsel on appeal argued that *Ballard's* federal statutory rule should be extended to the states as a matter of equal protection; the state's reason for continuing to excuse women — their families' need for them — was wholly inapplicable to the one-third of Florida women who worked outside the home.³¹⁰

Dorothy Kenyon persuaded the ACLU to befriend Hoyt on the appeal, the Union's first major feminist Supreme Court filing.³¹¹ Her remarkable amicus brief argued that representation on juries is an important civil right, as illustrated by the experience of blacks, who did not achieve genuine citizenship until the Court required that they be invited to its burdens such as jury service.³¹² The same was true of women. They continued to be excluded, either by law or in practice, because "the thinking of older times, when women were no part of the body politic," suggested that jury service would detract from women's "primary duties" of housekeeping and childrearing. This rationale was decidedly anachronistic, as "a revolution has taken place in the lives and status of women."³¹³ Not only was the discrimination against all women therefore unreasonable, but it was a discrimination that the "fully emancipated, fully enfranchised woman citizen" would no longer tolerate:

It is a belittlement of her accomplishment in overcoming that long time sex defect of hers to suggest, even by implication, that even in this day and age she is perhaps still not qualified or capable of performing this simple act of good citizenship on the same terms as men. It is a genuine humiliation and degradation of her spirit.³¹⁴

Kenyon's brief epitomizes what I am calling women's politics of recognition: in demanding equal respect, women were demanding the same duties as well as benefits that men had and insisted on complete rather than token integration into the public as well as private institutions of the nation.

The Warren Court did not see matters this way. At conference, the Chief Justice presented a diluted version of Kenyon's arguments and

310. Brief for Appellant at 10-19, *Hoyt v. Florida*, 368 U.S. 57 (1961) (1961 Term, No. 31).

311. See SUSAN M. HARTMANN, *THE OTHER FEMINISTS: ACTIVISTS IN THE LIBERAL ESTABLISHMENT* 53-71 (1998) (noting that Kenyon, an ACLU board member for forty years, was the only voice of feminism in the organization from 1930 until she was joined by Harriet Pilpel in 1962 and Pauli Murray in 1965).

312. Brief of Amici Curiae Florida Civil Liberties Union and American Civil Liberties Union at 8-12, *Hoyt* (1961 Term, No. 31).

313. *Id.* at 20.

314. *Id.* at 26.

urged reversal on the ground that Florida's opt-in system generated juries that were ridiculously unbalanced under the *Ballard* criteria.³¹⁵ Justices Black and Douglas immediately agreed, but the remainder of the Court went with Justices Frankfurter and Whittaker, who maintained that there was "no systematic exclusion" of women similar to that found in *Ballard* or the *Norris* line of cases.³¹⁶ Frankfurter smartly assigned the case to Justice Harlan, the finest lawyer on the Court. His opinion in *Hoyt v. Florida*³¹⁷ was a masterly treatment of the largely uncharted issue of how to handle sex-based classifications and of the much-litigated issue (in the race cases) of discriminatory application of a statutory standard. Even the dissenters in conference felt impelled to join part of Harlan's opinion.³¹⁸ In this fashion, the Warren Court was unanimous in denying women's incipient politics of recognition in what turned out to be that Court's only important sex discrimination case.

Hoyt cast into bold relief the fact that the Supreme Court had never struck down a sex discrimination as unconstitutional.³¹⁹ Ironically, the decision came just as the women's movement was taking flight again. Responding to mounting feminist demands, President Kennedy in 1961 established the President's Commission on the Status of Women, which served as a consciousness-raising and idea-sharing forum for feminist lawyers and thinkers from all around the country.³²⁰ Pauli Murray, a civil rights lawyer working toward her J.S.D. at Yale Law School, drafted a remarkable memorandum for the Commission. The memorandum argued that the Equal Protection Clause could be interpreted to question sex-based discrimination for the same reasons the Court had deployed it against race-based discrimination: sex discrimination (like race discrimination) rested upon a natural law understanding of "inherent differences" that had been deployed to support disadvantages and social inferiority of women; the naturalized view of sex differences rested upon unproven stereotypes or myths about

315. See Douglas Conference Notes for *Hoyt v. Florida* (Oct. 20, 1961), in Douglas Papers, *supra* note 192, Container 1269.

316. See *id.* Justice Brennan was a "tentative" vote for affirmance along those grounds.

317. 368 U.S. 57 (1961).

318. See *id.* at 69 (Warren, C.J., and Black & Douglas, JJ., concurring in part).

319. Contrast *Ballard*, 329 U.S. 187 (1946), where the Court struck down a total exclusion of women in a federal proceeding because it violated a federal statutory mandate, with *Fay*, 332 U.S. 261 (1947) (later in the 1946 Term), where the Court upheld against equal protection attack a substantial exclusion of women in a state proceeding, and *Hoyt*, 368 U.S. 57 (1961), where the Court continued to follow *Fay* even after most states had adopted inclusionary policies. *But cf.* *White v. Crook*, 251 F.Supp. 401 (M.D. Ala. 1966) (three-judge court) (striking down Alabama's exclusion of all women from juries; distinguishing *Hoyt* as involving unproven charges of de facto discrimination).

320. See HARRISON, ON ACCOUNT OF SEX, *supra* note 302, at 109-37.

women that were usually an irrational basis for subordinating them; like blacks, women needed to mobilize against pervasive state discrimination through the formation of an organization like the NAACP.³²¹

Murray's arguments not only persuaded the President's Commission that "[e]quality of rights under the law for all persons, male or female, is so basic to democracy and its commitment to the ultimate value of the individual that it must be reflected in the fundamental law of the land,"³²² but also helped persuade the ACLU to add sex equality to its civil rights agenda.³²³ Moreover, Murray's memorandum served to bridge the concerns of various civil rights activists: her Fourteenth Amendment strategy sought equality for women (desired by liberal ERA feminists), but without sacrificing laws genuinely remedying women's disadvantages in the workplace (desired by labor feminists and ERA opponents). For good measure, Murray, an African American who had been active in the civil rights movement, sought to unite blacks and women in a common campaign against prejudice and discrimination.³²⁴

Murray's arguments found their way into the congressional debates over the addition of "sex discrimination" to the jobs title of the Kennedy Administration's civil rights bill. Although the addition was propounded by anti-civil rights (but pro-ERA) Representative Howard Smith of Virginia, Murray and other feminists supported it and ensured that it was preserved in the final statute.³²⁵ The EEOC,

321. Pauli Murray, *A Proposal to Reexamine the Applicability of the Fourteenth Amendment to State Laws and Practices Which Discriminate on the Basis of Sex Per Se* (Dec. 1962), in President's Commission on the Status of Women Papers, Schlesinger Library [Radcliffe Inst.], Box 8, Folder 62, discussed in HARRISON, ON ACCOUNT OF SEX, *supra* note 302, at 126-34; Mary Becker, *The Sixties Shift to Formal Equality and the Courts: An Argument for Pragmatism and Politics*, 40 WM. & MARY L. REV. 209, 222-31 (1998).

322. PRESIDENT'S COMMISSION ON THE STATUS OF WOMEN, AMERICAN WOMEN 44-45 (1963).

323. Dorothy Kenyon in 1963 presented Murray's memo (whose arguments paralleled those she had pressed in *Hoyt*) to the ACLU board, which was supportive. HARTMANN, *supra* note 311, at 62-63. Murray joined the board in 1965, *id.* at 54, and she and Kenyon in 1966 urged the ACLU to go on record against legislation classifying on the basis of sex as "inherently discriminatory and unconstitutional." *Id.* at 72. Although they attracted allies within the ACLU (Norman Dorsen and Mel Wulf), they were not able to persuade the board to support constitutional equality for women until 1970, from which followed the establishment of the Women's Rights Project. *Id.* at 80-83; see also Nadine Strossen, *The American Civil Liberties Union and Women's Rights*, 66 N.Y.U. L. REV. 1940, 1950-55 (1991) (describing the origins of the ACLU's role in women's rights litigation).

324. See Pauli Murray & Mary O. Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 GEO. WASH. L. REV. 232 (1965); Serena Mayeri, Note, "A Common Fate of Discrimination": Race-Gender Analogies in Legal and Historical Perspective, 110 YALE L.J. 1045 (2001).

325. See HARRISON, ON ACCOUNT OF SEX, *supra* note 302, at 176-82; PAULI MURRAY, THE AUTOBIOGRAPHY OF A BLACK ACTIVIST, FEMINIST, LAWYER, PRIEST, AND POET

however, refused to make sex discrimination a priority in its enforcement of the new law, a stance that drew strong protests. When officials ignored their complaints at a 1966 conference on women's status, Murray, Betty Friedan, and other feminists stormed out in protest and founded the National Organization for Women ("NOW"). As Friedan later recalled, "it only took a few of us to get together to ignite the spark" that grassroots feminist consciousness raising had already created, "and it spread like a nuclear chain reaction."³²⁶ In its statement of purpose, NOW went beyond the ambivalent agenda of the President's Commission and demanded not just formal equality for women, but also a dismantling of the separate spheres ideology. Women should not only have all the (public) economic and social opportunities as men, but men should also share in the (private) responsibilities of home and childrearing.³²⁷ In 1967, NOW set out an ambitious national agenda, including serious enforcement of the Equal Pay Act and Title VII by the EEOC and the courts; adoption of the ERA; and repeal of abortion laws.³²⁸ As Cynthia Harrison has argued, NOW's agenda reflected the first coherent feminist philosophy of the century, one that combined an updated politics of protection with a new politics of recognition: childbearing should be separated from both sexual intimacy and from childrearing; both mothers and fathers are responsible for family as well as work.³²⁹

Like the NAACP, NOW established a Legal Defense and Education Fund to litigate issues of women's equality. In 1971, the ACLU established its Women's Rights Project, headed by Professor Ruth Bader Ginsburg. Representing a new generation of litigators, Ginsburg followed Kenyon and Murray in pressing the Court to rule that women have all the same legal rights and duties as men.³³⁰ These

354-58 (1987); Jo Freeman, *How "Sex" Got into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 *LAW & INEQUALITY* 163, 163-84 (1991).

326. JUDITH HOLE & ELLEN LEVINE, *REBIRTH OF FEMINISM* 81 (1971) (quoting Betty Friedan, *N.O.W. — How It Began*, *WOMEN SPEAKING*, Apr. 1967, at 4). See generally CAROLINE BIRD, *BORN FEMALE: THE HIGH COST OF KEEPING WOMEN DOWN* 209 (rev. ed. 1970); Jo Ann Freeman, *The Origins of the Women's Liberation Movement*, 78 *AM. J. SOC.* 792 (1973).

327. NOW, *Statement of Purpose*, reprinted in *UP FROM THE PEDESTAL: SELECTED WRITINGS IN THE HISTORY OF AMERICAN FEMINISM* 363-69 (Aileen S. Kraditor ed., 1968).

328. HARRISON, *ON ACCOUNT OF SEX*, *supra* note 302, at 201-05. At the same time NOW was pressing this national agenda, it was encouraging local "consciousness raising" groups among women and activism at the local level. See SARA EVANS, *PERSONAL POLITICS: THE ROOTS OF WOMEN'S LIBERATION IN THE CIVIL RIGHTS MOVEMENT AND THE NEW LEFT* (1979).

329. HARRISON, *ON ACCOUNT OF SEX*, *supra* note 302, at 217.

330. That their voice became the voice of women before the Court does not mean that all women agreed with their philosophy; both traditionalist and radical female perspectives were generally not heard by the Court until the 1980s. Compare F. CAROLYN GRAGLIA, *THE HOUSEWIFE AS PARIAH: CONTEMPORARY FEMINISM'S WAR ON THE FAMILY* (1997)

lawyers filed constitutional challenges to statutory sex discriminations, and state and federal judges found many of the challenged policies unconstitutional — notwithstanding *Hoyt*. The leading case was *White v. Crook*, where Dorothy Kenyon and Pauli Murray's ACLU brief helped persuade a three-judge federal court to hold invalid Alabama's exclusion of both people of color and women from criminal juries.³³¹ For examples at the state level, the New Jersey and California Supreme Courts struck down state exclusions of women from bartending, essentially refusing to follow *Goesaert*.³³² Several state courts overruled the common law presumption that only husbands could bring loss of consortium claims in tort, on the ground that this was a blatant sex discrimination.³³³ Federal judges struck down state laws excluding women from state universities,³³⁴ from living off campus at state colleges,³³⁵ and from juries,³³⁶ as well as state laws treating women differently from men for purposes of sentencing after conviction of a crime.³³⁷

The first case to reach the U.S. Supreme Court was an ACLU challenge to an Idaho statute which preferred male relatives over female ones for purposes of appointment to administer estates of intestate decedents. Sally Reed's counsel on appeal — Kenyon, Murray, Wulf, and Ginsburg — urged the Court to renounce the constitutional philosophy of *Muller*, *Goesaert*, and *Hoyt*.³³⁸ “[A] new appreciation of women's place has been generated in the United States.” Feminists “of both sexes” had pressed for women's “full membership” in the benefits and duties of constitutional citizenship. “But the distance to equal opportunity for women — in the face of the pervasive social,

(discussing exclusion of traditionalist women from feminist thinking), with IMELDA WHELEHAN, *MODERN FEMINIST THOUGHT* 69-79 (1995) (discussing exclusion of radical feminists from legal reformist efforts).

331. 251 F. Supp. 401 (M.D. Ala. 1966) (three-judge court) (not appealed).

332. *Sail'er Inn, Inc. v. Kirby*, 485 P.2d 529 (Cal. 1971); *Paterson Tavern & Grill Owners Ass'n v. Borough of Hawthorne*, 270 A.2d 628 (N.J. 1970); *Gallagher v. City of Bayonne*, 245 A.2d 373 (N.J. 1968); see also *Seidenberg v. McSorleys' Old Ale House*, 317 F. Supp. 593 (S.D.N.Y. 1970) (exclusion of female patrons unconstitutional).

333. *Deems v. Western Md. Ry. Co.*, 231 A.2d 514 (Md. 1967); *Montgomery v. Stephen*, 101 N.W.2d 227 (Mich. 1960); *Millington v. Southeastern Elevator Co.*, 239 N.E.2d 897 (N.Y. 1968); *Durham v. Gabriel*, 241 N.E.2d 401 (Ohio 1968); *Clem v. Brown*, 207 N.E.2d 398 (Ohio 1965).

334. *Kirstein v. Rector & Visitors of the Univ. of Va.*, 309 F. Supp. 184 (E.D. Va. 1970) (three-judge court).

335. *Mollere v. Southeastern La. College*, 304 F. Supp. 826 (E.D. La. 1969).

336. *Abbott v. Mines*, 411 F.2d 353 (6th Cir. 1969); *White v. Crook*, 251 F.Supp. 401 (M.D. Ala. 1966) (three-judge court).

337. *United States ex rel. Robinson v. York*, 281 F. Supp. 8 (D. Conn. 1968); *accord Liberti v. York*, 246 A.2d 106 (Conn. 1968); *Commonwealth v. Daniel*, 243 A.2d 400 (Pa. 1969).

338. Brief for Appellant at 41-53, *Reed v. Reed*, 404 U.S. 71 (1971) (No. 70-4).

cultural, and legal roots of sex-based discrimination — remains considerable. In the absence of a firm constitutional foundation for equal treatment of men and women by the law, women seeking to be judged on their individual merits will continue to encounter law-sanctioned obstacles.”³³⁹ Accordingly, the ACLU lawyers maintained that sex was a suspect classification for the same reasons race was: both were natural traits that the dominant culture has treated as a badge of inferiority and stigmatized legally, based upon inaccurate stereotypes about the group defined by the trait.³⁴⁰

At the urging of Professor Herma Hill Kay, the California Supreme Court had just accepted such an argument in *Sail'er Inn, Inc. v. Kirby*.³⁴¹ But the U.S. Supreme Court was not prepared to go that far in 1971, nor did the case require it to do so. As Chief Justice Burger said in opening the short conference discussion, the statute was a “carry over from [an] ancient English statute” and “can’t stand” because it was an unreasonable discrimination, as the ACLU had also argued.³⁴² Burger’s opinion for a unanimous Court in *Reed v. Reed*³⁴³ rested upon the statute’s arbitrariness and therefore left the ACLU’s other arguments unaddressed. In *Forbush v. Wallace*,³⁴⁴ the Court suggested it was still applying ordinary review to sex-based classifications, as it summarily affirmed a lower court decision upholding state rules requiring women to adopt their husbands’ surnames when they married.

Soon after *Reed* and *Forbush*, Congress voted for the proposed ERA and sent it to the states for ratification. This was an important normative moment, for not only did feminists unite behind the proposal, but huge bipartisan majorities in Congress agreed that “Equality of rights under the law shall not be denied or abridged by the United States or any State because of sex.”³⁴⁵ Meanwhile, Fourteenth

339. *Id.* at 10.

340. *Id.* at 14-41; *accord*, Joint Brief of Amici Curiae American Veterans Comm., Inc., NOW Legal Defense & Education Fund, Inc. at 10-12, *Reed* (No. 70-4); Brief of the City of New York at 8-17, *Reed* (No. 70-4).

341. 485 P.2d 529, 538-43 (Cal. 1971) (striking down statute barring women from being bartenders in licensed establishments, inconsistent with Equal Protection Clause (as well as title VII and state constitution)).

342. Douglas Conference Notes for *Reed* (Oct. 22, 1971), in Douglas Papers, *supra* note 192, Container 1525.

343. 404 U.S. 71 (1971).

344. 405 U.S. 970 (1971), *aff'g mem.*, 341 F. Supp. 217 (M.D. Ala. 1970) (three-judge court).

345. *See generally* MARY FRANCES BERRY, WHY ERA FAILED: POLITICS, WOMEN’S RIGHTS AND THE AMENDING PROCESS OF THE CONSTITUTION (1986); JANE J. MANSBRIDGE, WHY WE LOST THE ERA (1986); RIGHTS OF PASSAGE: THE PAST AND FUTURE OF THE ERA (Joan Hoff Wilson ed., 1986).

Amendment litigation for sex equality continued apace. In 1973, the Supreme Court heard an appeal brought by the Southern Poverty Law Center in *Frontiero v. Richardson*.³⁴⁶ The issue was whether the armed forces could deny female service personnel fringe benefits for their spouses absent a showing that the spouses were in fact “dependent” on them, a showing male service personnel did not have to make. Joseph Levin and Morris Dees’ brief on appeal argued that the Court should apply strict scrutiny to the statutory sex discrimination; Ginsburg and Wulf filed an amicus brief making the same arguments for strict scrutiny they had made in *Reed*.³⁴⁷ Although Chief Justice Burger made an impassioned effort to dismiss this challenge as a “tempest in a teapot,” the Brethren voted to reverse on the authority of *Reed*.³⁴⁸

Justice Brennan’s initial draft opinion followed *Reed* but invited his colleagues to consider the question whether sex is a suspect classification, as the *Frontieros* and the ACLU were urging.³⁴⁹ Justices Douglas, White, and Marshall immediately urged him to do so,³⁵⁰ while the other Justices held off. Brennan circulated a new opinion which accepted the suspect classification argument along the lines suggested by the ACLU. The opinion argued that, given the nation’s “long and unfortunate history of sex discrimination,” the immutability of sex as a trait, and the wide normative agreement that sex is usually irrelevant to proper public policy, sex is enough like race to justify its being treated as a “suspect classification” triggering “strict judicial scrutiny.”³⁵¹ Brennan’s opinion only attracted the votes of four Justices, however. Chief Justice Burger and Justices Powell, Stewart, and Blackmun were reluctant to adopt the suspect classification approach so long as the ERA was pending, and they ended up concurring in the judgment, depriving Brennan of his needed fifth vote to make a Court.³⁵²

346. 411 U.S. 677 (1973).

347. Brief for the Appellants at 28-37, *Frontiero* (No. 71-1694); Brief of American Civil Liberties Union Amicus Curiae at 24-44, *Frontiero* (No. 71-1694). By 1971, it was well-established that equal protection guarantees of the Fourteenth Amendment were “reverse-incorporated” into the Fifth Amendment’s Due Process Clause.

348. Douglas Conference Notes for *Frontiero*, in Douglas Papers, *supra* note 192, Container 1577. Only the Chief Justice and Justice Rehnquist favored upholding the policy.

349. See William J. Brennan, Jr., Memorandum to the Conference, re No. 71-1694 — *Frontiero v. Laird* (Feb. 14, 1973), in Brennan Papers, *supra* note 129, Box I: 299, Folder 11 (also including a draft of the opinion).

350. See *id.* (emended with a handwritten note from Justice Douglas saying that he preferred the new approach); Memorandum from Byron R. White to William J. Brennan, Jr. (Feb. 15, 1973), in Brennan Papers, *supra* note 129, Box I: 299, Folder 11.

351. *Frontiero*, 411 U.S. at 682-88.

352. See *id.* at 697 (Powell, J., joined by Burger, C.J., and Blackmun, J., concurring in the judgment) (explicitly reserving the suspect classification question in light of the pending

Nonetheless, *Frontiero* sent a powerful signal. Soon after losing the case, Solicitor General Erwin Griswold announced that the Equal Protection Clause “does not tolerate discrimination on the basis of sex.”³⁵³ As Professor Ginsburg read the case, “persons similarly situated, whether male or female, must be accorded even-handed treatment by the law.” Legislative classifications, she concluded, “may not be premised on sex-role stereotypes or unalterable sex characteristics that bear no necessary relationship to an individual’s need, ability or life situation.”³⁵⁴ Ginsburg’s campaign, essentially, was to interpret the Equal Protection Clause to entrench a feminist understanding of the ERA, which was in the midst of fierce ratification battles in state legislatures that savvy observers felt was being lost. To accomplish this, she continued to bring cases to, or support cases before, the Supreme Court challenging sex discriminations that reflected archaic stereotypes.³⁵⁵

The Burger Court did not always agree with the ACLU. For example, the Justices upheld sex-based classifications when they appeared remedial, such as the Florida law allowing widows but not widowers a small property tax exemption, upheld in *Kahn v. Shevin*.³⁵⁶ (Recall that many feminists themselves, such as Kenyon and Murray, believed that genuinely remedial legislation ought to pass equal protection scrutiny.) As the ACLU advocated, the Court struck down classifications that appeared to hold women back because of archaic stereotypes, such as the law allowing a spouse to stop paying child support for daughters at an earlier age than for sons, invalidated in *Stanton v. Stanton*.³⁵⁷ In *Taylor v. Louisiana*,³⁵⁸ the Court overruled

ERA); *id.* at 691 (Stewart, J., concurring in the judgment, without a statement of reasons). Justice Rehnquist dissented. *Id.* at 691.

353. Memorandum of Amicus Curiae United States at 8, *Cohen v. Chesterfield County Sch. Bd.*, 411 U.S. 947 (1973) (No. 72-1129) and *Cleveland Bd. of Educ. v. La Fleur*, 414 U.S. 632 (1974) (No. 72-777).

354. Brief for Appellants at 11, *Kahn v. Shevin*, 416 U.S. 351 (1974) (No. 73-78) (Ginsburg et al. representing the appellant).

355. Interestingly, the plaintiffs she represented or befriended were *Joseph* as well as Sharron *Frontiero*, *Mel Kahn*, *Stephen Charles Wiesenfeld*, *Will Webster*, and *William Herbert Orr* — men harmed by sex discriminations. The strategy, controversial among feminists, was to show male judges that everybody — including people like them — was harmed by sex discrimination.

356. 416 U.S. 351 (1974) (Douglas, J.) (women are more likely to need the tax break); see also *Califano v. Webster*, 430 U.S. 313 (1977) (upholding gendered social security provision, which the Court read as advantaging female wage earners and their families, as a way of redressing society’s longstanding disparate treatment of women); *Schlesinger v. Ballard*, 419 U.S. 498 (1975) (upholding a longer period for female officers to attain promotion for an “up or out” policy in the armed forces, because of greater difficulties women faced in compiling a record for promotion). In all three cases, the Court rejected the ACLU’s arguments.

357. 421 U.S. 7 (1975); see also *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (Brennan, J.) (invalidating gendered social security provision, which the Court read as discrimi-

Hoyt, on the ground that an opt-in system for women to serve on juries violates the Sixth Amendment and due process requirement that juries be cross-sections of the community.

The Women's Rights Project called on the Court to overrule *Goesaert* in *Craig v. Boren*.³⁵⁹ That case involved a state law barring the sale of two percent beer to eighteen-year-old males and twenty-one-year-old females, assertedly on the ground that the former were more likely to become inebriated and therefore a safety hazard than the latter. No longer making its pitch for strict scrutiny, the ACLU's amicus brief read the Supreme Court precedents for the still-strong proposition that the judiciary should strike down statutes reflecting "traditional attitudes and prejudices about the expected behavior and roles of the two sexes in our society," for these are "part of the myriad signals and messages that daily underscore the notion of men as society's active members, women as men's quiescent companions, members of the 'other' second sex."³⁶⁰ The Court was open to this statement of women's politics of recognition. Justice Brennan garnered six Justices to require that sex-based classifications "must serve important governmental objectives and must be substantially related to achievement of those objectives."³⁶¹ Specifically, neither "administrative . . . convenience" nor "overbroad and archaic generalizations" regarding men and women's different capacities or roles could justify sex-based classifications.³⁶²

Handed down in 1976, when it was likely the ERA would not be adopted, *Craig* seemed to satisfy liberal feminists' version of women's politics of recognition; the dissenting Justices certainly thought so.³⁶³ Notwithstanding the ambiguous level of scrutiny, the *Craig* formula-

nating against female wage earners), followed in *Califano v. Westcott*, 443 U.S. 76 (1979); *Califano v. Goldfarb*, 430 U.S. 199 (1977).

358. 419 U.S. 522 (1975), discussed in Section II.A.1.c.

359. 429 U.S. 190 (1976).

360. [ACLU] Brief Amicus Curiae at 22, *Craig* (No. 75-628) (citing SIMONE DE BEAUVOIR, *SECOND SEX* (1949)).

361. *Craig*, 429 U.S. at 197 (Brennan, J., for the Court, including Justices White, Marshall, Blackmun, Powell, and Stevens). Justice Stewart concurred only in the judgment, *id.* at 214; Chief Justice Burger, *id.* at 215, and Justice Rehnquist dissented, *id.* at 217.

362. *Id.* at 198 (opinion of the Court) (quotation omitted).

363. See *id.* at 221 (Rehnquist, J., dissenting); Memorandum from Warren E. Burger (who also dissented) to William J. Brennan, Jr. (Nov. 15, 1976), in Brennan Papers, *supra* note 129, Box I: 411, Folder 2 (testily admonishing Brennan that he might have joined a *Reed*-like opinion, but that "you read into *Reed v. Reed* what is not there. Every gender distinction does not need the strict scrutiny test applicable to a *criminal case*."). Commentators agreed with the dissenters' assessment that "even if the ERA should fail to be ratified, before long the Court seems certain to reach the same conclusion under the equal protection clause." Kenneth L. Karst, *The Supreme Court, 1976 Term — Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 54 (1977).

tion — and its application in that case, where there was both a plausible safety justification and an arguable Twenty-First Amendment boost for state alcohol regulation — had teeth enough to clear out most sex discriminations from state codes. Even armed with *Frontiero* and *Craig*, however, liberal feminism's constitutionalized politics of recognition ran into a formidable doctrinal roadblock: the reluctance of the Justices to scrutinize classifications that strongly affected women but were not openly gendered. At the very same time that the Burger Court was subjecting sex-based *classifications* to heightened scrutiny, it was subjecting laws having disparate impact on race-based *classes* to ordinary scrutiny in *Hackney*, *Rodriguez*, and *Washington v. Davis*. There was no reason to expect the Justices to follow a different approach with regard to sex-based classes, with or without the ERA.

The most important issue for feminists was whether the state could discriminate on the basis of pregnancy. Representing women whose pregnancies were excluded from a state disability program in *Geduldig v. Aiello*,³⁶⁴ Wendy Webster Williams maintained that “the individual who receives a benefit or suffers a detriment because of a physical characteristic unique to one sex benefits or suffers because he or she belongs to one or the other sex” — which surely is sex discrimination, because men are treated differently.³⁶⁵ Moreover, men were treated more favorably than women, and for exactly the reasons rejected in *Reed* and *Frontiero* (and later in *Craig*): men were privileged and women were denigrated in the public and workplace sphere because of women's unique ability to bear children and the concomitant special responsibility for rearing them in the domestic sphere.³⁶⁶ Indeed, “[t]his last prejudice — that women are not serious and permanent members of the workforce and that lurking somewhere in each woman's life is a man fully able to support her — underlies and reinforces discrimination against women in all realms of their lives.”³⁶⁷ Williams' powerful presentation was supported by amicus briefs from the ACLU and the EEOC.

But the nine men on the Court were not persuaded. The discussion in conference revealed little comprehension of Williams' arguments. Most of the Justices agreed with their Chief's complaint that the preg-

364. 417 U.S. 484 (1974).

365. Brief for Appellees at 31, *Geduldig* (No. 73-640).

366. “Those who would make these unique physical differences a touchstone for unscrutinized differential treatment offer nothing other than the modern version of the historical rationales which were for so long the source of women's second class citizenship under the law.” *Id.* at 36.

367. *Id.* at 39-40 (footnote numbers omitted); *see id.* at 42-45 (relying on the similar interpretation of the ERA forwarded by Professor Thomas Emerson and his Yale law students in Barbara A. Brown et al., *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 930 (1971)).

nancy exclusion involves “a different kind of risk than illness covered by [the] Act. [P]rostate problem is covered — as is hysterectomy — different from pregnancy.”³⁶⁸ Based upon this reasoning, the Court ruled that the pregnancy exclusion was not a sex-based classification³⁶⁹ and upheld the statutory scheme. During the same Term, the Court invalidated school board rules barring pregnant women from continuing their jobs as teachers, but the opinion by Justice Stewart (also the author of *Geduldig*) reasoned that the *per se* rule arbitrarily burdened the women’s parenthood and family rights and so was unconstitutional under the Due Process Clause.³⁷⁰ In 1976, the Supreme Court followed *Geduldig* to interpret the sex discrimination bar in Title VII to be inapplicable to pregnancy-based discrimination.³⁷¹ Wendy Williams again argued for the losing side — but it was her vision of sex discrimination that triumphed when she and Susan Deller Ross persuaded Congress to override the Court with the Pregnancy Discrimination Act of 1978 (“PDA”).³⁷² “[R]eaffirm[ing] that sex discrimination includes discrimination based on pregnancy, and specifically defin[ing] standards which require that pregnant workers be treated the same as other employees on the basis of their ability or inability to work,”³⁷³ the PDA provided a legal (even if not a constitutional) basis for liberal feminists’ ongoing campaign to assure women conditions of employment that would allow them to have productive careers.³⁷⁴

368. Douglas Conference Notes for *Geduldig* (Mar. 29, 1974), in Douglas Papers, *supra* note 192, Container 1630 (O.T. 1973, Argued Cases, 73-640); see Brennan Conference Notes for *Geduldig*, in Brennan Papers, *supra* note 129, Box I: 311, Folder 4 (Burger argued that the “exclusion is not sex based but upon distinction between pregnancy and other ailments”).

369. *Geduldig*, 417 U.S. at 496-97 n.20.

370. *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974). The *LaFleur* conference presaged the *Geduldig* one, for Burger, Stewart, and Blackmun all went out of their way to emphasize that the “differentiation is not sex related,” because it related only to pregnancy. Brennan Conference Notes for *LaFleur*, in Brennan Papers, *supra* note 129, Box I: 310 (No. 72-777) (quote is from Blackmun). Powell viewed the case in equal protection terms, but only required the board to show a rational basis. *Id.*

371. *Gilbert v. Gen. Elec. Co.*, 429 U.S. 125 (1976).

372. 42 U.S.C. § 2000e(k) (2000) (defining “because of sex” or “on the basis of sex” in Title VII to include pregnancy).

373. H. REP. NO. 95-948, at 3 (1978); see also SUZANNE UTTARO SAMUELS, *FETAL RIGHTS, WOMEN’S RIGHTS: GENDER EQUALITY IN THE WORKPLACE* (1995).

374. Chastened by Congress’s immediate and angry override of *Geduldig* and *Gilbert*, the Supreme Court not only applied the PDA expansively to protect women’s workplace rights, e.g., *United Auto Workers v. Johnson Controls Inc.*, 499 U.S. 187, 211 (1991) (rejecting employer policy protecting potentially pregnant women against jobs posing hazards to fetuses), but also applied its preemptive force conservatively when confronted with state rules expanding women’s workplace opportunities. *California Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 292 (1987) (holding that the PDA does not preempt a state law requiring employers to grant leaves for pregnant women).

As the pregnancy cases reflect, feminists' politics of recognition insisted on heightened scrutiny of rules that had an inevitable impact on women. And, generally, the U.S. Supreme Court rejected their stance, just as it had rejected similar arguments made by people of color. The leading case was *Personnel Administrator v. Feeney*.³⁷⁵ Helen Feeney found it virtually impossible to advance in the civil service because of the operation of the state's strong preference for veterans. She challenged the preference for its significant adverse impact upon women's opportunities in a state where 98% of the veterans were men. Phyllis Segal's NOW amicus brief supporting her claim argued that the preference "inevitably discriminates deeply and pervasively against women as a result of a congeries of laws, regulations and practices which define as overwhelmingly male the class of individuals who qualify as veterans."³⁷⁶ Invoking *Washington v. Davis*, the state responded that the classification itself (veterans) was benign and there was no evidence whatsoever of any intent to discriminate against women.³⁷⁷ With little internal dissent, the Supreme Court agreed. Justice Stewart's opinion for the Court was an important clarification of the burden of proving intent under *Washington v. Davis*: challengers to a state employment policy must show that the challenged policy was not only adopted *in spite of* its disparate impact on women (or racial minorities), but *because of* that impact.³⁷⁸

3. *The Politics of Remediation and the New Politics of Preservation, 1976-Present*

Traditionally, most opposition to equality for women was driven by open commitments to a natural law view in which sex and gender differences were viewed as profound and women's proper role was to bear and rear children and govern the domestic sphere.³⁷⁹ As women

375. 442 U.S. 256 (1979).

376. Brief of Amici Curiae National Organization for Women, NOW Legal Defense and Education Fund, Inc. et al. at 12-13, *Feeney* (No. 78-233).

377. Brief for Appellants at 30-57, *Feeney* (No. 78-233); accord 42 U.S.C. § 2000e-11 (veterans' preferences exempted from Title VII); Brief of Amicus Curiae United States, *Feeney* (No. 78-233) (agreeing with the state).

378. *Feeney*, 442 U.S. at 278-80. For an excellent analysis of *Feeney* as a different "intent" standard than that in *Washington v. Davis* and *Arlington Heights*, see Sheila Foster, *Intent and Incoherence*, 72 TUL. L. REV. 1065 (1998).

379. Examples of such natural law discourse include *Goesaert v. Cleary*, 335 U.S. 464 (1948) (allowing women to tend bar only if employed by their fathers or husbands); *Muller v. Oregon*, 208 U.S. 412 (1908) (upholding maximum hours law to protect only women); *Bradwell v. Illinois*, 83 U.S. 130 (1873) (Bradley, J., concurring in the judgment) (excluding women from the practice of law); PHYLLIS SCHLAFLY, *THE POWER OF THE POSITIVE WOMAN* 54, 159-63 (1977) (normative book by the leading opponent of the ERA); Siegel,

increasingly objected to their subordinate status and moved public opinion toward the idea that sex is a tolerable variation as far as most public policies were concerned, pragmatic arguments came to the fore. Although natural law continued to be the basis for supporting traditional gender roles and separate spheres, preservationist rhetoric gradually shifted to include or emphasize the bad consequences of “radical” change, including harms to the privacy of the marital relationship and the harmony of the family, the psychic costs to women as well as men if traditional mores were upset, and the possibilities of violence and disorder.³⁸⁰ As in the race cases, the shift in rhetoric was accelerated by the Supreme Court’s sex discrimination jurisprudence. Because traditionalist arguments for the status quo came perilously close to the kinds of “archaic” notions about sex differences that were automatically lethal in cases like *Craig* and *Frontiero*, these precedents pressed preservationists strongly toward pragmatic rather than natural law arguments, at least in public. Like the politics of racial preservation, the politics of sex and gender role preservation in the 1970s and 1980s was dominated by this kind of cost-benefit moderation, with at least one important exception. Pragmatists as well as traditionalists paid attention to women’s “real differences” from men, particularly those related to pregnancy and women’s responsibilities to the unborn as well as the children they (still) reared.³⁸¹ Indeed, feminists themselves split on the issue. A new generation of *difference feminists* urged the necessity of state rules empowering and compensating women for their traditionally undervalued caretaking roles.³⁸²

Like the liberal feminists they were opposing, both pragmatic and natural law preservationists invoked the Constitution. They maintained that sex-neutral and abortion-protective rules imposed by judges in Washington, D.C. were at war with (1) the values of local-

She the People, *supra* note 237 (discussing arguments against female suffrage and ratification of the Nineteenth Amendment).

380. See generally Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives’ Rights to Earnings, 1860-1930*, 82 GEO. L.J. 2127 (1994); Reva B. Siegel, “*The Rule of Love*: Wife Beating as Prerogative and Privacy”, 105 YALE L.J. 2117, 2119-20 (1996) (arguing in two different contexts that when traditional male privileges came under fire, their justifications were “modernized” and thereby strengthened).

381. Thus, women (the supposed beneficiaries of the politics of recognition) have been well-represented in the pro-life and anti-ERA politics of preservation. Women opposing the liberal feminist agenda hold different views than the liberals regarding gender roles, sexuality, and parenting. Generally, they view women’s greatest fulfillment in their roles as wives and mothers. See LUKER, *supra* note 290, at 158-91 (pro-life women); MANSBRIDGE, *supra* note 345, at 98-117 (1986) (anti-ERA women).

382. Although difference feminism is typically set “against” liberal feminism, that is simplistic. Both liberals like Wendy Williams and Ruth Ginsburg and difference feminists like Chris Littleton agreed with Pauli Murray and Celia Kenyon that neither the ERA nor the equal protection clause should be construed to invalidate legislation genuinely remedial to women’s traditional disadvantages, especially in the workplace.

ism, where the family and the state were the primary situs for rules relating to gender-normative roles in bearing and raising children, without interference from the national government; (2) the constitutional separation of powers, whereby the popularly elected legislature is both the most legitimate and the most institutionally competent state organ to handle complex, delicate moral and family issues; and (3) fundamental liberties, particularly the rights of fetuses and parents. These arguments were prominent in the campaign to defeat the ERA. Phyllis Schlafly and other opponents argued that the ERA was a bad idea because it would undermine the family and deprive states of their ability to legislate morality (including sexual abstinence and compulsory heterosexuality), would empower unaccountable federal judges to impose their own elite views on an unconsenting populace, and would deprive wives and parents of fundamental rights needed for the preservation of families.³⁸³

The arguments that sunk the ERA also instructed the Supreme Court regarding the extent to which it should apply the Equal Protection Clause to liberate women from archaic stereotypes.³⁸⁴ Among Mrs. Schlafly's most popular charges against the ERA were that it would empower the Supreme Court to subject women to the draft and military service, to invalidate gendered laws protecting women, and to require states to recognize same-sex marriages and other "homosexual rights."³⁸⁵ Americans supported sex segregation in military service, many special protections for women, and marriage limited to different-sex couples. While the ERA lingered, the Supreme Court reaffirmed all of the foregoing sex discriminations, substantially following the constitutional logic of Mrs. Schlafly and her allies. Between 1972 and 1975, the Court brushed aside sex discrimination (and other) arguments for same-sex marriage and sodomy law nullification without even asking for briefs on the merits.³⁸⁶ The Court addressed

383. See MANSBRIDGE, *supra* note 345; DONALD G. MATHEWS & JANE SHERRON DE HART, *SEX, GENDER, AND THE POLITICS OF THE ERA: A STATE AND THE NATION* (1990) (case study of the ERA's defeat in North Carolina); *id.* at 35-53 (arguments against ERA by Senator Ervin [D-N.C.] during its debate in Senate, 1971-72).

384. Recall that four concurring Justices declined to join Justice Brennan's opinion in *Frontiero* because these arguments were being seriously debated in connection with the ERA. See *supra* note 352.

385. See Phyllis Schlafly, *What's Wrong with "Equal Rights" for Women?*, 5 PHYLLIS SCHLAFLY REP. NO. 7, Feb. 1972, reprinted in *WOMEN'S RIGHTS IN THE UNITED STATES: A DOCUMENTARY HISTORY* 291 (Winston E. Langley & Vivian C. Fox eds., 1994) (women would be subject to the draft and would lose custody of their children); Phyllis Schlafly, *Memo on the Equal Rights Amendment 2000*, at <http://www.eagleforum.org/era/ERA99.shtml> (last visited Aug. 20, 2002) (federally funded abortions and rights for "homosexuals," including marriage).

386. See *Doe v. Commonwealth's Attorney for Richmond*, 425 U.S. 901 (1976) (summarily affirming state consensual sodomy law); *Baker v. Nelson*, 409 U.S. 810 (1972) (dismissing

the other two issues in 1981, just before the period for ERA ratification expired for good (1982).

As *Feeney* and *Frontiero* illustrated, the United States armed forces operated under a cornucopia of sex-discriminatory rules, the centerpiece of which was the exclusion of women from combat roles. Women's marginal role in the military was, from the perspective of most feminists, a textbook example of the way in which sexist public law reinforced women's status as second-class citizens.³⁸⁷ Traditionalists viewed women's exclusion as necessary, lest the military be feminized and weakened.³⁸⁸ Such a justification was insufficient under *Craig* or even *Reed*. The modernized (pragmatic) justification for exclusions was that unit cohesion would break down if women joined in combat.³⁸⁹ For this and other reasons, the 1980 reactivation of the draft required only men to register. A three-judge court ruled that the sex discrimination violated the *Craig* standard. Although the ACLU was joined on appeal by NOW, the League of Women Voters, and a number of other feminist organizations, and a generation of the nation's finest constitutional lawyers (like Wendy Williams and Larry Tribe) defended the lower court judgment, their arguments fell on deaf (or deferential) judicial ears. Justice Rehnquist's opinion in *Rostker v. Goldberg*³⁹⁰ emphasized that the Constitution commits military policy to the political branches, that the judiciary has very little competence to evaluate their policy choices, and that Congress had in this case engaged in careful factfinding and deliberation to which the Court must defer. Moreover, "the decision to exempt women from registration was not the 'accidental by-product of a traditional way of thinking about females.'" ³⁹¹ Instead, the decision was a corollary of the proposition that women were barred from combat roles, a bar not challenged by the plaintiffs.³⁹² Writing for three dissenters, Justice

appeal of rejected challenge to state bar to same-sex marriages); see also *supra* Section I.C.2 (discussing *Baker* and *Doe*).

387. Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. REV. 499 (1991); see also Lori Kornblum, *Women Warriors in a Men's World: The Combat Exclusion*, 2 L. & INEQUALITY 351 (1984); Wendy Webster Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN'S RIGHTS L. REP. 175, 182-85 (1982).

388. See BRIAN MITCHELL, *WEAK LINK: THE FEMINIZATION OF THE AMERICAN MILITARY* (1989).

389. See generally FEMALE SOLDIERS — COMBATANTS OR NONCOMBATANTS? HISTORICAL AND CONTEMPORARY PERSPECTIVES (Nancy Loring Goldman ed., 1982) [hereinafter FEMALE SOLDIERS]. Note especially Mady Weschler Segal, *The Argument for Female Combatants*, in FEMALE SOLDIERS, *supra*.

390. *Rostker v. Goldberg*, 453 U.S. 57, 64-74 (1981).

391. *Id.* at 74 (quoting *Califano v. Webster*, 430 U.S. 313, 320 (1977), in turn quoting *Califano v. Goldfarb*, 430 U.S. 199, 223 (1977)).

Marshall found more at stake in the challenge because women were being excluded from “a fundamental civic obligation.”³⁹³

The Court was also tolerant of sex-based classifications protecting women against male predation. Although states in the 1970s redrafted their penal codes to be largely sex-neutral, California continued to make it a felony for a male (of any age) to have sexual intercourse with a female under the age of eighteen. In *Michael M. v. Superior Court*,³⁹⁴ plaintiffs and their amici challenged the statute as a classic sex discrimination based upon traditional gender stereotypes, where the vulnerable girl needs to be protected against predatory boys and men, but boys can take care of themselves.³⁹⁵ California and the United States, which entered the case as an amicus, defended the statute as appropriately focusing regulatory attention on the main problem, the need to protect girls against predation and unwanted pregnancies.³⁹⁶ The statutory rape law was a prophylactic measure to protect minor women who were in fact vulnerable to sexual assault. Its sex discrimination was permissible, because women rarely assaulted boys; it was necessary to the operation of this policy, because girls would be reluctant to report violations if they themselves could be prosecuted. Five Justices accepted this justification.³⁹⁷ Dissenting Justices and feminist critics of the decision disputed both elements of the Court's logic: the historical policy of the gendered statute was rooted in archaic stereotypes of vulnerable girls and predatory boys, and a humane anti-predation policy that recognizes girls' as well as boys' sexual agency can criminalize sex between adults and underage persons of either sex.³⁹⁸

Although the Supreme Court proved receptive to preservationist arguments in the areas of greatest social anxiety about sex equality —

392. Because the goal of registration was to prepare for combat mobilization, it was a reasonable decision to register only those who could engage in combat, men. *Id.* at 76-83.

393. *Id.* at 86 (Marshall, J., dissenting). Marshall demonstrated that the Court attributed a more rational policy to Congress than could be supported from the record and that the experts to whom greatest deference was owed (the Joint Chiefs of Staff and the President) had supported the registration of women. *Id.* at 88-113.

394. 450 U.S. 464 (1981).

395. See Brief of Amici Curiae ACLU and the ACLU of Northern California, *Michael M.* (No. 79-1344).

396. Brief of Amicus Curiae United States at 13-24, *Michael M.* (No. 79-1344).

397. See *Michael M.*, 450 U.S. at 470-76 (Rehnquist, J., for a plurality); *id.* at 478-80 (Stewart, J., concurring); *id.* at 481-87 (Blackmun, J., concurring in the judgment).

398. See *id.* at 493-95 (Brennan, J., dissenting); Kristin Bumiller, *Rape as a Legal Symbol: An Essay on Sexual Violence and Racism*, 42 U. MIAMI L. REV. 75 (1987); Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEXAS L. REV. 387 (1987); Williams, *supra* note 387, at 181-82; see also Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1305 (1991) (criticizing both majority and dissenting Justices).

same-sex marriage, women in combat, and statutory rape — it did not retreat from *Craig*'s baseline, even after the Court shifted toward the right after President Reagan's election in 1980. Indeed, Reagan's first Supreme Court appointee was Sandra Day O'Connor, the first woman to serve on the Court.³⁹⁹ In one of her earliest major opinions for the Court, *Mississippi University for Women v. Hogan*,⁴⁰⁰ Justice O'Connor struck down a state law allowing only women to enroll at the state nursing college. When a law adopts a sex-based classification, the state has a "burden of showing an 'exceedingly persuasive justification' for the classification," a burden that cannot be met by post-hoc rationalizations by counsel or policies that ultimately rest upon gender stereotypes.⁴⁰¹ With *Craig*, *Hogan* remains the leading statement of the Court's approach to statutory sex discriminations, and the Rehnquist Court — often over the objection of its Chief — has been just as vigorous as the Burger Court was in carrying out the liberal feminist politics of recognition under cover of the Equal Protection Clause. No longer can women be peremptorily struck from juries without explanation⁴⁰² or excluded from state paramilitary colleges,⁴⁰³ for prominent examples. In both cases, Justice O'Connor was in the majority, and the opinion for the Court quoted and applied *Hogan*.⁴⁰⁴

The foregoing sex discrimination cases reflect the Court's stance as the twentieth century came to a close: consistent with the feminist politics of recognition (and public opinion), most of the Justices have insisted on formal equality and respect for women's co-equal role in public as well as private life.⁴⁰⁵ On the other hand, and probably consistent with public opinion, the Justices backed away when women's equality was strongly inconsistent with third-party rights, the legitimacy and comparative competence of the judiciary (*vis à vis* the political branches), and the Constitution's preference for local decision-making as to matters of family life and public safety.

399. Although a reliable conservative on issues of federalism, separation of powers, and the individual rights of racial and sexual minorities, Justice O'Connor also proved attentive, in a way her Reagan Brethren were not, to feminist voices. *E.g.*, Judith Olans Brown et al., *The Rugged Feminism of Sandra Day O'Connor*, 32 *IND. L. REV.* 1219 (1999); Sandra Day O'Connor, *Portia's Progress*, 66 *NYU L. REV.* 1546, 1553 (1991).

400. 458 U.S. 718 (1982), also discussed in Section II.C.3 *infra*. Because the decision was 5-4, the replacement of Justice Stewart (a conservative in sex discrimination cases) with Justice O'Connor very probably changed the outcome of the case.

401. *Id.* at 724.

402. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994).

403. *United States v. Virginia*, 518 U.S. 515 (1996).

404. *Id.* at 523-24; *J.E.B.*, 511 U.S. at 136.

405. See ROSEN, *THE WORLD SPLIT OPEN*, *supra* note 299, at 338 (opinion polls have found large majorities of Americans supportive of a "strong women's movement to push for changes that benefit women").

Although the foregoing constitutional clashes between women's politics of recognition and traditionalists' politics of preservation were important and meaningful, the most intense post-1976 clashes involved the unique issue of abortion and issues of remediation. Abortion has been an intense question because it is so important for each group and their points of view are incommensurable: feminists understand choice as essential to their equal citizenship, while traditionalists understand life to be at stake. As with the civil rights movement, the other contentious issues relate to women's politics of remediation. The women's movement has sought and obtained statutes and administrative rules protecting against private workplace discrimination and sexual harassment; requiring integration of public accommodations; insisting that schools not only protect girls against sexual harassment, but also devote equal resources to girls' athletic as well as educational programs; modernizing rape laws and criminalizing hate speech; and providing tort causes of action for gender-based violence. Remedial measures such as these are costly and may cross fuzzy constitutional lines relating to federalism, separation of powers, and individual rights of free speech and association. Even as they were being routed as to matters of women's equal rights to serve on juries and attend paramilitary colleges, preservationists have made successful court challenges to feminist remedial measures suppressing misogynistic pornography, regulating pro-life protests and persuasive activities outside abortion clinics, and (most controversially) creating a federal cause of action for gender-based violence.

a. The Post-Roe Abortion Cases. Pro-life traditionalists mobilized as a normative social movement seeking to preserve not only human life, but also a traditionalist ethic of family values and women's domestic role.⁴⁰⁶ They maintained that *Roe v. Wade* was worse than the ERA because it took the most moral of issues away from family and state decisionmaking, represented the most arrogant example of judicial legislation, and blatantly ignored the fundamental right to life of the most vulnerable party to the matter, the unborn human child.⁴⁰⁷ Through organs such as the National Right to Life Committee (1973), the movement sought to amend the Constitution to overrule *Roe* and, failing that, to adopt new state laws regulating abortion in a variety of ways. These laws, in turn, were challenged by pro-choice groups and defended by state attorneys general and their pro-life amici. Three kinds of abortion-regulatory laws illustrate how this ongoing culture

406. See DALLAS A. BLANCHARD, *THE ANTI-ABORTION MOVEMENT AND THE RISE OF THE RELIGIOUS RIGHT: FROM POLITE TO FIREY PROTEST* 22-36 (1994) (providing an institutional history of the pro-life movement); *id.* at 44-46 (providing essential ideology of pro-lifers).

407. See *id.* at 37-50; Luker, *supra* note 290.

clash played itself out in constitutional law: parental and spousal notification and consent requirements, bars to public funding or assistance for abortions, and informed consent rules seeking to persuade women to think twice before they chose abortions.

In *Planned Parenthood v. Danforth*,⁴⁰⁸ the first major post-*Roe* case, Missouri Attorney General John Danforth pressed a pro-life constitutional understanding in support of Missouri's law which required a minor to obtain her parents' consent and a wife to obtain her husband's consent before an abortion could be performed. He was supported by an amicus brief from the United States Catholic Conference.⁴⁰⁹ Both argued that "the [constitutional] rights of parents to the exercise of their authority is considered fundamental and only a compelling interest by the state can overcome it."⁴¹⁰ Similarly, both invoked the right to marry cases, including *Griswold*, for the proposition that family decisions, including those relating to pregnancy, are joint decisions in which the husband has a legally protected interest, just as his wife does.⁴¹¹ These arguments had an audience on the Court: Justices White, Rehnquist, and Stevens were persuaded by the arguments for parental consent; White and Rehnquist went with spousal consent as well.⁴¹² But a majority of the Court insisted on the individualistic framework suggested by *Roe* and supported by Planned Parenthood's detailed argument that, in practice, the state's consent rules would give parents and husbands vetoes over a decision that was ultimately personal to the mother.⁴¹³

The foregoing pro-life constitutional arguments were pressed more ardently in *Bellotti v. Baird*,⁴¹⁴ which evaluated a Massachusetts law requiring minors to notify their parents and obtain their consent before they could obtain abortions, with a judicial proceeding available if

408. 428 U.S. 52 (1976).

409. The National Catholic Bishops' Conference had in 1967 established a Committee on Family Life, which was the main speaker for the pro-life viewpoint before *Roe*. The Committee was the precursor to the National Right to Life Committee, formed in 1973. Blanchard, *supra* note 406, at 50-53.

410. Brief of Amicus Curiae the United States Catholic Conference at 24, *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976) (No. 74-1151); see Brief for Appellees at 42-44, *Danforth* (No. 74-1151).

411. Brief of Amicus Curiae the United States Catholic Conference at 32-39, *Danforth* (No. 74-1151); Brief for Appellees at 38, *Danforth* (No. 74-1151).

412. See *Danforth*, 428 U.S. at 94 (Stevens, J., dissenting); Brennan Conference Notes for *Danforth* (Nos. 74-1151, 74-1419), in Brennan Papers, *supra* note 129, Box I: 368, Folder 6.

413. *Danforth*, 428 U.S. at 68-72 (parental consent), *id.* at 72-75 (spousal consent); Brief for Appellants and Cross-Appellees Planned Parenthood of Central Missouri, et al., at 72-90, *Danforth* (Nos. 74-1151, 74-1419) (spousal consent), *id.* at 90-105 (parental consent).

414. 443 U.S. 627 (1979).

either parent refused and the minor felt it was in her best interests. Several amici argued that the constitutional protection for family integrity not only justified the parental consent requirement, but also barred the state from overriding the parents' decision with the judicial bypass.⁴¹⁵ Writing for a plurality of the Court, Justice Powell accepted the traditionalists' point that the state has much more leeway in regulating the sexual choices of minors because of "the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing."⁴¹⁶ Powell also adopted the amici's localist stance that moral instruction and choice for minors lay first within the family, and "beyond the competence of impersonal political institutions."⁴¹⁷ On the other hand, he agreed with the challengers' claim that the statute was overbroad: it required notification even when there was no chance of productive dialogue and therefore was an "undue burden" on the minor's right to choose an abortion.⁴¹⁸ In dictum, Justice Powell suggested that states could require both parents to consent to the procedure, so long as there was a judicial bypass available to the minor in lieu of parental dialogue.⁴¹⁹ Because Powell spoke for four Justices and a fifth (White) believed the Massachusetts law was valid, *Bellotti* indicated that there was a Court that would uphold subsequent parental consent and notification laws — as indeed there was in subsequent cases, notwithstanding mounting evidence that even notification-with-bypass requirements imposed traumatic burdens on minor women.⁴²⁰

415. See Brief of Amici Curiae Catholic League for Religious and Civil Rights, et. al at 6-32, *Bellotti v. Baird*, 443 U.S. 627 (1979) (No. 78-329).

416. *Bellotti*, 443 U.S. at 634 (Powell, J., for a plurality joined by Burger, C.J., and Stewart & Rehnquist, JJ.); *id.* at 637-39 (discussion relying on *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) and other cases emphasized by the state and its amici).

417. *Id.* at 638. "Thus, 'it is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include prep for obligations the state can neither supply nor hinder.'" *Id.* (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)).

418. *Id.* at 646-50.

419. *Id.* at 649.

420. To trace the development of the doctrine, see *H.L. v. Matheson*, 450 U.S. 398 (1981) (upholding parental notification-whenever-possible requirement); *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476 (1983) (upholding parental-consent law, with judicial bypass as suggested in *Bellotti*); *Hodgson v. Minnesota*, 497 U.S. 417 (1990) (upholding a two-parent notification, with bypass, law against strong social science evidence and lower court findings of fact that notification did not contribute to healthy dialogue about the important moral choice and instead contributed to trauma for the minors); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (joint opinion, delivering the judgment of the Court) (upholding one-parent consent requirement, with judicial bypass, but striking down spousal notification requirement). For an analysis of the social science evidence that the parental-consent and notification requirements burden women and do not contribute to family com-

The Supreme Court was also responsive to the arguments of pragmatic preservationists that even if choosing an abortion was a *tolerable* moral choice, such that the state could ordinarily not make it a crime, abortion was not a *benign* or *good* moral choice, such that the state must support or “promote” it. In *Maier v. Roe*,⁴²¹ the Court ruled that it is not unconstitutional for state medicaid programs to exclude abortions even if they fund childbirths. Justice Powell’s opinion for the Court interpreted *Roe-Danforth-Bellotti* as protecting women against “unduly burdensome interference with her freedom to decide whether to terminate her pregnancy” — a freedom from state “compulsion” that did not entitle women to have their abortions paid for by the state.⁴²² “There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy.”⁴²³ The state has wide latitude not to “promote abortion” by funding it, and Powell’s opinion concluded with a statement that this is precisely the sort of policy issue best left to the democratically elected legislators.⁴²⁴

Maier encouraged pro-life activists to press for laws not only requiring that abortions be performed only after doctors obtain the written consent of their patients (a requirement upheld in *Danforth*),⁴²⁵ but also that the consent be “informed” by pro-life information the doctors were required to provide. Akron, Ohio, for example, required doctors to inform their patients about “the anatomical and physiological characteristics of the particular unborn child,” many possible complications of abortion, and the “fact” that “the unborn child is a human life from the moment of conception.” This was a powerful bit of lobbying by the state, and an intrusion into the doctor-patient relationship, but one that was defended by the Reagan Administration, which argued that *Roe* was not strongly implicated in regulations that did not “unduly burden” the woman’s ability to obtain an abortion

munication, see WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, *SEXUALITY, GENDER, AND THE LAW* 190-202 (1997) [hereinafter ESKRIDGE & HUNTER, *SEXUALITY*].

421. 432 U.S. 464 (1977). See also *Maier’s* companion cases, *Beal v. Doe*, 432 U.S. 438 (1977) (interpreting Social Security Act to allow states to participate in medicaid program without funding abortions), and *Poelker v. Doe*, 432 U.S. 519 (1977) (per curiam) (municipal hospital providing childbirth services was not constitutionally required to provide abortion services). The Court followed and applied *Maier* to uphold a federal bar to spending federal monies on abortions in *Harris v. McRae*, 448 U.S. 297 (1980).

422. *Maier*, 432 U.S. at 473-74 (citing *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977)).

423. *Id.* at 475. Powell contrasted a law barring schools from teaching German, invalidated in *Meyer v. Nebraska*, 262 U.S. 390 (1923), with a policy of teaching Latin as the only foreign language in the public schools, which the Court would uphold. *Maier*, 432 U.S. at 476-77.

424. *Id.* at 479-80; see *id.* at 481-82 (Burger, C.J., concurring) (same).

425. *Planned Parenthood v. Danforth*, 428 U.S. 52, 67, 85 (1976).

and that the Court should “accord heavy deference to the legislative judgment” in determining whether this and other requirements constituted an “undue burden” on the pregnant patient.⁴²⁶ The Inc. Fund, in an amicus brief, reminded the Court that deference to legislative judgments had been the last line of segregationist constitutionalism — and that *Brown* and other race cases had decisively rejected this kind of argument.⁴²⁷ In any event, the required disclosures loaded up the informed consent process too much for Justice Powell, who wrote for the Court in striking down this ordinance in *Akron v. Akron Center for Reproductive Health*.⁴²⁸ “By insisting upon recitation of a lengthy and inflexible list of information, Akron unreasonably has placed ‘obstacles in the path of the doctor upon whom [the woman is] entitled to rely for advice in connection with her decision.’”⁴²⁹

The Court followed *Akron* in *Thornburgh v. American College of Obstetricians and Gynecologists*,⁴³⁰ which struck down a similarly loaded informed consent statute. Justice Blackmun’s opinion for the Court was more forceful than that in *Akron*, however. “The States are not free, under the guise of protecting maternal health or potential life,” state interests recognized as valid in *Roe*, “to intimidate women into continuing pregnancies” or “to deter a woman from making a decision that, with her physician, is hers to make.”⁴³¹ *Thornburgh* is significant, for it represented an advance for the politics of preservation’s campaign to overrule *Roe*. Solicitor General Charles Fried filed an amicus brief urging the Court to abandon *Roe*’s “rigid” trimester framework and to apply *Maher*’s “undue burden” approach to evaluate the informed consent provisions⁴³² — and his brief drew general

426. Brief of Amicus Curiae the United States at 6-7, *Akron v. Akron Ctr. for Reproductive Health*, 462 U.S. 416 (1983) (No. 81-746) (undue burden as the constitutional standard); *id.* at 8-10 (deference to legislators); *cf. id.* at 5 n.1 (reserving the question whether the government believed *Roe* was correctly decided).

427. Brief of Amicus Curiae NAACP Legal Defense and Educational Fund, Inc. at 5-12, *Akron* (No. 81-746).

428. 462 U.S. 416, 442-49 (1983).

429. *Id.* at 445 (quoting *Whalen*, 429 U.S. at 604 n.33). Powell rejected the argument, pressed in dissent by Justice O’Connor, that the unconstitutional advice could be severed from other information that Akron properly required doctors to make available. *Id.* at 445-46 n.37.

430. 476 U.S. 747 (1986).

431. *Id.* at 759.

432. See Brief of Amicus Curiae the United States at 17-18, *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986) (No. 84-495) (urging the Court to abandon the *Roe* framework for analysis).

support from four Justices, including Chief Justice Burger (who had joined *Roe* and subsequent majority opinions).⁴³³

After President Reagan appointed Antonin Scalia and Anthony Kennedy to the Court, only three of the seven *Roe* Justices remained on the Court, and there was every reason to believe that *Roe* would be narrowed or overruled.⁴³⁴ The life/choice culture clash broke open in *Webster v. Reproductive Health Services*.⁴³⁵ Missouri required doctors to perform viability tests near the end of the second trimester, a requirement foreclosed by *Roe* as applied in *Akron*.⁴³⁶ The state asked the Court to reconsider and overrule *Roe v. Wade* — a petition joined by dozens of right-to-life amici and the Reagan Administration.⁴³⁷ The Solicitor General argued that *Roe* created a fundamental right that was not supported by constitutional text, intent, or tradition; denigrated the state's interest in potential human life without any legal or moral basis; created an arbitrary trimester framework for implementing its flawed premises; and, most important, engaged in this activism in the teeth of popular demands for regulation.⁴³⁸ "At the heart of the abortion controversy lies a divisive conflict between a woman's interest in procreative choice and the State's interest in protecting the life of an unborn child and promoting respect for life generally. This is not the kind of conflict that is amenable to judicial resolution."⁴³⁹ Indeed, judicial activism tangibly interfered with the proper operation of the democratic process; by constitutionalizing the key issues, *Roe* deprived legislators of the room to bargain and moderate the views of the various groups.⁴⁴⁰

433. *Thornburgh*, 476 U.S. at 782-85 (Burger, C.J., dissenting); *id.* at 785-814 (White, J., joined by Rehnquist, J., dissenting); *id.* at 814 (O'Connor, J., joined by Rehnquist, J., dissenting).

434. See Walter Dellinger & Gene Sperling, *Abortion and the Supreme Court: The Retreat from Roe v. Wade*, 138 U. PA. L. REV. 83 (1989).

435. 492 U.S. 490 (1989).

436. *Akron*, 462 U.S. at 434-38.

437. Among the religious groups filing briefs to overrule *Roe* were the United States Catholic Conference; the Southern Baptist Convention; the National Association of Evangelicals; the Missouri Synod of the Lutheran Church; the Holy Orthodox Church. Other amici represented Feminists for Life of America; the National Association of Pro-Life Nurses; Women Exploited by Abortion; the Family Research Council; Right to Life Advocates.

438. Brief for Amicus Curiae the United States at 11-20, *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989) (No. 88-605).

439. *Id.* at 20.

440. *Id.* at 20-24; see also MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW: AMERICAN FAILURES, EUROPEAN CHALLENGES* (1987) (most western countries have resolved these issues through legislation), discussed in Brief of Amicus Curiae the United States at 23-24, *Webster* (No. 88-605).

We do not know exactly how the Justices received these arguments in conference, but ultimately the Court met the Reagan Administration more than halfway. Chief Justice Rehnquist's opinion for three Justices did not question *Roe's* holding that a woman's choice is a "liberty interest protected by the Due Process Clause" but seemed open to the Solicitor General's view that the liberty interest did not require strict scrutiny; following the administration, his opinion abandoned *Roe's* trimester framework, as it had been applied as recently as *Thornburgh*.⁴⁴¹ Declining to follow the administration's lead so completely, Justice O'Connor concurred only in the result, applying *Maher's* "undue burden" analysis.⁴⁴² Justice Scalia also concurred only in the result. In his own distinctive language, he advanced the Solicitor General's position: *Roe* should be completely overruled.⁴⁴³

Roe seemed doomed after two more of its majority (Brennan and Marshall) left the Court and were replaced by Justices Souter and Thomas. Both the Solicitor General and the Commonwealth of Pennsylvania, joined by dozens of amici, again urged the Court to overrule *Roe* in *Planned Parenthood v. Casey*.⁴⁴⁴ Planned Parenthood suggested that the state law could not be sustained without overruling *Roe* but urged that the Court not do so.⁴⁴⁵ A large majority of Americans believed that women do have liberty interests in their decisions whether to choose to abort an unplanned pregnancy,⁴⁴⁶ and a great deal of American law and family practice had evolved in reliance on the rights recognized for a generation under *Roe*. The conservative Court faced a dilemma, which its centrists — Justices O'Connor, Kennedy, and Souter — resolved in a Solomonic way. Their joint opinion, which also delivered the judgment of a fractured Court, reaffirmed *Roe's* holding that the Due Process Clause guarantees a "woman's [fundamental] right to terminate her pregnancy before

441. *Webster*, 492 U.S. at 517 (Rehnquist, C.J., joined by White & Kennedy, JJ.).

442. *Id.* at 530 (O'Connor, J., concurring in the judgment). *Contra* Brief of Amicus Curiae the United States at 22, *Webster* (No. 88-605) (rejecting the "undue burden" approach as unmoored in the Constitution and therefore arbitrary); *id.* at 22 n.16 (if the Court adopts an undue burden approach, the focus should be the "burden on procreational choice" and not the "burden on abortion").

443. *Webster*, 492 U.S. at 537 (Scalia, J., concurring in the judgment).

444. 505 U.S. 833 (1992). For demands that the Court overrule *Roe*, see, for example, Brief of Amicus Curiae the United States Supporting Respondents at 8-9, *Casey* (No. 91-744); Brief for Respondents at 104-17, *Casey* (No. 91-744).

445. See Brief for Petitioners and Cross-Respondents at 17-34, *Casey* (No. 91-744).

446. See, e.g., ELIZABETH ADELL COOK ET AL., BETWEEN TWO ABSOLUTES: PUBLIC OPINION AND THE POLITICS OF ABORTION (1992); Noemie Emery, *The Women Who Really Want This President*, THE SPECTATOR, Jan. 31, 1998, at 12 (61% of Americans support some right to abortion).

viability,” while at the same time jettisoning the trimester framework, “which we do not consider to be part of the essential holding of *Roe*.”⁴⁴⁷

In place of the prior framework, the three controlling Justices ruled that the appropriate test should be whether a state regulation imposes an “undue burden” on the woman, namely, that it “has the purpose or effect of placing a substantial obstacle in the path of a woman seeking abortion of a nonviable fetus.”⁴⁴⁸ The joint opinion applied this test to allow the state requirements of parental consent (with the *Bellotti* bypass) and the woman’s written consent after she had been given state-required information about the fetus and the consequences of the abortion.⁴⁴⁹ Although the latter holding essentially overruled *Akron* and *Thornburgh*, the joint opinion justified it in feminist terms that tied women’s politics of recognition to the state’s right to promote its own conception of the good.⁴⁵⁰ Reaffirming *Danforth*, the joint opinion rejected the spousal notification requirement in terms of women’s politics of recognition. No longer could the Court presume, as it wrongly did in *Hoyt* and *Bradwell*, that a woman’s place is in the home, under the thumb of her husband and consigned to bearing and raising children. The spousal notification provision “embodies a view of marriage consonant with the common-law status of married women but repugnant to our present understanding of marriage and of the nature of the rights secured by the Constitution. Women do not lose their constitutionally protected liberty when they marry.”⁴⁵¹

As Justices Blackmun and Stevens argued in partial dissent, the joint opinion was a conservative understanding of feminist politics, because it permitted a great deal of state regulation of women’s choices that do not burden men’s choices.⁴⁵² But the joint opinion was also a far cry from the strict pro-life ideology, which received its classic judicial articulation in Justice Scalia’s seething dissent, joined by four Justices. Echoing the view of the pro-life amici, Scalia denounced the Court for finding a “liberty” to destroy “*a human life*,” without any

447. *Casey*, 505 U.S. at 846, 873 (joint opinion).

448. *Id.* at 877. This was the test followed by Justice Powell in *Maher*, 432 U.S. at 473-74.

449. *Casey*, 505 U.S. at 882-83 (written consent and information requirements); *id.* at 899-900 (parental consent).

450. “Regulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman’s exercise of the right to choose.” *Id.* at 877.

451. *Id.* at 898.

452. *Id.* at 927-29 (Blackmun, J., dissenting in part); *id.* at 934-36 (Stevens, J., dissenting in part).

principled legal basis for justifying that move.⁴⁵³ He insisted that this profoundly moral matter is the classic example of an issue best left to the democratically legitimate state legislative process, and that the elitist usurpation of decisionmaking by the Court was illegitimate.⁴⁵⁴

Although most observers thought that *Casey* resolved the legal status of *Roe v. Wade*, the pro-life/pro-choice constitutional debate has continued and possibly escalated. The next wave of statutes reflecting traditionalist objections to *Roe* focused on certain mechanisms for late-term abortions, and these laws have produced emotional clashes in all levels of government.⁴⁵⁵ The Supreme Court ruled in *Stenberg v. Carhart*,⁴⁵⁶ that states could not ban all such mechanisms and could not ban any that did not have a broad exception giving physicians discretion to protect the health of the mother. Joined by four members of the Court, Justice Thomas's dissenting opinion described procedures allowed by the Court's decision in gruesome detail, analogizing them to "infanticide."⁴⁵⁷ Justice Scalia went further, describing the Court's authorization for "killing a human child" as a decision whose infamy would be equivalent to that of *Dred Scott* and *Korematsu*.⁴⁵⁸ Although Justice O'Connor provided a roadmap for states to enact partial birth abortion laws that would satisfy her (the critical fifth vote for the majority),⁴⁵⁹ there is little doubt that this new manifestation of the constitutional politics of abortion will occupy the country and the courts for some time to come.

b. The First Amendment Cases. The libertarian First Amendment, protective of women's interests in the family planning context, was a fulcrum for critique once feminists obtained state and federal legislation protecting their interests. Where feminists were most united and public opinion agreed with their agenda, the Court has applied the First Amendment cautiously. For example, many states and municipalities have barred "public accommodations" from discriminating on the basis of sex, and some have applied these laws to private clubs

453. *Id.* at 982 (Scalia, J., dissenting in part).

454. *Id.* at 996.

455. See *Hope Clinic v. Ryan*, 195 F.3d 857, 881 (7th Cir. 1999) (Posner, C.J., dissenting) (analyzing cynically the politics of partial birth abortion measures).

456. 530 U.S. 914 (2000), *discussed in* Section III.B.

457. *Id.* at 983-87 (Thomas, J., joined by Rehnquist, C.J., and Scalia & Kennedy, JJ., dissenting) (noting that the procedure "so closely borders on infanticide that 30 States have attempted to ban it," a characterization repeated at 1020); *id.* at 983-87 (describing in detail the procedure, with the suggestion that this is surgical murder).

458. *Id.* at 953 (Scalia, J., dissenting). In a characteristically antic move, Scalia presented himself as a modern Cato, as he ended two consecutive paragraphs, and his dissenting opinion, with the refrain, "*Casey* must be overruled" (translatable as "*Casey delenda est*"). *Id.* at 955-56.

459. *Id.* at 947-51 (O'Connor, J., concurring).

such as the Jaycees and the Rotary Club, which were all-male by national rule.⁴⁶⁰ In *Roberts v. United States Jaycees*,⁴⁶¹ the Court recognized that the First Amendment protects the right of men to form “expressive” associations but failed to see how admitting women would undermine the expressive and associational interests of the Jaycees.⁴⁶² Moreover, the Court ruled that whatever injury the law imposed on men’s rights of association was justified by the important state antidiscrimination interest.⁴⁶³

In other areas, where feminists were themselves divided and the public less supportive, the Court has applied the First Amendment aggressively. The Court, for example, summarily affirmed Judge Frank Easterbrook’s decision invalidating an Indianapolis law creating a tort cause of action for women injured by sexually explicit pornography that objectifies or degrades women.⁴⁶⁴ As Easterbrook’s opinion emphasized, the ordinance regulated published materials that were not obscene (as the Court had defined the term) based on their content, the kind of regulation the First Amendment has traditionally rejected. Professor Catharine MacKinnon and other feminists had supported the ordinance as a measure needed for the protection of women against violence, and Indianapolis pressed their views on appeal. The ordinance regulated “speech” that is of the lowest value and results in great harm to women; under the Court’s child pornography and indecent speech precedents, these demonstrated harms should have been sufficient to justify the ordinance, they maintained.⁴⁶⁵ Even under strict scrutiny, the ordinance could be defended as needed to advance the compelling state interest in “eradicating sex discrimination,” as in *Roberts*.⁴⁶⁶ The most powerful critics of these arguments have been

460. See, e.g., David E. Bernstein, *Sex Discrimination Laws Versus Civil Liberties*, 1999 U. CHI. LEGAL FORUM 133.

461. 468 U.S. 609 (1984).

462. *Id.* at 627; accord *Bd. of Dirs. of Rotary Int’l v. Rotary Club*, 481 U.S. 537 (1987) (following *Roberts*). The Jaycees’ brief probably did not help their cause much, as it was largely circular: the Jaycees defined themselves as a “young men’s” association, and so their goals would axiomatically be impaired if “young women” were imposed upon them. See Brief of Appellee at 11-16, *Roberts* (No. 83-724). Their expressive association claim would have been stronger — but also probably less acceptable to their membership — if it had been that “our association stands for the idea that ‘business is for guys.’” Cf. Brennan Conference Notes for *Roberts*, in Brennan Papers, *supra* note 129, Box 1: 628, Folder 4 (Stevens: “Male chauvinists can’t have protections unless they admit they are.”).

463. *Roberts*, 468 U.S. at 623.

464. *Hudnut v. Am. Booksellers Ass’n, Inc.*, 475 U.S. 1001 (1986), summarily *aff’d* 771 F.2d 323 (7th Cir. 1985).

465. Jurisdictional Statement at 11-15, *Hudnut* (No. 85-1090) (relying on *New York v. Ferber*, 458 U.S. 747 (1982) (child pornography)); *Young v. Am. Mini-Theatres*, 427 U.S. 50 (1976) (plurality opinion) (sexually explicit speech is low-value) as well as Catharine MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1 (1985).

466. Jurisdictional Statement at 15-20, *Hudnut* (No. 85-1090).

feminists, however.⁴⁶⁷ In the Indianapolis case, their only fans on the Supreme Court were its most traditionalist Justices.⁴⁶⁸

Hate speech codes have been even more controversial, because traditionalists as well as liberal feminists are skeptical of them. Defenders such as Professor Mari Matsuda maintain that such codes are constitutional because of their effect on third parties, especially people of color, women, and lesbian and gay people: hate speech literally disables them from participating in the political, social, and intellectual life of the community.⁴⁶⁹ Notwithstanding these powerful arguments, such codes are of dubious constitutionality after the Court's decision in *R.A.V. v. City of St. Paul*.⁴⁷⁰ The Court ruled that a hate crime law was overbroad because it penalized a lot of protected speech because of its expressive content, and indeed because of its viewpoint (denigration of racial or sexual minorities or women). Most judges — and many feminists — have understood this decision to be fatal to broadly written state hate speech laws.

Contrast the EEOC's Title VII guidelines regulating sexual harassment in the workplace.⁴⁷¹ Like the anti-porn ordinance, these guidelines are drawn from the work of Professor MacKinnon and other early feminists.⁴⁷² And their requirement that the employer not tolerate a "hostile work environment" has been interpreted to restrict speech as well as conduct that creates an environment hostile to women. Although libertarians have been consistently critical of these speech-restrictive rules, feminists and ordinary judges have disputed their tension with First Amendment values.⁴⁷³ Even Justice Scalia's opinion in *R.A.V.* was forced (by his colleagues no doubt) to concede that "sexually derogatory 'fighting words,' *among other words*, may produce a violation of Title VII's prohibition of *sexual* discrimination

467. See Lisa Duggan et al., *False Promises: Feminist Anti-Pornography Legislation*, 38 N.Y.L. SCH. L. REV. 133 (1993); Nicholas Wolfson, *Eroticism, Obscenity, Pornography, and Free Speech*, 60 BROOK. L. REV. 1037 (1994).

468. Within the Court, Burger, Rehnquist, and O'Connor — the most traditionalist Justices in 1986 — would have noted probable jurisdiction and heard arguments in the case. The other six Justices voted to affirm Easterbrook's opinion without briefing and argument. See *Hudnut*, 475 U.S. 1001.

469. Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989).

470. 505 U.S. 377 (1992).

471. EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. 1604.11(a); see *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986) (upholding these regulations).

472. CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* (1979).

473. Compare JEFFREY ROSEN, *THE UNWANTED GAZE* (2001); Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791 (1992), with Miranda Oshige McGowan, *Certain Illusions About Speech: Why the Free Speech Critique of Hostile Work Environment Harassment Is Wrong*, CONST. COMM. (forthcoming 2002).

in employment practices.”⁴⁷⁴ This consensus has eroded: some feminists and judges are concerned that the breadth of the EEOC’s guidelines or their too-aggressive implementation by employers are chilling sexual expression in the workplace.⁴⁷⁵

The most hotly contested area has involved pro-life activities. Frustrated by their mixed results from the legal system and the political process, pro-life activists formed more aggressive groups, the Pro-Life Action League (1980) and Operation Rescue (1986). These groups have engaged in an escalating campaign to picket abortion clinics and the homes of abortion doctors, to approach women entering clinics and persuade them not to proceed with abortions, and (in some instances) to assault abortion providers and damage the clinics.⁴⁷⁶ Pro-choice activists objected that these activities intimidated both women seeking abortions and providers.⁴⁷⁷ In 1986, NOW sued the Pro-Life Action League for conspiring to interfere with its members’ constitutional rights; Operation Rescue was added as a defendant in 1989. Abortion providers and their allies obtained injunctions all over the country; the orders typically enjoined protesters from blocking access to clinics, harassing women as they approached the clinics, and creating loud disturbances outside the clinics.⁴⁷⁸

Pro-life protesters objected that these injunctions violated their First Amendment rights. In *Madsen v. Women’s Health Center*,⁴⁷⁹

474. *R.A.V.*, 505 U.S. at 389 (emphasis added). Note Scalia’s slip of the pen: “sexual” rather than “sex” discrimination. *Id.*

475. See, e.g., *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200 (3d Cir. 2001) (trimming back application of school district’s sexual harassment guidelines in light of First Amendment values); Vicki Schultz, *The Sanitized Workplace*, 112 *YALE L.J.* (forthcoming 2002).

476. See RANDALL A. TERRY, *OPERATION RESCUE* (1988) (describing the philosophy of the organization’s founder); Blanchard, *supra* note 406, at 51-60; Faye Ginsburg, *Rescuing the Nation: Operation Rescue and the Rise of Anti-Abortion Militance*, in *ABORTION WARS: A HALF CENTURY OF STRUGGLE, 1950-2000*, at 227-50 (Rickie Solinger ed., 1998); Victoria Johnson, *The Strategic Determinants of a Countermovement: The Emergence and Impact of Operation Rescue Blockades*, in *WAVES OF PROTEST: SOCIAL MOVEMENTS SINCE THE SIXTIES* 241, 245-65 (Jo Freeman & Victoria Johnson eds., 1999).

477. See generally *Abortion Clinic Violence: Oversight Hearings Before the Subcomm. on Civil & Constitutional Rights of the House Comm. on the Judiciary*, 99th Cong. (1985-86); *Freedom of Access to Clinic Entrances Act of 1993: Hearings Before the Senate Comm. on Labor and Human Resources*, 103d Cong. (1993).

478. See Brief of Amici Curiae NOW Legal Defense and Education Fund et al., *Madsen v. Women’s Health Ctr.*, 512 U.S. 753 (1994) (No. 93-880) (listing reported federal and state cases issuing or upholding such injunctions).

479. 512 U.S. 753 (1994), *followed and applied in* *Schenck v. Pro-Choice Network of Western N.Y.*, 519 U.S. 357 (1997). An earlier case, *Frisby v. Schultz*, 487 U.S. 474 (1988), upheld an ordinance regulating residential picketing that had been aimed at pro-life protesters. *Accord* *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263 (1993) (holding that women have no § 1985 claim for relief against pro-life protesters conspiring to deny them access to abortion).

Operation Rescue and counsel Jay Sekulow argued that the injunctions were prior restraints per se invalid under the First Amendment and, if not prior restraints, were substantive (and not time, place, or manner) restrictions on speech that were subject to strict scrutiny.⁴⁸⁰ Other amici associated Operation Rescue's protest activities with those of Susan B. Anthony, Martin Luther King, Jr., and early gay rights activists — a tradition of "civil disobedience" justifying judicial protection.⁴⁸¹ Feminists and the clinic responded that the injunctions regulated conduct and likely violations of the law, not ideas, and therefore constituted ordinary time, place, and manner restrictions, traditionally subjected to rational basis inquiry.⁴⁸²

As it had in *Casey*, the Supreme Court chose a middle path to resolve the clash of norms. Chief Justice Rehnquist's opinion for the Court in *Madsen* ruled, with the clinic, that the injunction was neither a prior restraint nor a content-based regulation of the protesters but followed Operation Rescue in declining to characterize it as nothing more than a time, place, or manner restriction. Because injunctions "carry greater risks of censorship and discriminatory application" than statutes do, Rehnquist ruled that they require more exacting scrutiny than statutory time, place, and manner restrictions. "We must ask instead whether the challenged provisions of the injunction burden no more speech than is necessary to serve a significant government interest."⁴⁸³ Applying the standard, the Chief Justice upheld the thirty-six-foot buffer zone in front of the clinic but invalidated other features of the injunction that were too broad.⁴⁸⁴

c. The National Campaign Against Sexual Harassment and Assault. Like civil rights activists, feminists have had strong incentives to nationalize their rights campaign: national laws and precedents offer the impressive enforcement resources of the federal government, can trump sexist policies still followed in the most traditionalist states (especially in the South), and present better possibilities for policies that actually redistribute power toward women.⁴⁸⁵ Nowhere has this been

480. See Brief of Amici Curiae Operation Rescue et al. at 4-15, *Madsen* (No. 93-880).

481. Brief of Amicus Curiae American Family Association at 4-11, *Madsen* (No. 93-880).

482. Brief for Respondents at 21-28, *Madsen* (No. 93-880).

483. *Madsen*, 512 U.S. at 764-65.

484. The Court followed and elaborated *Madsen* in *Hill v. Colorado*, 530 U.S. 703 (2000) (discussed in Section III.B) and *Scheck v. Pro-Choice Network*, 519 U.S. 357 (1997).

485. As to the last item, political scientists recognize that local governments are less likely to redistribute resources or rights, because they fear flight from traditionally empowered groups (especially rich people and corporations). At least in the 1960s, the flight problem was not so serious when regulation was national, and so redistributive legislation in the twentieth century tended to flourish at the national rather than local level. See PAUL PETERSON, *THE PRICE OF FEDERALISM* (1995).

more important than in women's mobilization against gender-based violence. Recall the previous discussion of the EEOC's rules against sexual harassment in the workplace. Because of the civil rights movement's complete victory in legitimating Title VII as a proper exercise of congressional authority, this feminist effort did not encounter strong objection that it was an intrusion into areas best regulated by state and local governments. In contrast, feminist arguments that sexual harassment is illegal in educational institutions covered by Title IX, accepted by the Department of Education in 1998, have met with strong federalism-based resistance. Federalist critics concede that the federal government has broad discretion to set conditions on the funds it distributes to state educational institutions but argue that Title IX does not provide the states with adequate notice that their receipt of federal money carries with it potentially costly liability for sexual harassment lawsuits.⁴⁸⁶ As the new millennium opened, Title IX has been the subject of intense policy debates.

In contrast to sexual violence in the workplace, where national regulation is well-established, and in schools, where national regulation is justified by the receipt of federal funds, sexual violence in the bedroom has traditionally been the province of state and local governments. As scholars have shown, those governments have performed their functions poorly (and by some accounts scandalously). Even after states liberalized rape laws, women too often remain unprotected against sexual assault, either by strangers or (especially) boyfriends and spouses.⁴⁸⁷ Between 1990 and 1994, feminists and their allies developed a detailed record in a series of congressional hearings and reports, showing that women are pervasively subjected to violence because of their sex, that this pervasive violence not only affects women but also imposes enormous costs on the community and the economy, and that state law enforcement has been and remains inadequate to handle this level of gender-based violence.⁴⁸⁸ Based on this record, Congress enacted the Violence Against Women Act of 1994

486. Compare *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 654 (1999) (Kennedy, J., dissenting) (making this argument as a basis for not rendering schools liable for hostile environment harassment), *with id.* at 632 (O'Connor, J., for the Court) (allowing a claim for relief, but defining it narrowly because of these federalism concerns).

487. There is an enormous literature on the prevalence of unremedied sexual assaults against women in America, including DIANA E.H. RUSSELL, *SEXUAL EXPLOITATION: RAPE, CHILD SEXUAL ABUSE, AND WORKPLACE HARASSMENT* (1984); Mary Koss et al., *The Scope of Rape: Incidence and Prevalence of Sexual Aggression and Victimization in a National Sample of Higher Education Students*, 55 *J. CONSULTING & CLINICAL PSYCHOL.* 162 (1987). For a popular critique of these studies, see KATIE ROIPHE, *THE MORNING AFTER: SEX, FEAR, AND FEMINISM ON CAMPUS* (1993).

488. The congressional evidence is assembled, with references, in *United States v. Morrison*, 529 U.S. 598, 628-36 (2000) (Souter, J., dissenting).

("VAWA"), which, *inter alia*, created a private claim for relief for "crimes of violence motivated by gender."⁴⁸⁹

Although Congress justified its authority to enact VAWA upon the Commerce Clause and Fourteenth Amendment precedents that had sustained the Civil Rights Act ("CRA") and the Voting Rights Act ("VRA"),⁴⁹⁰ VAWA was different from the earlier laws. Unlike the VRA, which applied only to state and local governments, VAWA created a claim for relief against private violators; unlike the CRA, which applied to employers and public accommodations engaged in economic activities, VAWA reached defendants engaged in private noneconomic activity (sexual violence, usually in private places). To the extent the Court viewed the Commerce Clause as justifying federal regulation only of economic activity and the Fourteenth Amendment as justifying federal regulation only of state activity, VAWA was in constitutional trouble — and, not surprisingly, it reached the U.S. Supreme Court pretty quickly, as *United States v. Morrison*.⁴⁹¹

In my view, the mountains of briefs in the case mechanically worked the precedents, which could have justified either result.⁴⁹² In lawyerly fashion, VAWA defenders emphasized the desperate need for national enforcement of widely accepted norms against sexual assault,⁴⁹³ while critics argued that any theory supporting VAWA could be used to justify any exercise of congressional power, thereby eliminating federalism as a limit on Congress.⁴⁹⁴ An issue that received remarkably short shrift was the longstanding feminist charge that the ideas of traditional state sovereignty over domestic relations (relevant to the Commerce Clause power) and the state action doctrine (rele-

489. Violence Against Women Act, § 40302, 108 Stat. 1941-42, codified at 42 U.S.C. § 13981 (2002).

490. The precedents are discussed in Section II.E.2.

491. 529 U.S. 598 (2000), *discussed in* Section II.E.2.

492. That is, briefs supporting VAWA argued that the civil rights precedents supported federal lawmaking over any activity affecting commerce, *Katzenbach v. McClung*, 379 U.S. 294 (1965), or undermining equal access to state justice, *United States v. Guest*, 383 U.S. 745 (1966). Briefs attacking VAWA argued that newer federalism precedents did not allow Congress to regulate noneconomic activity under the Commerce Clause, *United States v. Lopez*, 514 U.S. 549, 559-60 (1995), or to regulate purely private activity under the Fourteenth Amendment, *City of Boerne v. Flores*, 521 U.S. 507 (1997) (reaffirming *The Civil Rights Cases*, 109 U.S. 3 (1883)).

493. *See* Brief of Petitioner at 6-18, 26-32, 42-45, *Morrison v. United States*, 529 U.S. 598 (2000) (Nos. 99-5, 99-29); Brief of Amici Curiae States of Arizona [and 35 other states and Puerto Rico] in Support of Petitioner's Brief on the Merits at 5-9, 15-21, *Morrison* (Nos. 99-5, 99-29); Brief of Amici Curiae Law Professors in Support of Petitioners at 7-12, 18-23, *Morrison* (Nos. 99-5, 99-29).

494. *See* Brief of Amicus Curiae Eagle Forum Education & Legal Defense Fund in Support of Respondents, *Morrison* (Nos. 99-5, 99-29).

vant to the Fourteenth Amendment power) mimicked the separate spheres construct that has long retarded women's equality. That is, the traditional relegation of women to the domestic sphere finds parallels in the presumption against national regulation of domestic relations or of private discriminations and violence. The spaces where women are most centrally located and most vulnerable are those least constitutionally susceptible to national regulation that is much more efficacious. In contrast, the public spheres of commerce and state action — where men have been and remain dominant — are spaces where the Court has authorized Congress to act, partly in response to cases brought by the male-dominated civil rights movement.

Although one may doubt the Justices would have been receptive to this kind of theoretical argument, it does help us understand the consequences of the Court's 5-4 ruling striking down the law. Rejecting the feminist position taken by thirty-six states, Chief Justice Rehnquist's opinion for the *Morrison* Court strictly followed the arguments laid out in the briefs for the defendants and the amicus brief for Phyllis Schlafly's Eagle Forum. This was an important defeat for women's politics of recognition as well as remediation: not only will sexual assault laws continue to be greatly underenforced, but the separate spheres idea got an unexpected boost from the Court, which specifically targeted "family law" as an arena limited to state regulation.⁴⁹⁵ Conversely, *Morrison* is an important victory for the politics of preservation's effort to localize antidiscrimination law. A consequence is that feminist efforts to redistribute resources to protect women will continue to be thwarted by obstacles inherent to local governance.

C. Gay Rights Movement

Unlike the civil rights and women's rights movements, which had rich conceptual and political antecedents in the nineteenth century, the gay rights movement was entirely a creature of the twentieth century. Although states criminalized sodomy and municipalities made cross-dressing a minor crime before 1900, "homosexual sodomy" and "homosexuality" were not objects of state regulation until the early twentieth century.⁴⁹⁶ But once the state focused on "homosexuals and

495. *Morrison*, 529 U.S. at 615-16 (noting that a danger of accepting Congress's understanding of the Commerce Clause is that it could "be applied equally as well to family law and other areas of traditional state regulation").

496. For this regulatory shift, see ESKRIDGE, GAYLAW, *supra* note 14, at 17-56; LILLIAN FADERMAN, *ODD GIRLS AND TWILIGHT LOVERS: A HISTORY OF LESBIAN LIFE IN TWENTIETH CENTURY AMERICA* (1991); ANGUS MCLAREN, *THE TRIALS OF MASCULINITY: POLICING SEXUAL BOUNDARIES, 1870-1930* (1997); and Estelle Freedman, "Uncontrolled Desires": *The Response to the Sexual Psychopath, 1920-1960*, 74 J. AM. HIST. 83 (1987).

sex perverts," it did so with a vengeance. At the height of America's anti-homosexual terror, the half-generation after World War II, the state not only hunted and jailed "homosexuals" for cross-dressing and having sex with one another, but kicked them out of the civil service, closed their bars and hangouts, seized novels and journals about their "perversion," censored movies that mentioned the crime that dared not speak its name, deported them, and locked them in hospitals where they were electroshocked, castrated, and otherwise tortured.⁴⁹⁷

Before the anti-homosexual *Kulturkampf*, there was little homophile politics of any sort — there were frightened individuals seeking to avoid disclosure, tiny subcultural communities concentrated in the larger cities, and isolated institutions such as bars and publishers who catered to a lesbian clientele. State persecution stimulated a nascent politics of protection after 1945, as "homosexuals" and their subcultural institutions not only started to resist their persecution, but did so through organizations and lawyers that asserted their rights in court. Both the persecution and the resistance encouraged a larger number of gay people to "come out of the closet" in the 1960s, a process that spawned a tiny but influential politics of recognition, modeled on the civil rights experience and claiming that homosexuality is a benign variation, rather than the malignant one portrayed by the law. Because openly lesbian people have been a minuscule (and later small) minority of the American population, and an intensely hated minority to this day, they have relied on lawyers to assert their interests more than women and perhaps even people of color have in the last generation. Unlike the civil rights and women's movements, moreover, the gay rights movement has been far from successful in its politics of recognition: not only do many state and even national laws and policies disadvantage lesbians as a practical matter, many openly disrespect Americans because of their minority sexual orientation.⁴⁹⁸ On the other hand, in municipalities and an increasing number of gay-friendly states, a lesbian politics of remediation has been successful in obtaining state protection for sexual and gender minorities.

The slow and to this day uncertain progress of a pro-gay politics of recognition and remediation owes much to the average person's association of lesbian people with sodomy and other sexual activities. Ac-

497. On the postwar anti-homosexual persecution, see ALLAN BÉRUBÉ, *COMING OUT UNDER FIRE: THE HISTORY OF GAY MEN AND WOMEN IN WORLD WAR TWO* (1990); JOHN D'EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940-1970* (1983); ESKRIDGE, *GAYLAW*, *supra* note 14, at 57-80; JONATHAN NED KATZ, *GAY AMERICAN HISTORY* (1976) (reproducing many primary documents); and George Chauncey, Jr., *The Postwar Sex Crime Panic*, in *TRUE STORIES FROM THE AMERICAN PAST 160* (William Graebner ed., 1993).

498. Antigay laws and policies as of 1998 are collected (with references) in ESKRIDGE, *GAYLAW*, *supra* note 14, at 139-41, 362-71 (app. B3).

cordingly, lesbian people's political and constitutional struggles have tended to be more like the politics of abortion than the politics of equal rights for women and people of color. Like the (intimately related) pro-life countermovement, the traditional family values ("TFV") countermovement focuses on the asserted immorality of specific conduct (consensual sodomy) to deny individuals rights and, when this argument runs out, falls back on "no promotion" arguments: even if the state cannot criminalize consensual same-sex intimacy, it can adopt numerous measures to discourage or signal its disapproval of such controversial activities. Ongoing clashes between gay rights and family values form one of the cutting edges of American constitutional law at the dawn of the new millennium.

1. *The Politics of Protection, 1946-69*

"Homosexuals" and cross-dressers were legally defenseless but were mostly left alone by the law before World War II. The two phenomena were interrelated: so long as they were left alone, these Americans were not even an identity-based "minority group." This changed with the postwar anti-homosexual terror, for it landed many lesbian people in prison, outed them and others, and triggered a moderate "homophile" politics seeking constitutional protection of private gay spaces.⁴⁹⁹ That politics relied on the libertarian features of the Due Process Clause and the First Amendment, at the very point when the civil rights and free press movements were giving these constitutional provisions real bite. For a dramatic example, the earliest public triumph of the Mattachine Society of Los Angeles, the first substantial homophile group, was a campaign against police entrapment of one of their members through aggressive sting operations.⁵⁰⁰ In this and other campaigns, the Mattachine Society, and its sister the Daughters of Bilitis, conceded gay people's condition as tragic but claimed basic civil liberties.

Unlike the early civil rights and women's movements, the homophile movement relied most successfully on the First Amendment. State censorship of "degenerate" or "perverted" books, plays, and movies was particularly common, because traditionalists were squeamish about any favorable or even neutral public discussion of "sexual deviation," while lesbian people were thirsty for information about sexual variation and saw their despised status as one based on

499. On the early homophile politics, see D'EMILIO, *supra* note 497; STUART TIMMONS, *THE TROUBLE WITH HARRY HAY* (1990). See also ERIC MARCUS, *MAKING HISTORY: THE STRUGGLE FOR GAY AND LESBIAN EQUAL RIGHTS* 32-36, 40-41, 50-53, 62-63, 111-13 (1992) (providing various first-person accounts by early homophile leaders).

500. See Dale Jennings, *To Be Accused Is to Be Guilty*, ONE, INC., Jan. 1953, at 11-12 (providing first-hand account).

society's misinformation.⁵⁰¹ State and lower federal courts had sometimes ruled against censorship of gay-friendly or gay-neutral materials before World War II. For example, New York's state courts overturned local censorship of Sholom Asch's lesbian-themed *God of Vengeance*, gay writer André Gide's autobiography, and Radclyffe Hall's lesbian classic, *Well of Loneliness*.⁵⁰² In retrospect, these few protected works were pretty tame discussions of sexual variation; the authorities wished to censor them because they spoke of homosexuality as a natural rather than sinful phenomenon, a benign or at worst tolerable sexual variation. After the war, more provocative literary depictions of sexual variants tested the limits of the First Amendment. Most lesbigay-depicting novels either passed unnoticed by the censors or were suppressed without much fuss, but in the 1950s aggressive censors confronted more in-your-face gay works such as Allen Ginsburg's homoerotic poem "Howl" and Herman Womack's male physique magazines, both of which were suppressed by state authorities and then liberated by the courts.⁵⁰³

These legal questions first reached the Supreme Court in the most innocuous setting imaginable. The U.S. Post Office seized the October 1954 issue of *One, Inc.*, the earliest homophile informational magazine.⁵⁰⁴ The Post Office claimed that the magazine's brief, generalized depiction of a potential lesbian romance ("Sappho Remembered"), a dirty poem, and an advertisement for a German magazine were obscene; the Ninth Circuit agreed, on the ground that vulnerable minds could be corrupted by these materials.⁵⁰⁵ *One* appealed to the Supreme

501. For accounts of the battle by gay people to express themselves and society to shut them up in various fora, see ROGER AUSTEN, *PLAYING THE GAME: THE HOMOSEXUAL NOVEL IN AMERICA* (1977); KAIER CURTIN, "WE CAN ALWAYS CALL THEM BULGARIANS": THE EMERGENCE OF LESBIAN AND GAY MEN ON THE AMERICAN STAGE (1987); and RODGER STREITMATTER, *UNSPEAKABLE: THE RISE OF A GAY AND LESBIAN PRESS IN AMERICA* (1995). On the legal struggle, see ESKRIDGE, *GAYLAW*, *supra* note 14, at 32-34, 46-49, 76-78, 95-96, 116-23. *See also id.* at 80-82 (suggesting chilling parallels between Nazi suppression of homosexual expression and similar suppressive measures in America after the war against the Nazis).

502. For the stories of these works' censorship and state court action, see ESKRIDGE, *GAYLAW*, *supra* note 14, at 33, 47-48; Nancy J. Knauer, *Homosexuality as Contagion: From The Well of Loneliness to the Boy Scouts*, 29 HOFSTRA L. REV. 401, 430-54 (2000) (offering detailed analytical account of *Well's* obscenity trials in both the U.S. and U.K.). Most gay-themed works either passed without censorial notice or, if discovered, were successfully censored before World War II, however. *See* ESKRIDGE, *GAYLAW*, *supra* note 14, at 46-49 (providing examples).

503. Womack's work is treated below; Ginsburg's in Section II.F.2.

504. For two slightly different accounts of this episode, compare STREITMATTER, *supra* note 501, at 32, with MARCUS, *supra* note 499, at 52-53 (providing first-person account years after the events).

505. *One, Inc. v. Olesen*, 241 F.2d 772 (9th Cir. 1957), *rev'd*, 355 U.S. 371 (1958) (per curiam).

Court, on the ground that “[w]orks which attempt to elucidate, explain or grapple with thorny and fundamental human problems should be extended great latitude of expression, since they often, in the last analysis, serve humanity’s ends.” Apologetically, Eric Julber’s brief submitted that the magazine never included lewd sexual references nor even any “*advocacy* of homosexuality as a way of life”; it just proffered discussion of the issues associated with “that particular neurosis, or complexion.”⁵⁰⁶

Right after Julber filed his brief, the Court decided *Roth v. United States*,⁵⁰⁷ which held that the state could not censor a publication as “obscene” unless, considered as a whole, its predominant appeal is to the audience’s prurient interest and its presentation exceeds customary limits. Was a lesbian romance inherently prurient in ways that straight ones were not? As one law clerk put it,

The [appeals] court seems to feel that homosexuality is disgusting and therefore allusions to homosexual practices are disgusting and obscene. . . . I think *One* is no more descriptive of sexual practices than dozens of magazines. The fact that the practices differ from those of the “normal” person should not make the magazine obscene.⁵⁰⁸

We do not know exactly how the Justices viewed the case, but they voted with no recorded dissent to reverse the Ninth Circuit’s decision and to direct that judgment be awarded to the homophile publication on the basis of *Roth*.⁵⁰⁹

The Post Office’s campaign also included male physique magazines, which government psychiatrists believed had a prurient appeal to male homosexuals. In *Manual Enterprises, Inc. v. Day*,⁵¹⁰ Herman Womack challenged the government’s targeting several of his magazines (*MANual*, *Grecian Guild Pictorial*) under *Roth*. Stanley Dietz’s

506. Petition for Writ of Certiorari at 8, *One, Inc. v. Olesen*, 355 U.S. 371 (1958) (1957 Term, No. 290).

507. 354 U.S. 476 (1957), *discussed in* Section II.F.2.

508. Law Clerks’ Memoranda for *One, Inc.* (1957 Term), in *Burton Papers*, *supra* note 249, Container 298 (No. 290). Another law clerk professed himself “torn between the desire to cut down on this sort of administrative censorship and the revulsion the magazine gives me.” However, he opined that “in the long run it is better to let the American people make the choice than a postmaster.” Office Memos for *One, Inc.* (Aug. 26, 1957), in *Douglas Papers*, *supra* note 192, Container 1187.

509. *One, Inc. v. Olesen*, 355 U.S. 371 (1958) (per curiam) (reversing on the basis of *Roth v. United States*, 354 U.S. 476 (1957)). According to Justice Douglas’ docket book, six Justices voted to take the case on January 3, 1958, with four Justices (Frankfurter, Douglas, Harlan, and Whittaker) reversing summarily, rather than remanding for the lower court to reconsider in light of *Roth*. (There is no notation for how three Justices voted.) A week later, Justice Clark, who voted against certiorari the week before, voted with the Frankfurter group to reverse outright. See Docket Book for *One, Inc.* (Jan. 13, 1958), in *Douglas Papers*, *supra* note 192, Container 1184.

510. 370 U.S. 478 (1962), described and analyzed by JOYCE MURDOCH & DEB PRICE, *COURTING JUSTICE: GAY MEN AND LESBIANS V. THE SUPREME COURT* 65-88 (2001).

brief for Womack charged the Post Office with “nothing more than an attempt to enforce the prejudices of the predominant social and economic majority over a minority group.” If the state could censor images based on their prurient appeal alone, then the Post Office could seize suggestive pin-up photographs of Marilyn Monroe, Dietz argued.⁵¹¹ Solicitor General Archibald Cox’s brief responded that the state could censor any kind of scantily-clad pin-ups and, in any event, that homophile pin-ups are more dangerous to society because “homosexuals are more easily stimulated to overt sexual activities than are normal persons with heterosexual outlooks. Finally, it seems scarcely open to question that society has a legitimate interest,” expressed in state sodomy laws, “in preventing overt homosexual activities while refusing to condemn comparable activities when indulged in on a heterosexual basis.”⁵¹² Dietz’s oral argument in *Manual Enterprises* was the Justices’ first face-to-face encounter with constitutional issues raised by sexual minorities. There is no evidence that anyone on the Court learned anything from the encounter. Justice Harlan’s plurality opinion reversed the censorship because the pictures were not inherently “prurient” according to contemporary standards of decency⁵¹³ but gratuitously described the magazines as “dismally unpleasant, uncouth, and tawdry” and their readers as “unfortunate persons.”⁵¹⁴ Justice Clark’s dissenting opinion lamented that the Post Office was now required to be “the world’s largest disseminator of smut.”⁵¹⁵ The Supreme Court in the 1960s and 1970s repeatedly addressed state and local censorship of publications depicting homosexual intimacy more directly. The Court sometimes protected gay erotica against censorship, but often treated gay erotica more harshly than straight.⁵¹⁶

Lesbigay people could invoke the speech and press protections of the First Amendment to protect discussion about homosexuality, in-

511. Brief for Appellant at 23 (quotation in text), 27-28, *Manual Enterprises* (1961 Term, No. 123).

512. Brief for the Respondent at 44-45, *Manual Enterprises* (1961 Term, No. 123); see *id.* at 27 (making similar argument that “pornographic material directed to sexual deviates is more likely to induce overt sexual activity than such material directed to the normal sexual impulses”).

513. *Manual Enterprises*, 370 U.S. 478 (Harlan, J., joined by Stewart, J.). Four Justices concurred in the result. *Id.* at 495 (Black, J., concurring in the result); *id.* at 495-519 (Brennan, J., joined by Warren, C.J., and Douglas, J., concurring in the judgment) (rejecting the Post Office’s authority to censor).

514. *Id.* at 490 (opinion by Harlan, J.).

515. *Id.* at 519 (Clark, J., dissenting). “The magazines have no social, educational, or entertainment qualities but are designed solely as sex stimulants for homosexuals.” *Id.* at 526.

516. See *infra* Section II.F.2.

cluding autobiographical discussion.⁵¹⁷ They could also invoke the assembly provision to protect their ability to gather together. Indeed, the NAACP's right of association cases made it unlikely that the state would directly prosecute homophile organizations. Most of the litigation arose in the context of state efforts to revoke liquor licenses from bars catering to lesbian or gay clientele. Unlike individual gay people, the bars had resources to resist such efforts, and sometimes state courts would intervene. The California Supreme Court in *Stoumen v. Reilly*⁵¹⁸ ruled that regulators could not deny licenses to bars simply because of "patronage . . . by homosexuals . . . without proof of the commission of illegal or immoral acts on the premises."⁵¹⁹ Because the constitutional basis for this ruling was unclear, the legislature adopted a law barring licenses to establishments that were reputed to be resorts for "sexual perverts."⁵²⁰ In *Vallerga v. Department of Alcoholic Beverage Control*,⁵²¹ the California Supreme Court invalidated this law as a violation of gay people's constitutional right to association, just as Mitchell and Juliet Lowenthal had argued in their amicus brief filed on behalf of the ACLU. As *Vallerga* suggests, ACLU-affiliated attorneys sometimes represented lesbigay defendants in the 1950s and early 1960s, even though the national ACLU was on record in favor of sodomy laws.

The Due Process Clause had a lot less bite for the homophile politics of protection than it had for people of color, because almost all the "homosexuals" arrested by police dragnets and stings were either released immediately or plea bargained to a mild punishment without a constitutional peep.⁵²² The biggest value of due process was prophylactic: homophile groups made gay people aware of their procedural rights, especially their right to remain silent and to retain counsel (later provided free by the state).⁵²³ Once an accused "homosexual"

517. See, e.g., *People ex rel. Savery v. Gotham Book Mart, Inc.*, 285 N.Y.S 563 (NYC Magis. Ct. 1936) (protecting André Gide's autobiography against censorship).

518. 234 P.2d 969 (Cal. 1951).

519. *Id.* at 971; see William N. Eskridge, Jr., *Privacy Jurisprudence and the Apartheid of the Closet, 1946-1961*, 24 FLA. ST. U. L. REV. 703, 752-53 (1997) (discussing the California gay bar cases).

520. Law of 1955, CAL. BUS. & PROF'L CODE ANN., § 24200(e) (repealed 1963) (West 1997).

521. 347 P.2d 909 (Cal. 1959).

522. See, e.g., Charles K. Robinson, *The Raid*, ONE, INC., July 1960, at 26 (state judge complaining that homosexual defendants pleaded guilty to charges even the prosecution was willing to drop). It must be noted that most of the lesbigay defendants rounded up by the police faced relatively mild punishments (a short time in jail), in contrast to the death sentences often meted out to men of color.

523. See *Your Rights in Case of Arrest*, ONE, INC., Jan. 1954, at 14 (publishing handy list of constitutional rights of criminal defendants, and advice to lesbigays harassed or arrested by the police).

lawyered up, he or she could usually escape jail time and even any kind of conviction. When defendants were brave enough to contest charges of consensual sodomy or solicitation in court, there were often winning due process defenses: the police entrapped the defendant or obtained evidence illegally; there was not sufficient evidence to sustain a conviction; or the substantive statute was too vague to provide adequate notice to defendants that their conduct was criminal.⁵²⁴ The vagueness argument, of course, could inure to the benefit of all gay people, and not just the defendant in the particular case. State courts were particularly hard on cross-dressing and, to a lesser extent, vagrancy and solicitation laws.⁵²⁵ Several courts invalidated or narrowly construed their crime against nature laws.⁵²⁶

Unlike the First Amendment, the Due Process Clause offered no protection for gay people in the U.S. Supreme Court, however. The Court's first struggle with such issues involved the immigration law's exclusion of aliens "afflicted with psychopathic personality." The administering agencies interpreted that language to exclude all "homosexuals and sex perverts," and sought to deport George Fleuti, a sodomite. His counsel introduced psychiatric evidence that sexual variation was not sufficient to justify a diagnosis of "psychopathy." Demonstrating that the term did not even have an accepted meaning among psychiatrists, the Ninth Circuit in *Fleuti v. Rosenberg*⁵²⁷ ruled that the statutory language was too imprecise to justify exclusion or deportation of gay people as a group. On appeal, the Supreme Court was deeply split, with four Justices finding the statute unconstitutionally vague, but five unpersuaded. The decisive vote in conference came from newly appointed Justice Arthur Goldberg, who believed that Fleuti's arrests for sex in public places rendered him "a psychopath in the conventional sense."⁵²⁸ Goldberg was assigned the opinion for the Court, but on further deliberation changed his mind. He proposed that the Ninth Circuit's refusal of deportation be affirmed on a narrow statutory ground; the four Justices formerly in the minority joined his opinion, with one important change of language.⁵²⁹ So Fleuti

524. See ESKRIDGE, *GAYLAW* *supra* note 14, at 84-90 (discussing these challenges).

525. See *id.* at 109-11 (surveying state court opinions striking down these laws).

526. See *Harris v. State*, 457 P.2d 638 (Alaska 1969); *Franklin v. State*, 257 So.2d 21 (Fla. 1971); *Commonwealth v. Balthazar*, 318 N.E.2d 478 (Mass. 1974).

527. 302 F.2d 652, 657-58 (9th Cir. 1962), *aff'd on other grounds*, 374 U.S. 449 (1963), also discussed in Section II.A.3. See generally MURDOCH & PRICE, *supra* note 510, at 85-101 (giving more background on *Fleuti*).

528. Conference Notes for *Fleuti v. Rosenberg* (Apr. 17, 1962), in *Douglas Papers*, *supra* note 192, Container 1281.

529. *Fleuti v. Rosenberg*, 374 U.S. 449 (1963). At the urging of Justice Brennan, Justice Goldberg changed this sentence, "Congress unquestionably has the power to exclude homosexuals and other undesirables from this country," to omit "homosexuals and other." See

was able to stay in the United States, but the immigration authorities continued their campaign against others.

Responding to the Ninth Circuit opinion, Congress amended the law to exclude people “afflicted with . . . sexual deviation” as well. When the “psychopathic personality” issue returned to the Supreme Court in *Boutilier v. INS*,⁵³⁰ the Justices were less divided: even though the bisexual Canadian was deported under the old psychopathic personality exclusion (before the new amendment took effect), at least two of the Justices gave up on their vagueness objection in light of Congress’s subsequent clarification.⁵³¹ The majority opinion, by Justice Clark (the solo dissenter in *Manual*), lumped all homosexuals and the apparently bisexual Boutilier into the statutory category of “psychopaths.” The most sympathy lesbian people could find from the Court was Justice Douglas’s lament, in his draft dissent, that “homosexuals” are “just as much the victims of their constitutions as we are of ours, and we can only step in when their conduct becomes subversive of society, or when they request help so as to enable them to reach a more mature level.”⁵³²

The Court was also unreceptive to vagueness challenges to laws criminalizing “lewd conduct”⁵³³ or the “crime against nature.” Although the crime against nature might mean almost anything (or nothing), the Court ultimately ruled, in a perfunctory per curiam opinion, that the term had acquired sufficient clarity through longstanding judicial construction and popular understanding to pass the vagueness test.⁵³⁴ A potentially stronger challenge to such laws lay in the right of privacy recognized in *Griswold* and *Roe*. The American Law Institute (“ALI”) in 1955 had taken the position that sodomy be-

Letter from William J. Brennan, Jr., to Justice Goldberg re: *Fleuti* (June 6, 1963), in Brennan Papers, *supra* note 129, Box I: 91, Folder 5. Said Brennan: “[I] think it may be, at least medically, a matter of doubt whether homosexuals also necessarily fall into the category of undesirable aliens.” *Id.*

530. 387 U.S. 118 (1967); see William N. Eskridge, Jr., *Gadamer/Statutory Interpretation*, 90 COLUM. L. REV. 609 (1990) (putting forth a detailed examination of the statutory interpretation arguments in *Boutilier*).

531. According to Justice Douglas’ notes, Justice Black, who had found the psychopathic personality term too vague in *Fleuti*, found it clear enough the next time around to say that “psychopathic personality means sexual deviate,” the term added in 1965. Douglas Conference Notes for *Boutilier* (Mar. 17, 1967), in Douglas Papers, *supra* note 192, Container 1391. Chief Justice Warren continued to believe that “a homo immigrant might not be psychotic,” *id.*, but he ultimately joined the majority opinion upholding Boutilier’s deportation.

532. Draft Dissenting Opinion for *Boutilier* at 2 (Mar. 17, 1967), in Douglas Papers, *supra* note 192, Container 1391. The language quoted in text was deleted in the published dissent.

533. See *Talley v. California*, 390 U.S. 1031 (1968) (denying certiorari to gay couples’ challenge to a “lewd conduct” arrest for kissing one another in the Black Cat Bar).

534. *Wainwright v. Stone*, 414 U.S. 21 (1973) (per curiam), followed in *Rose v. Locke*, 423 U.S. 48 (1975).

tween consenting adults should be decriminalized as a matter of private liberty rather than public concern.⁵³⁵ After *Griswold*, the ACLU took the position that the right of privacy required states to follow the ALI. After *Roe*, the ACLU brought a class action challenging Virginia's sodomy law as a violation of the right of privacy and the First Amendment rights of association, thought, and expression.⁵³⁶ The Supreme Court in 1976 summarily (without full briefing and oral argument) affirmed the lower court decision upholding the law.⁵³⁷

Not only could the state constitutionally imprison someone for engaging in oral or anal sex with a consenting adult, but for the most part the courts allowed the state to exclude lesbian people from civil service employment. For a dramatic example, the Civil Service Commission ("CSC") dismissed Dr. Franklin Kameny, a Harvard-trained astronomer, for failing to report that he had been arrested in 1956 for allegedly soliciting sex from an undercover police officer.⁵³⁸ That Kameny lost his job over a minor incident suggesting his homosexuality was nothing new in the period after World War II.⁵³⁹ What was unusual was Kameny's response: he sued the federal government to get his job back. His attorney, Byron Scott, maintained that the government's action was arbitrary and therefore a violation of the Due Process Clause. The federal courts summarily dismissed this complaint. Kameny filed a pro se petition for writ of certiorari with the U.S. Supreme Court on January 27, 1961. Like his attorney in the courts below, Kameny made standard due process arguments: the government's decision to fire him and bar him from further employment was not sufficiently supported by the facts of his case, did not follow the proper procedures, and operated under a substantively unsupported rule barring federal employment of people who commit "immoral conduct."⁵⁴⁰ Not only was the "immoral conduct" bar vague,

535. See MODEL PENAL CODE § 207.5 comments (Tent. Draft No. 4, 1955).

536. See Jurisdictional Statement at 7-11, Brief of American Civil Liberties Union, *Doe v. Commonwealth's Attorney*, 425 U.S. 901 (1976) (No. 75-896) (asserting Supreme Court's jurisdiction to review three-judge court's refusal to invalidate sodomy law).

537. *Doe v. Commonwealth's Attorney*, 425 U.S. 901 (1976) (per curiam), *aff'g mem.*, 403 F. Supp. 1199 (E.D. Va. 1975) (three-judge court); see Consolidated Petition for Rehearing, *Doe* (No. 75-896) and *Enslin v. North Carolina*, 425 U.S. 985 (1976) (No. 75-897).

538. In return for a guilty plea to a charge of lewd conduct, the court sentenced Kameny to probation. After he completed the probation, the court granted his motion to withdraw the guilty plea and substitute a note of dismissal. Kameny therefore felt justified in not disclosing the expunged arrest. See Petition for a Writ of Certiorari at 6-9, *Kameny v. Brucker*, 365 U.S. 843 (1961) (1960 Term, No. 676); Brief for the Respondents in Opposition at 3-4 & n.4, *Kameny* (1960 Term, No. 676).

539. See Note, *Government-Created Employment Disabilities of the Homosexual*, 82 HARV. L. REV. 1738 (1969).

540. See Brief for Petitioner at 24-26, *Kameny* (1960 Term, No. 676) (quoting 5 C.F.R. § 2.106(a)(3) (CSC regulation)).

but it imposed an “odious conformity” upon federal employees, inconsistent with the First Amendment.⁵⁴¹ This petition was the first time the Supreme Court had seen a challenge to state exclusions of gay people from the civil service. The Court denied the petition, without either internal or written dissent.⁵⁴²

2. *The Birth of a Politics of Recognition, 1961-81*

Futile as it was, Kameny’s petition to the Supreme Court was a landmark in the politics as well as constitutional discourse of gay people. Kameny also argued that the federal government’s broad exclusion from employment “makes of the homosexual a second-rate citizen, by discriminating against him without reasonable cause.”⁵⁴³ There was, for example, no scientific basis for the belief that “homosexuals” were psychopathic. “The average homosexual is as well-adjusted in personality as the average heterosexual.”⁵⁴⁴ Because such persons are capable of excellent government service, excluding them is presumptively irrational. The federal government should be doing precisely the opposite: “ ‘One role of government is to stimulate changes in attitude.’ In fields of anti-Negro, Anti-Semitic, anti-Catholic, and other prejudice, the government has indeed recognized, and is playing fully and admirably its role as a leader of changes in attitude.”⁵⁴⁵ The CSC’s exclusion, Kameny argued, “constitute[s] a discrimination no less illegal and no less odious than discrimination based upon religious or racial grounds”⁵⁴⁶

The ideas in Kameny’s brief were revolutionary and important. The brief was an announcement that the objects of the postwar anti-homosexual *Kulturkampf* were insisting on equal citizenship and not just an easing of persecution. It was the beginning of a serious politics of recognition and even remediation for lesbian and gay people, and this rapidly eclipsed the apologetic homophile politics of protection of the

541. *Id.* at 27; *see id.* at 28-29. For an updated version of Kameny’s argument, see David Cole & William N. Eskridge, Jr., *From Hand-Holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct*, 29 HARV. C.R.-C.L. L. REV. 319 (1994).

542. *Kameny*, 365 U.S. 843. The docket sheet kept by Justice Brennan revealed no Justice willing to hear Kameny’s case.

543. Brief for Petitioner at 32, *Kameny* (1960 Term, No. 676). For the historical context of Kameny’s revolutionary brief, see David K. Johnson, “*Homosexual Citizens*”: *Washington’s Gay Community Confronts the Civil Service*, WASH. HIST., Fall-Winter 1994-1995, at 52. An important normative precursor to the egalitarian arguments was DONALD WEBSTER CORY, *THE HOMOSEXUAL IN AMERICA: A SUBJECTIVE APPROACH* (1951).

544. Brief for Petitioner at 37, *Kameny* (1960 Term, No. 676).

545. *Id.* at 49-50.

546. *Id.* at 56; *see id.* at 59 (calling exclusionary policy “a stench in the nostrils of decent people, an offense against morality”).

1950s. After filing his petition, Kameny founded the Mattachine Society of Washington, D.C. (“MSW”), which expressed this philosophy in a letter to Attorney General Robert Kennedy:

We feel that, for the 15,000,000 American homosexuals, we are in much the same position as the NAACP is in for the Negro, except for the minor difference that the Negro is fighting official prejudice and discrimination at the state and local level, whereas we are fighting official prejudice and discriminatory policy and practice, as ill-founded, as unreasonable, as unrealistic, and as harmful to society and to the nation, at the Federal level. Both are fighting personal prejudice at all levels. For these reasons, and because we are trying to improve the position of a large group of citizens presently relegated to second-class citizenship in many respects, we should have, if anything, the assistance of the Federal government, and not its opposition.⁵⁴⁷

Other groups, such as San Francisco’s Society for Individual Rights and New York’s Mattachine Society, took similar positions. In February 1966, the First National Planning Conference of Homophile Organizations resolved: “Homosexual American citizens should have precise equality with all other citizens before the law and are entitled to social and economic equality of opportunity.”⁵⁴⁸ By the late 1960s, Kameny’s slogan “Gay is Good” had become the rallying cry for gay activists.

Kameny’s pro se brief was the first time a litigant before the Court had challenged the compulsory heterosexuality requirement for federal employment or other benefits. It was the first brief before the Supreme Court to argue that homosexuality was a benign variation, that “homosexuals” were a minority group like Jews and African Americans, that anti-homosexual discrimination was fundamentally based on prejudice rather than a neutral policy, and that the equal protection component of the Fifth Amendment barred discrimination on the basis of sexual variation. Lawyers representing lesbians picked up on some of Kameny’s ideas. For example, in *Manual Enterprises*, Stanley Dietz challenged the Kennedy Administration’s view that gay erotica should be treated differently from straight: “Our Constitution does not state that only heterosexuals may receive and read the literature of their choice and homosexuals must read the same literature or

547. Letter from Franklin E. Kameny, President, The Mattachine Society of Washington, D.C., to Robert F. Kennedy, Attorney General 1 (June 28, 1962) (on file with the FBI, FOIA File HQ 100-403320 (Mattachine Society) § 6, Serial No. 88); see also News Release, Mattachine Society of Washington, D.C. (Aug. 28, 1962) (on file with the FBI, FOIA File HQ 100-403320 (Mattachine Society) § 6, Serial No. 90X) (insisting on the same constitutional rights for “the homosexual minority — a minority in no way different, as such, from other of our national minority groups. . .”).

548. *U.S. Homophile Movement Gains National Strength*, THE LADDER, Apr. 1966, at 4 (quoting the conference’s resolutions).

be denied the right to view a magazine which interests them. To interpret our Constitution . . . in the manner that the Post Office Department has done, reduces a large segment of our society to second class citizenship.”⁵⁴⁹ To the Solicitor General’s suggestion that lesbian people are sick, Dietz responded that, according to modern science, homosexuality is neither a disease nor a mental defect, “nor is homosexuality as such intrinsically evil.”⁵⁵⁰ The same kind of arguments were made by the attorneys for George Fleuti and Clive Michael Boutilier, gay and bisexual men whom the Kennedy-Johnson Administration sought to deport as statutory psychopaths. Based on newer and more reliable medical research, counsel maintained that lesbian people generally were no more mentally defective than straight people. The Ninth Circuit’s opinion in *Fleuti* was the rare decision that recognized some part of this new rhetoric of recognition. Kameny and Boutilier lost their cases, and Manual Enterprises and Fleuti won theirs only on legal technicalities.

Likewise, MSW sponsored challenges to the federal civil service exclusion through the 1960s, and sometimes its attorneys were successful — but always under cover of the procedural and nonarbitrariness features of the Due Process Clause.⁵⁵¹ Chief Judge David Bazelon of the D.C. Circuit ruled in *Norton v. Macy*⁵⁵² that it was a violation of due process guarantees for the CSC to bar gay people from employment without a demonstrated “nexus” between their sexual orientation or activities and the legitimate requirements of their jobs. Authored by a judge with deep understanding of the medical literature debunking anti-homosexual stereotypes, *Norton* was a breakthrough precedent, in part because it was handed down simultaneously with the Stonewall riots, after which thousands of lesbian people streamed out of their closets and protested their various state exclusions.⁵⁵³

549. Brief of Appellant at 23, *Manual Enters. v. Day*, 370 U.S. 478 (1962) (1961 Term, No. 123).

550. *Id.*

551. For the few successful challenges, see *Dew v. Halaby*, 317 F.2d 582 (D.C. Cir. 1963), *cert. granted*, 376 U.S. 904 (1964) (after certiorari granted, government agreed to reinstate married civil servant who had committed “homosexual acts” in his youth); and *Scott v. Macy*, 349 F.2d 182 (D.C. Cir. 1965), 402 F.2d 644 (D.C. Cir. 1968) (overturning CSC’s discharge of gay man). Outside of the D.C. Circuit, such challenges generally failed in the late 1960s. See, e.g., *Anonymous v. Macy*, 398 F.2d 317 (5th Cir. 1969); *Taylor v. United States Civil Serv. Comm’n*, 374 F.2d 466 (9th Cir. 1967).

552. 417 F.2d 1161 (D.C. Cir. 1969); see Rhonda R. Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799 (1979) [hereinafter Rivera, *Our Straight-Laced Judges*] (discussing *Norton* and its aftermath).

553. The Stonewall riots were June 26-28, 1969; *Norton* was handed down July 1, 1969. Until a month before he issued *Norton*, Bazelon served on a task force studying homosexu-

Within a year of Stonewall, the ACLU's Norman Dorsen and Charles Lister revived Kameny's equal protection arguments in a petition for the Supreme Court to review the civil service exclusion. They maintained that gay people are good citizens, homosexuality is an acceptable variation from the norm, and antigay employment discrimination is "odious," unjust and, for all of these reasons, contrary to the equal protection component of the Fifth Amendment.⁵⁵⁴ Although the Supreme Court continued to ignore these arguments, they were starting to have bite with more lower courts. Decisions by federal judges in the District of Columbia and California, where lesbians were politically mobilized, ruled civil service discriminations unconstitutional, and the CSC formally abandoned its policy in 1973-74.⁵⁵⁵ The Supreme Court even granted certiorari for a petition by a cross-dressing gay man who had (before the CSC policy shift) been discharged by the EEOC for "flaunting" his sexual orientation.⁵⁵⁶

Many municipalities and states followed the CSC's lead, but other government employers, including the federal armed forces, continued to exclude and discharge gay people because of their sexual orientation. Gone were the days when outed "homosexuals" passively accepted their fates, however; a substantial number of those discharged brought lawsuits as openly lesbian persons. Most of the lawsuits were unsuccessful in the 1970s,⁵⁵⁷ but some judges were willing to overturn discharges because they were not accompanied by any statement of reasons⁵⁵⁸ or because there was no nexus between the agreed-upon

ality for the National Institute of Mental Health. Rivera, *Our Straight-Laced Judges*, *supra* note 552, at 1036 n.107.

554. Brief for Petitioners at 6-9, *Schlegel v. United States*, 397 U.S. 1039 (1970) (1969 Term, No. 1257), *denying cert. to* 416 F.2d 1372 (Ct. Cl. 1969); Brief for Petitioner at 5, *Adams v. Laird*, 397 U.S. 1039 (1970), *denying cert. to* 420 F.2d 230 (D.C. Cir. 1969), (1969 Term, No. 1258).

555. For an account of the cases and of the decline and fall of CSC's exclusion, see William N. Eskridge, Jr., *Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, Nomos, and Citizenship, 1961-1981*, 25 HOFSTRA L. REV. 817, 911-18 (1997) [hereinafter Eskridge, *Establishing Conditions*]. Executive Order No. 13,087, 63 Fed. Reg. 30,097 (May 28, 1998), prohibited employment discrimination on the basis of sexual orientation by the federal government outside the armed forces.

556. *Singer v. United States Civil Serv. Comm'n*, 429 U.S. 1034 (1977), *granting cert. to* 530 F.2d 247 (9th Cir. 1976); see Rhonda R. Rivera, *QueerLaw: Sexual Orientation Law in the Mid-Eighties* (Pt. 1), 10 U. DAYTON L. REV. 459, 485 (1985) (federal government reinstated Singer after certiorari was granted, and so the case was never heard by the Court).

557. See, e.g., *McConnell v. Anderson*, 451 F.2d 193 (8th Cir. 1971), *rev'g* 316 F. Supp. 809 (D. Minn. 1970); see Rivera, *Our Straight-Laced Judges*, *supra* note 552, at 1043-47 (surveying the state employment cases), *id.* at 1078-92 (surveying cases where public school teachers were discharged on grounds of homosexuality).

558. See, e.g., *Matlovich v. Sec'y of the Air Force*, 591 F.2d 852, 860 (D.C. Cir. 1976); see MIKE HIPPLER, *MATLOVICH: THE GOOD SOLDIER* (1989).

reasons for discharge and legitimate job requirements.⁵⁵⁹ By the late 1970s, counsel for those discharged were no longer willing to rest their cases on due process arguments alone, however. Like Kameny, they maintained that it was a violation of equal protection for gay people to be treated any differently from straight people. Their arguments met with a variety of thoughtful responses, especially in the military exclusion cases. In the leading case, *Beller v. Middendorf*,⁵⁶⁰ Judge Anthony Kennedy upheld the armed forces bar largely because of the judiciary's long tradition of near-absolute deference to military judgments; because the Navy's reasons were defensibly pragmatic concerns with unit cohesion, the chain of command, and recruitment, its exclusionary policy was constitutionally permissible.⁵⁶¹ The opinion, however, explicitly recognized that discriminatory treatment of gay people in other institutional contexts could represent valid privacy and equal protection claims.⁵⁶²

In a civil employment case, the California Supreme Court gave a stronger endorsement to gay people's politics of recognition, but under free speech auspices. In *Gay Law Students Association v. Pacific Telephone & Telegraph Co.*,⁵⁶³ the court ruled that harassment or discharge of openly gay employees violated a statutory bar to discrimination on the basis of "political activities or affiliations." Because "the struggle of the homosexual community for equal rights, particularly in the field of employment, must be recognized as a political activity," and because "com[ing] out of the closet" and "acknowledg[ing] their sexual preferences" were essential to that politics as understood by gay people, efforts to discourage or penalize such employees and press them back into their closets was within the bar to political activity discrimination.⁵⁶⁴

I start with the employment cases because they dramatically illustrate the new kinds of constitutional arguments, but lesbian and gay people's new politics of recognition also triggered important public discourses in connection with lesbian and gay associations, criminal law and enforcement, and family law. If lesbian and gay groups and organizations could be counted on a few hands in 1961, they numbered in the hundreds within a few years of Stonewall. The NAACP cases insulated these associations from direct state persecution or harassment, but state insti-

559. See, e.g., *Bd. of Educ. v. Jack M.*, 566 P.2d 602 (Cal. 1977); *Morrison v. State Bd. of Educ.*, 461 P.2d 375 (Cal. 1969).

560. 632 F.2d 788 (9th Cir. 1980) (reversing *Saal v. Middendorf*, 427 F. Supp. 192 (N.D. Cal. 1977) and abrogating *Martinez v. Brown*, 449 F. Supp. 207 (N.D. Cal. 1978)).

561. See *id.* at 810-12.

562. See *id.* at 809-10 (right of privacy in some contexts); *id.* at 812 (equal protection).

563. 595 P.2d 592 (Cal. 1979).

564. *Id.* at 610.

tutions were reluctant to provide any kind of sanction to them.⁵⁶⁵ After the 1960s, this was no longer tolerable in jurisdictions where lesbian and gay people were politically mobilized. For example, the Lambda Legal Defense and Education Fund, Inc. was formed “to promote the availability of legal services to homosexuals by encouraging and attracting homosexuals into the legal profession; to disseminate to homosexuals general information concerning their rights and obligations; and to render technical assistance to any legal services corporation or agency in regard to legal issues affecting homosexuals.” New York’s Appellate Division balked at approving Lambda as an authorized legal group, and Lambda’s first legal victory came when the Court of Appeals vacated the original decision and the Division grudgingly approved its application.⁵⁶⁶ Other lesbian and gay groups also sued, usually with success, to require state officials to register them on equal terms with other associations.⁵⁶⁷ After several years of resistance, the Internal Revenue Service in 1977 agreed to recognize tax exemptions for gay groups formed for educational or charitable purposes.⁵⁶⁸

Many right of association cases arising from the new politics of recognition involved public universities. The leading case was *Gay Students Organization v. Bonner*.⁵⁶⁹ The University of New Hampshire recognized the Gay Students Organization (“GSO”) but sought to limit GSO’s social and political activism that stirred enormous publicity and political trouble for the administration. Judge Coffin’s opinion ruled that the university as a public forum could not discriminate against gay people’s politics of recognition, which included social events and plays as well as more conventional educational activities.⁵⁷⁰

565. *E.g.*, Eskridge, *Establishing Conditions*, *supra* note 555, at 876-77 (congressional investigation into D.C. registration of MSW as a “charitable organization”). The NAACP cases are discussed in Sections I.A.3 and II.F.1.

566. *See In re Thom*, 301 N.E.2d 542, 543 (N.Y. 1973), *on remand* 350 N.Y.S.2d 1 (App. Div. 1973). The Court of Appeals’ opinion quoted Lambda’s statement of purpose. 301 N.E.2d at 543. The court chose to strike part of the statement of purpose on remand, deeming it to fall outside the scope of the law authorizing legal assistance corporations. 350 N.Y.S.2d 2.

567. *Compare* *GAA v. Lomenzo*, 293 N.E.2d 255 (N.Y. 1973) (requiring state officials to register gay rights group), *with* *Grant v. Brown*, 313 N.E.2d 847 (Ohio 1974) (allowing state officials to refuse registration, on “no promo homo” grounds).

568. *IRS Reverses Policy on Tax Exemptions*, *ADVOCATE*, Oct. 5, 1977, at 11 (IRS announcement); *Rev. Rul. 78-305*, 1978-2 C.B. 172 (formal rule).

569. 509 F.2d 652 (1st Cir. 1974); *cf.* *Rivera, Our Straight-Laced Judges*, *supra* note 552, at 1144 (describing an unreported 1971 California Superior Court decision, *Associated Students of Sacramento State College v. Butz*, Civ. No. 200795, which required a state college to recognize a gay student group on the ground that the First Amendment bars public forums from discriminating on the basis of the content of the speech or association of petitioners).

570. On the other hand, the judge conceded the university ample room for regulation of “overt sexual behavior, short of criminal activity, which may offend the community’s sense of propriety.” *Bonner*, 509 F.2d at 663.

Judges all over the country followed *Bonner* to require fair access by gay student groups to state collegiate public forums.⁵⁷¹

After a substantial number of lesbian people came out of their closets, the operation of the criminal justice system in big cities changed, almost overnight, with regard to gay and bisexual men in particular. Most changes were effectuated through the political process, as police departments were pressured into reducing resources devoted to victimless crime enforcement and as legislatures were persuaded to repeal their consensual sodomy laws.⁵⁷² But constitutional law also played an important role, and a different role than it played before the 1960s. During the earlier period of the politics of protection, gay people relied on after-the-fact retail arguments (if they dared resist at all): this particular arrest was tainted with entrapment, denial of counsel, a coerced confession, and so forth. Once gay people mobilized, and gained institutional allies such as the ACLU (in the 1960s) and Lambda (1970s), they made sweeping wholesale arguments: the jurisdiction's cross-dressing, sexual solicitation, lewd conduct, or sodomy law cannot be applied to any such defendants because it is unconstitutional. The reasons these statutes were said to be unconstitutional included not just the traditional due process problem of vagueness and lack of notice, but also newer problems raised by the right to privacy (*Griswold*), the First Amendment (*Stanley*), and even the Equal Protection Clause (*Kameny*).

For one important example, when North Carolina entrapped Eugene Enslin into a violation of its consensual sodomy law, the ACLU took up his defense. As foundation for its argument at trial that the statute was unconstitutional, ACLU attorney Marilyn Haft presented evidence that the conduct criminalized (oral and anal sex) is performed by and gives great pleasure to a majority of Americans, without any harm to them or to third parties, and that the people most stigmatized by the statute, gay people, are psychologically normal, non-predatory citizens.⁵⁷³ The ACLU appealed Enslin's conviction all the way to the Supreme Court, where it was joined by Lambda and the National Gay Task Force. No one argued that the law was unclear, nor

571. See, e.g., *Gay Lib v. Univ. of Missouri*, 558 F.2d 848 (8th Cir. 1977); *Gay Alliance of Students v. Matthews*, 544 F.2d 162 (4th Cir. 1976). For a recent example, see *Gay Lesbian Bisexual Alliance v. Pryor*, 110 F.3d 1543 (11th Cir. 1997).

572. See Eskridge, *Establishing Conditions*, *supra* note 555, at 836-42 (gay political pressure leading to milder police practices in various cities); *id.* at 842-63 (gay political pressure and litigation leading to repeal, invalidation, or narrow construction of sodomy, lewdness, and cross-dressing laws); Steven A. Rosen, *Police Harassment of Homosexual Women and Men in New York City 1960-1980*, 12 COLUM. HUM. RTS. L. REV. 159 (1980-81) (providing a detailed account of milder application of criminal laws against gay people in New York City).

573. Petition for a Writ of Certiorari at 6-9, *Enslin v. North Carolina*, 425 U.S. 903 (1976) (No. 75-897) (describing defendant's case at trial).

did the petitions merely plead for the state to leave gay people alone. Instead, the petitioners maintained that sodomy laws were the legal authorization for an array of public and private practices punishing lesbian people unfairly — employment discrimination, police harassment, exclusion from the armed services, loss of children, and the closet itself.⁵⁷⁴ As Lambda put it, “just as the elimination of legal segregation and miscegenation laws [was] a necessary first step to the elimination of race prejudice, so the elimination of the sodomy laws is the essential first step to the elimination of unwarranted prejudice against gay people.”⁵⁷⁵ Although the Justices declined to address Haft’s arguments, they had receptive audiences in other judiciaries. New York’s Court of Appeals invalidated that state’s consensual sodomy law for these kinds of reasons in *People v. Onofre*.⁵⁷⁶ Indeed, the state judiciaries of New York, California, New Jersey, Ohio, and Massachusetts narrowly construed or invalidated laws in those jurisdictions that had been deployed by the police to terrorize lesbian and transgendered people.⁵⁷⁷

The most radical manifestation of lesbian people’s politics of recognition was in the arena of family law. Not only were lesbians and gay men insisting on their rights to come out of their closets in the workplace and in public culture, but they asserted their moral and constitutional rights to have the state recognize and protect their families. The most sensational cases were the same-sex marriage ones, and the first of those was *Baker v. Nelson*.⁵⁷⁸ After the Minnesota Attorney General and Supreme Court denied a male couple’s right to a marriage license, Michael Wetherbee of the local ACLU chapter filed an appeal with the U.S. Supreme Court. “At first, the question and the proposed relationship may well appear bizarre — especially to heterosexuals,” but that first impulse “provides us with some measure

574. *Id.* at 11-17; Brief of Amicus Curiae Lambda Legal Defense and Education Fund, Inc. at 7-12, *Enslin* (No. 75-897). The ACLU and Lambda made similar arguments in their briefs seeking rehearing of the Court’s refusal to grant review, and there they were joined by the Brief of Amicus Curiae National Gay Task Force in Support of Petition for Rehearing, *Enslin* (No. 75-897).

575. Brief of Amicus Curiae Lambda Legal Defense and Education Fund, Inc. at 11-12, *Enslin* (No. 75-897).

576. 415 N.E.2d 936 (N.Y. 1980), *cert. denied*, 451 U.S. 987 (1981).

577. *See, e.g.*, *Pryor v. Mun. Court*, 599 P.2d 636 (Cal. 1979) (narrowly construing “vag- lewd” law used to entrap gay men) (discussed in greater detail in Section II.A.3); *People v. Uplinger*, 447 N.E.2d 62 (N.Y. 1983) (invalidating on privacy grounds the state law barring loitering for the purpose of solicitation of “deviate sexual intercourse”); *City of Columbus v. Rogers*, 324 N.E.2d 563 (Ohio 1975) (invalidating on vagueness grounds a municipal cross-dressing ordinance). For a detailed discussion of cases from a variety of jurisdictions, see Eskridge, *Establishing Conditions*, *supra* note 555, at 842-52 (privacy challenges) and 852-63 (vagueness challenges).

578. 191 N.W.2d 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972).

of the continuing impact on our society of prejudice against non-heterosexuals.” Indeed, Wetherbee maintained, “the relationship contemplated is neither grotesque nor uncommon.”⁵⁷⁹ He set forth a brief case for the descriptive proposition that sexual variation is benign and homosexuality normal. Prescriptively, he argued that marriage bars should be subjected to heightened scrutiny for any of three reasons. First, such bars deny lesbian and gay couples their fundamental right to marry that had been recognized in *Griswold* (for straight couples) and *Loving* (different-race couples).⁵⁸⁰ Second, the marriage bar also denies such couples the important property and economic rights that accompany spousehood as a matter of law.⁵⁸¹ Third, the state’s discrimination was one “based on gender.”⁵⁸² Whatever the basis for heightened scrutiny, the state marriage bar could not be sufficiently justified. The state’s argument that marriage had always been different-sex (the reason accepted by the courts below) begged the normative question, and the state’s association of marriage with children did not justify treating childless gay couples differently from childless straight ones, as the statute did. By a unanimous vote, the Supreme Court dismissed the appeal in *Baker*, but all the key arguments for invalidating same-sex marriage bars were suggested in that case.⁵⁸³

At the same time same-sex couples were going to court seeking marriage licenses from the state, lesbigays formerly married to persons of the opposite sex were being dragged into court by their former spouses seeking to deprive them of all contact with their children. Lesbian and gay parents who chose to fight for their children, as many did, turned to studies showing that their orientation had no bearing on their ability to be good parents. Lesbian and gay parents and their lawyers ultimately revolutionized custody law, as most states abandoned per se rules against lesbian and gay custody of their own children and adopted the

579. Jurisdictional Statement at 8-9, *Baker v. Nelson*, 409 U.S. 810 (1972) (No. 71-1027).

580. *See id.* at 11.

581. *See id.* at 11-12.

582. *See id.* at 16-18. The brief did not flesh out this argument, as the Court had just handed down its first sex discrimination decision, *Reed v. Reed*, 404 U.S. 71 (1971), but it appears that the argument was inspired by the miscegenation analogy: just as the bar to different-race marriage was treated as race discrimination in *Loving*, so the bar to same-sex marriage should be treated as sex discrimination. This precise argument was made and rejected in *Singer v. Hara*, 522 P.2d 1187 (Wash. App.), *reh’g denied*, 84 Wash.2d 1008 (1974) (interpreting the state ERA as not requiring state recognition of same-sex marriages).

583. 409 U.S. 810 (1972); *see* Docket Sheet for *Baker*, in *Brennan Papers*, *supra* note 129, Box I:281, Folder 1 (revealing that all nine Justices voted to dismiss the appeal). For discussion of the other same-sex marriage cases of the 1970s and 1980s, *see* WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE* 52-57 (1996); *cf. id.* at 232-33 nn.23-24, 248-49 n.18 (listing the attorney general and judicial decisions).

best interests of the child standard.⁵⁸⁴ Nonetheless, most openly gay or lesbian parents lost their legal battles in the 1970s. Even when they were successful in retaining custody or visitation rights, courts often imposed burdens and conditions on them that would never have been contemplated for straight parents.⁵⁸⁵

A striking feature of the foregoing discussion of gay people's politics of recognition in this formative period is that the Burger Court as a group were unwilling to listen or respond to any of it. In every case presented for its review between 1969 and 1986, the Court either denied certiorari (as in *Enslin*), granted review without reaching the merits,⁵⁸⁶ or affirmed an antigay decision without briefing or argument (as in *Baker*). Sometimes these avoidances provoked dissents. In *Doe v. Commonwealth's Attorney*,⁵⁸⁷ the Court summarily affirmed a lower court decision upholding Virginia's consensual sodomy law against privacy, equal protection, and First Amendment attack. Justices Brennan, Marshall, and Stevens dissented on the ground that the important privacy issues should have been briefed and argued.⁵⁸⁸ The Court denied certiorari in *Ratchford v. Gay Lib*,⁵⁸⁹ thereby leaving in effect a lower court decision requiring a state university to recognize and fund a gay rights group. Justice Rehnquist wrote a passionate dissent, arguing that the lower court was requiring the state to tolerate moral contagion. He rejected the claim that the students were merely engaged in political and educational activities and insisted that "the question is more akin to whether those suffering from measles [i.e., homosexuality] have a constitutional right, in violation of quarantine regulations [i.e., the state sodomy law], to associate together and with others [i.e., vulnerable youth] who do not presently have measles."⁵⁹⁰

Finally, the Court denied review to *Rowland v. Mad River Local School District*,⁵⁹¹ which had upheld the discharge of a bisexual high

584. Excellent reviews of this litigation are found in Nan D. Hunter & Nancy Polikoff, *Custody Rights of Lesbian Mothers: Legal Theory and Litigation Strategy*, 25 BUFF. L. REV. 691 (1976); and Rivera, *Our Straight-Laced Judges*, *supra* note 552, at 1102-23.

585. See, e.g., *Schuster v. Schuster*, 585 P.2d 130 (Wash. 1978) (en banc).

586. *People v. Uplinger*, 447 N.E.2d 62 (N.Y. 1983), *cert. dismissed as improvidently granted*, 467 U.S. 246 (1984). The decision followed and applied the Court of Appeals' prior decision in *Onofre*.

587. 425 U.S. 901 (1976), *summarily aff'g* 403 F.Supp. 1199 (E.D. Va. 1975) (three-judge court). The Court's order in *Doe* was issued the same day the Court denied certiorari in *Enslin*.

588. *Id.* (Brennan, Marshall, and Stevens, JJ. would have noted probable jurisdiction).

589. 434 U.S. 1080 (1978) *denying cert. to* *Gay Lib v. University of Missouri*, 558 F.2d 848 (8th Cir. 1977).

590. *Id.* at 1084 (Rehnquist, J., joined by Blackmun, J., dissenting from the denial of certiorari).

591. 730 F.2d 444 (6th Cir. 1984), *cert. denied*, 470 U.S. 1009 (1985).

school guidance counselor against First Amendment and equal protection attack. Justice Brennan, joined by Justice Marshall, vigorously dissented and laid out substantive reasons for reversing the lower court. The dissenters maintained that sexual orientation — like sex, illegitimacy, and race — ought to be a suspect classification, because the group stigmatized by the classification has been the object of hostile state action reflecting prejudice rather than rationality and because that group has been relatively powerless in the political process.⁵⁹² Brennan's statement was the most complete analysis, at the Supreme Court level, of the level of scrutiny owed to sexual orientation classifications. (Note some parallels to Brennan's plurality opinion in *Frontiero*.) Even if sexual orientation were not a suspect classification per se, Brennan argued that the state bore a high burden of justification when it denies a minority group public rights, including employment opportunities, because of either their private choices and conduct or their "nondisruptive expression of homosexual preference."⁵⁹³

3. *The Ongoing Politics of Recognition and Remediation and the Politics of Preservation, 1981-Present*

Even the limited success of gay people's politics of recognition in the late 1970s alarmed traditionalists and called forth a politics of preservation. What I call the "traditional family values" ("TFV") movement emerged as a well-organized countermovement between 1976 and 1981.⁵⁹⁴ It has flourished since then, even as more Americans have come out as lesbian or gay or bisexual and as litigating organizations have pursued gay rights systematically.⁵⁹⁵ Like the anti-civil rights

592. *Rowland*, 470 U.S. at 1014 (Brennan, J., dissenting from the denial of certiorari); see also MURDOCH & PRICE, *supra* note 510, at 241-51 (giving a moving account of Brennan's gay rights dissent).

593. *Rowland*, 470 U.S. at 1015-16 (Brennan, J., dissenting from the denial of certiorari).

594. Key moments in the emergence of the TFV countermovement were the debate over sodomy reform and same-sex marriage in California in 1976-77; Anita Bryant's "Save the Children" campaign to override Dade County's antidiscrimination law in 1977, and subsequent successful initiatives revoking progay laws in St. Paul, Wichita, and other cities in 1978 and 1979; California's unsuccessful Briggs Initiative in 1978, whose proponents sought to bar from public schoolteaching any person who "advocated" homosexuality in any way; and the Moral Majority's successful campaign to persuade Congress to override the District of Columbia's attempted sodomy law repeal in 1981. See generally CHRISTOPHER BULL & JOHN GALLAGHER, *PERFECT ENEMIES: THE RELIGIOUS RIGHT, THE GAY MOVEMENT, AND THE POLITICS OF THE 1990S* (1996); DIDI HERMAN, *THE ANTIGAY AGENDA: ORTHODOX VISION AND THE CHRISTIAN RIGHT* (1997).

595. Lambda and the ACLU (which formally established a Lesbian & Gay Rights Project headed by Nan Hunter) remained the leading litigation groups. They have been joined by Gay and Lesbian Advocates and Defenders in Boston and other regional litigation groups.

and pro-life countermovements with which it was linked, the TFV countermovement has had natural law and pragmatic faces. Natural law traditionalists maintain that sexual variation is *malignant*, for religious (“abomination”) or medical (AIDS) or mental health (psychopathic) reasons.⁵⁹⁶ Therefore, it would be a catastrophe for the state to provide any “special rights” to gay people or not to criminalize sodomy. Pragmatic traditionalists, in contrast, concede that there is *some tolerable* variation in sexuality. They are willing to abandon sodomy laws, for practical reasons, and focus on positive projects that would be threatened by too many “special rights” for gay people.⁵⁹⁷ Thus, the state should *tolerate* gay people but should *not promote* homosexuality. The “no promo homo” arguments of the last several decades are the rhetorical means by which TFV extremists and moderates can work together and even attract ordinary Americans to their point of view.⁵⁹⁸ Again like prior countermovements, TFV people from both horizons espouse a shared constitutional philosophy of states’ rights, institutional deference, and individual liberties.

American law in the 1980s and 1990s was a battleground between an increasingly vigorous lesbian and gay people’s politics of recognition/remediation and an equally vigorous politics of preservation. The consequent legal equilibrium varied significantly by state or region: in gay-friendly states like California, New York, and Vermont, lesbian and gay people now enjoy normal personal and economic liberties and increasing state protection against private violence and discrimination; in noncommittal states like New Mexico and Pennsylvania, lesbian and gay people are not much harassed or arrested, but neither are they afforded normal protections by the state against private violence and discrimination; and in states in the South, lesbian and gay people are still treated like presumptive criminals.⁵⁹⁹ The TFV strategy within states has been to localize pro-gay measures to the urban areas where lesbian and gay people are concentrated; in the country at large, the strategy has been to protect states like Mississippi and Texas from the constitutionalization of policies followed in New York and California. TFV

596. See, e.g., ANITA BRYANT, *THE ANITA BRYANT STORY: THE SURVIVAL OF OUR NATION’S FAMILIES AND THE THREAT OF MILITANT HOMOSEXUALITY* (1977) (religious and moral); JOSEPH NICOLISI, *REPARATIVE THERAPY OF MALE HOMOSEXUALITY: A NEW CLINICAL APPROACH* (1991) (mental health).

597. See e.g., STEPHEN BRANSFORD, *GAY POLITICS VS. COLORADO AND AMERICA: THE INSIDE STORY OF AMENDMENT 2*, 36-40 (1994) (supporters of Amendment 2 chose a pragmatic over a natural law approach to that antigay initiative).

598. See William N. Eskridge, Jr., *No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, 75 N.Y.U. L. REV. 1327, 1338-46 (2000) [hereinafter Eskridge, *No Promo Homo*].

599. For antigay laws, state-by-state, see ESKRIDGE, *GAYLAW*, *supra* note 14, app. B3 at 362-71.

people have also had confidence that their position is one that ordinary folks would prefer to that of elitist judges — so they prefer that decisions be made by legislation and popular referenda rather than through judicial review and constitutional discourse.⁶⁰⁰

Since 1981, therefore, American politics of sexuality has been caught up in this pas de deux between gay people's politics of recognition and TFV people's politics of preservation. Because both sides have constitutionalized their discourse, the courts have been drawn into the culture clash — including the once comically squeamish U.S. Supreme Court. To the extent there has been a national consensus about issues of sexuality it has been the edgy ambivalent tolerance of “no promo homo”: states are not allowed to hurt lesbian and gay people and are required to provide them minimal protections of law, but are not required to “promote” homosexuality in affirmative ways and indeed are debarred from forcing private groups to accept lesbian and gay people if they feel that acceptance is tantamount to “endorsing” homosexuality.

a. *Sodomy Laws and the Military Exclusion*. No issue has set the gay rights movement apart from the civil rights and women's rights movements more than the association of homosexual *status* with homosexual *conduct*. That many Americans claim to be disgusted by the latter makes it harder for gay people to claim protection because of the former.⁶⁰¹ It is for this reason that lesbian and gay legal groups have since the 1960s made sodomy law repeal or invalidation their central goal. By 1986, when the Burger Court finally addressed the privacy argument against consensual sodomy laws in *Bowers v. Hardwick*,⁶⁰² half the states had repealed their laws, either judicially or (for most states) legislatively. As Professor Larry Tribe realized, there was no Court majority for a “gay rights” argument, and so his brief for the challenger pushed homosexuality into a legal closet and emphasized the abuse of state power represented by the gendarmerie's charge into Michael Hardwick's bedroom. No one else saw the case his way, though. Homosexuality was front and center in the remainder of the briefs. The American Psychological Association's brief presented the benign sexual variation notion that the conduct criminalized in

600. For the most part, they have been right about that, as antigay initiatives have shown an astounding success rate. See Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 AM. J. POL. SCI. 245, 251, 258 (1997). By my informal count, however, more than half of the antigay referenda after 1997 have failed. See *infra* note 1535.

601. For insightful discussions of this phenomenon, see Anne B. Goldstein, Comment, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of Bowers v. Hardwick*, 97 YALE L.J. 1073 (1988) [hereinafter Goldstein, *History, Homosexuality*]; Janet E. Halley, *Reasoning About Sodomy: Act and Identity in and after Bowers v. Hardwick*, 79 VA. L. REV. 1721 (1993); Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 777-800 (1989); and Michael Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 CAL. L. REV. 521 (1989).

602. 478 U.S. 186 (1986) (discussed also in Section II.B).

Georgia is in no way pathological and, indeed, is important to the psychological health of individuals and to their intimate relationships, whether homosexual or heterosexual.⁶⁰³ The state responded that the statute reflected the moral judgments of the people of Georgia, and the Court could not legitimately interfere with those judgments unless required by constitutional text or well-established precedent.

Justice White's perfunctory opinion for the Court agreed with the state, concluding that it was illegitimate for the unelected Justices to overturn the state legislature's moral judgment that sodomy is wrong, without a firmer basis in constitutional text or tradition.⁶⁰⁴ Even within that framework, however, White's obsessive focus on "homosexual sodomy," notwithstanding the statute's inclusion of sodomy of all kinds, exposed the Court to criticism that it was not treating gay people impartially.⁶⁰⁵ Four dissenting Justices not only questioned the Court's analysis, but recognized the link between lesbian and gay people's equal citizenship and a constitutional recognition of benign sexual variation.⁶⁰⁶

Only the most willful blindness could obscure the fact that sexual intimacy is "a sensitive key relationship of human existence, central to family life, community welfare, and the development of human personality." The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many "right" ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to *choose* the form and nature of these intensely personal bonds.

The dissenters also contrasted the Court's passivity in *Hardwick* with its productive activism in *Brown*, *Loving*, and *Roe*, all of which have

603. See Brief of Amici Curiae American Psychological Association and American Public Health Association in Support of Respondents, *passim*, *Hardwick* (No. 85-140); see also Brief of Amicus Curiae for Lesbian Rights Project [and other feminist groups], *passim*, *Hardwick* (No. 85-140) (similar argument, plus sodomy laws contribute to rampant discrimination against lesbian and gay people in particular). These kinds of briefs, routinely filed in gay rights cases, are called "Homo 101 briefs" because they lay out the established scientific facts of (gay) life to presumptively ignorant judges.

604. *Hardwick*, 478 U.S. at 194-95; see *id.* at 191-94 (asserting that the argument that "homosexual sodomy" is protected by the nation's libertarian tradition is, "at best, facetious").

605. Compare *id.* at 190, 191, 192, 196 (limiting case to "homosexual sodomy"), and *id.* at 196-97 (Burger, C.J., concurring) (similar), with *id.* at 199-200 (Blackmun, J., dissenting) (arguing that it is morally arbitrary for the Court to insist that only "homosexual sodomy" is at stake, when the statute covers all kinds of sodomy), and *id.* at 215-16 (Stevens, J., dissenting) (noting that state legislature deliberately expanded its sodomy law to include all different-sex sodomy).

606. *Id.* at 205 (Blackmun, J., joined by Brennan, Marshall, and Stevens, JJ., dissenting) (quoting *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 63 (1973) and citing Kenneth Karst, *The Freedom of Intimate Association*, 89 *YALE L.J.* 624, 637 (1980)).

been cogently criticized for expanding constitutional freedoms beyond the boundaries suggested by constitutional text and original intent.⁶⁰⁷

The Court's 5-4 decision upholding Georgia's law brought upon the Court the greatest criticism I have seen for a decision upholding rather than striking down a law.⁶⁰⁸ Legal junkies continue to be fascinated by new revelations about the many corrupt features of the case, such as Attorney General Bowers' longtime adulterous (and allegedly sodomitic) affair during the case.⁶⁰⁹ In a twisted way, *Hardwick* was (in part) a boon to lesbian rights as a social movement, for the Court's openly antigay opinion not only reinforced lesbians as a "marked" minority group, but also rallied lesbian attorneys out of their closets in record numbers and attracted moderate allies. Movement lawyers brought fresh challenges under state constitutions and have prevailed in most of the cases.⁶¹⁰ Social norms have decisively moved away from the Supreme Court's assumptions: conservatives and traditionalists as well as liberals and civil rights advocates have joined in a public consensus that the state should not make consensual sodomy a crime. On the other hand, there is no consensus for the proposition that sodomy is unproblematic — and in one area of law, sodomy remains the key to a strong antigay policy, the military exclusion.

Surprisingly, the stream of cases appealing the exclusion of lesbian people from the armed forces continued after *Hardwick*. Indeed, the Ninth Circuit fiercely debated the issue in *Watkins v. United States Army*.⁶¹¹ Judge William Norris' panel opinion ruled that the army's exclusion of "homosexuals" (defined as people who "desire[] bodily contact between persons of the same sex") was a status-based discrimina-

607. *Id.* at 210-11 n.5 (Blackmun, J., dissenting).

608. Critiques from different points of view include ESKRIDGE, GAYLAW, *supra* note 14, ch. 4 (precedent and gaylegal history); CHARLES FRIED, ORDER AND LAW — ARGUING THE REAGAN REVOLUTION 81-84 (1991) (precedent); RICHARD A. POSNER, SEX AND REASON 341-50 (1991) (libertarian philosophy); Goldstein, *History, Homosexuality*, *supra* note 601 (history); Sylvia Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187 (feminist premises and history); and Frank I. Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1987) (republican philosophy). There is no major law review article or legal book defending *Hardwick*, a notable contrast to other controversial Supreme Court opinions, such as *Roe v. Wade* or even *Brown*.

609. See MURDOCH & PRICE, *supra* note 510, at 493-94.

610. For decisions striking down consensual sodomy laws under state constitutions, see *Powell v. State*, 510 S.E.2d 18 (Ga. 1998) (the *Hardwick* law); *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992); *State v. Cogshell*, 997 S.W.2d 534 (Mo. App. 1999); *Gryczan v. Montana*, 942 P.2d 112 (Mont. 1997); and *Campbell v. Sundquist*, 926 S.W.2d 250 (Tenn. App. 1996) (appeal denied). For opinions upholding a law against state constitutional challenge, see *State v. Smith*, 766 So.2d 501 (La. 2000), and *Lawrence v. State*, 41 S.W.3d 349 (Tex. 2001) (petition for certiorari pending).

611. 847 F.2d 1329 (9th Cir. 1988), *vacated en banc*, 875 F.2d 699 (9th Cir. 1989) (discussed in Section II.C.1.f).

tion subject to strict scrutiny.⁶¹² In dissent, Judge Stephen Reinhardt read *Hardwick* to condone “anti-homosexual animus in the actions of the government,” and to allow the state to discriminate against that class of people who are predisposed to commit criminalizable sodomy.⁶¹³ There were analytical problems with both stances: as Norris argued, *Hardwick* was concerned only with homosexual conduct and, even in that sphere, did not reach equal protection issues — but because homosexual status is defined by the desire and the proclivity to engage in proscribable conduct, *Hardwick* was not irrelevant to the equal protection issue, Reinhardt’s point.⁶¹⁴ Ultimately, the Ninth Circuit, en banc, vacated the Norris opinion and judgment but ruled that the army was debarred on estoppel grounds from expelling Perry Watkins.⁶¹⁵

The 1993 debate over the president’s proposed executive order ending the bar to gays in the military echoed the Norris-Reinhardt debate, with added twists. Critics of the lesbian exclusion emphasized the status denigration, reminiscent of the military’s exclusion and later segregation of blacks and women; like these other minorities, lesbian people would not enjoy the full status of citizens until they could openly serve their country as soldiers.⁶¹⁶ Supporters of the exclusion were insulted by the parallel to discredited race and gender exclusions, because the antigay policy was grounded upon conduct not status. Unlike people of color, who were victims of prejudiced attitudes, gay people (this argument went) were themselves responsible for lowering morale and unit cohesion because of their disruptive behavior.⁶¹⁷ Although this kind of preservationist argument has been rejected in most other industrial countries, it prevailed in the United States in 1993. The result was a statutory exclusion of anyone who either engaged in “homosexual acts” or had a “propensity” to do so,⁶¹⁸ assertedly (but

612. *Watkins*, 847 F.2d at 1336.

613. *Id.* at 1355-58 (Reinhardt, J., dissenting). *But see id.* at 1339-42 (Norris, J., distinguishing *Hardwick*).

614. See Nan D. Hunter, *Life After Hardwick*, 27 HARV. C.R.-C.L. L. REV. 531 (1992).

615. *Watkins*, 875 F.2d 699 (9th Cir. 1989) (en banc).

616. See Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. REV. 499 (1991).

617. See, e.g., ESKRIDGE & HUNTER, *SEXUALITY*, *supra* note 420, at 388-400 (collecting materials reflecting opposition to the president’s proposal); JANET E. HALLEY, *DON’T: A READER’S GUIDE TO THE MILITARY’S ANTI-GAY POLICY* (1999) (tracing the conduct-status arguments through the legislative process).

618. National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 571(a), 107 Stat. 1670 (1993) (codified at 10 U.S.C. § 654 (2000)). Technically, there are three grounds for exclusion: the service member (1) has engaged in or attempted to engage in “homosexual acts,” unless there are findings (essentially) that they were an isolated occurrence unlikely to recur; (2) has stated that he or she is a “homosexual or bisexual,” unless the member can prove that he or she has no “propensity” to engage in “homosexual acts”; or

ambiguously) accompanied by an admonition against witch-hunts for closeted lesbian personnel. The tag line for this policy — “don’t ask, don’t tell” — summarizes the normative compromise espoused by policymakers. This could be viewed as a triumph, of sorts, for pragmatics in both movements — but for the fact that the “compromise” has not worked! Many traditionalists are upset that gay people continue to serve and have aggressively assaulted or outed them, while lesbian and gay personnel have challenged the policy as violative of First Amendment as well as equal protection rights.⁶¹⁹ As the debate moved from Congress to the courts, the preservationist position was strengthened by *Rosiker* arguments: without conceding the problems with their syllogism that openly lesbian people could be excluded because of their propensity to sodomy,⁶²⁰ defenders of the updated lesbian exclusion have maintained — with uniform success so far — that judges must defer to the military’s (and Congress’s) judgment that exclusion of open lesbians is necessary for it to carry out its important missions.⁶²¹

b. Family Law and Same-Sex Marriage. At the same time a pro-gay people’s politics of recognition was being routed in the military arena, it was making some progress in family law. The family law progress has been possible only when TFV people have been divided or unenthusiastic in their opposition to equal treatment of lesbian and gay families of choice. Many lesbian people are raising children or would like to do so. Although natural law traditionalists have fervently opposed the rearing of children by lesbian biological or adoptive parents, pragmatic traditionalists have generally not, because there is no reliable evidence indicating harm to children in such families and (perhaps more important) much harm can result from state intrusion into working family relationships. For these reasons, states have been increasingly supportive of gay families of choice. Thus, judges in gay-friendly industrialized states have approved “second-parent adoptions,” whereby lesbian people adopt children of their partners, so

(3) has married or has attempted to marry someone of the same sex. 10 U.S.C. § 654(b) (2000).

619. See ESKRIDGE, GAYLAW, *supra* note 14, at 174-204.

620. To wit: openly straight people also have a propensity to commit sodomy. EDWARD L. LAUMANN ET AL., SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICES IN THE UNITED STATES 98-99 (1994) (noting that more than three-quarters of the American people have engaged in oral sex; one quarter have engaged in anal sex).

621. Deference has been virtually the only ground for upholding the exclusion in the leading cases. See *United States v. Able*, 155 F.3d 628 (2d Cir. 1998); *Thomasson v. Perry*, 80 F.3d 915 (4th Cir. 1996) (en banc); *Steffan v. Perry*, 41 F.3d 677 (D.C. Cir. 1994) (en banc) (upholding pre-1993 policy on deference grounds).

that same-sex couples then raise children jointly.⁶²² Likewise, judges have slowly become amenable to child custody by lesbian parents divorcing their different-sex spouses.⁶²³ Legislatures, especially at the municipal level, have recognized horizontal (romantic) relationships by creating registries for “domestic partnerships” between people of the same sex (as well as different sex in most cases).⁶²⁴ These have all been modest advances in lesbians’ politics of recognition, as the state has recognized that sexual variation has little or no bearing on a person’s capacity to raise children or establish a joint household. Traditionalists have objected, strongly, that this politics has come at the sacrifice of the rights of children to be raised in husband-wife households that are best for them, but so far their arguments have not been found credible by either social scientists or neutral judges.⁶²⁵

The equality jackpot would be state recognition of same-sex marriages, the last refuge of compulsory heterosexuality in American family law. Given *Hardwick*, as a barrier at the federal level, lesbian couples have focused on state constitutional challenges. In 1993, the Hawaii Supreme Court ruled in *Baehr v. Lewin*⁶²⁶ that the law’s refusal to recognize same-sex unions as marriages was a sex discrimination requiring strong justification under the state’s ERA. The decision galvanized gay rights and its countermovement in a big way. Lesbians and their allies hailed the decision as a vindication of the idea that gay people are just as capable as straight people of forming loving and committed relationships which should be recognized on equal terms by the state. Because the supreme court remanded the case so that the

622. See, e.g., *In re M.M.D. & B.H.M.*, 662 A.2d 837 (D.C. 1995); *In re Jacob*, 660 N.E.2d 397 (N.Y. 1995); *In re Adoption of B.L.V.B.*, 628 A.2d 1271 (Vt. 1993); see Nancy Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Households*, 78 GEO. L.J. 459 (1990).

623. An increasingly large majority of judicial decisions since 1981 have deployed the “best interests of the child” approach without presuming against custody by lesbian parents. The leading case, *Bezio v. Patenaude*, 410 N.E.2d 1207 (Mass. 1980), has been followed by most state appeals courts that have addressed issues of child custody. See, e.g., *Boswell v. Boswell*, 721 A.2d 662 (Md. 1998); see also ESKRIDGE & HUNTER, SEXUALITY, *supra* note 420, at 836 n.“c” (listing cases as of 1997). The old per se rule or strong presumption against custody has largely become confined to the deep South. See, e.g., *Ex parte D.W.W.*, 717 So.2d 793 (Ala. 1998).

624. See Raymond C. O’Brien, *Domestic Partnership: Recognition and Responsibility*, 32 SAN DIEGO L. REV. 163, 166, 183 (1995).

625. See Carlos Ball & Janice Pea, *Warring with Wardle: Morality, Social Science, and Gay and Lesbian Parents*, 1998 U. ILL. L. REV. 233 (responding to Lynn Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833); see also Judith Stacey & Timothy J. Biblarz, *(How) Does the Sexual Orientation of Parents Matter?*, 66 AM. SOC. REV. 159 (2001) (finding that lesbian parenting may have some impact on children, but not the malignant impact claimed by traditionalists).

626. 852 P.2d 44 (Haw. 1993); see WILLIAM N. ESKRIDGE, JR., EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS 1-42 (2001) [hereinafter ESKRIDGE, EQUALITY PRACTICE] (situating *Baehr* in the context of sexuality politics).

state could offer possible justifications for the sex discrimination, gay lawyers had an opportunity to expose the lack of factual foundation for their discriminatory treatment.⁶²⁷ TFV people criticized the decision as illegitimate judicial usurpation promoting homosexuality and depriving traditional married couples of their unique status. Significantly, both natural law and pragmatic traditionalists were intensely critical of *Baehr* — as were most Americans.

In the short term, the politics of preservation triumphed more sweepingly than it had in the gays-in-the-military campaign. As of August 2002, thirty-six states have adopted statutes either reaffirming that marriage can only exist between one man and one woman or refusing to recognize out-of-state same-sex marriages (in most cases both).⁶²⁸ Congress and the President united in support of the Defense of Marriage Act of 1996 (“DOMA”), which sought to validate the state nonrecognition statutes against full faith and credit clause challenge and amended federal law to ensure that spouse and marriage rules would not apply to same-sex couples.⁶²⁹ DOMA is the most sweepingly antigay statute adopted in American history. Although natural law extremists argued that gay people were abominations and same-sex marriage unholy or yucky, the TFV countermovement successfully focused on the pragmatic position that each state ought to be able to decide the issue without coercion from extremist states (i.e., Hawaii); that states ought to decide the issue through a procedure where the voices of all people were heard and majorities respected; and that lesbians should be tolerated, but their short-lived relationships should not be valorized as much as heterosexual marriage.⁶³⁰

Notwithstanding DOMA and what appeared to be a complete victory for the politics of preservation, a lesbian grass-roots movement in Vermont challenged that state’s same-sex marriage bar, also suc-

627. The state’s main justification was the rights of children to be raised in households best serving their interests — a justification the trial judge rejected as unsupported either by the state’s own expert witnesses or by any reputable social scientific evidence. See *Baehr v. Miike*, No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996), slip op. ¶¶ 125-27, 132, 135-36, 139.

628. The states are listed in ESKRIDGE, EQUALITY PRACTICE, *supra* note 626, at 27-28 & n.*.

629. Pub. L. No. 104-199, 110 Stat. 2419, codified at 1 U.S.C. § 7 (2000) (barring construction of federal spousal and marriage rules to apply to same-sex marriages); 28 U.S.C. § 1738B (2000) (validating state choice of law rules barring recognition of out-of-state same-sex marriages).

630. See ESKRIDGE, EQUALITY PRACTICE, *supra* note 626, at 32-39; ANDREW KOPPELMAN, THE GAY RIGHTS QUESTION IN CONTEMPORARY AMERICAN LAW 127-40 (2002) (containing a detailed history and constitutional critique of DOMA). After DOMA was enacted, Hawaiian voters amended their state constitution to authorize the legislature to limit marriage to different-sex couples. See ESKRIDGE, EQUALITY PRACTICE, *supra* note 626, at 39-42.

cessfully. In *Baker v. State*,⁶³¹ the Vermont Supreme Court unanimously ruled that the bar violated the common benefits clause of the state constitution. Sensitive to the inevitable charge that judges were usurping the policymaking role of the legislature, the court did not enter an immediate remedy but instead urged the legislature to try its hand first. Over both natural law and pragmatic arguments for preserving the status quo, the legislature created a new institution, *civil unions*, under which same-sex couples would be governed by the same legal requirements and benefits applicable to different-sex married couples.⁶³² There is no reason to believe that most American states will follow Vermont in the near term, but a few (California, Connecticut, Hawaii, Massachusetts, New York) have already adopted statewide laws recognizing same-sex couples as a family unit deserving some state protection or benefits. More will follow, even as other states lag behind the rest of the world.⁶³³

c. Antidiscrimination Laws. One consequence of gay people's politics of remediation is that dozens of cities, thirteen states, and the District of Columbia have adopted laws prohibiting sexual orientation discrimination by private employers and (under some of the laws) public accommodations.⁶³⁴ The process of enacting such legislation calls forth the same arguments as those deployed elsewhere: lesbian and gay people claim they are subject to vicious private discrimination that the state ought not tolerate because sexual orientation is irrelevant to employment and other economic activities, while traditionalists warn that such laws will promote homosexuality and sacrifice third-party rights.⁶³⁵ The opponents' arguments are ultimately purely normative and reflect a deep-seated hostility to shameless public displays of ho-

631. 744 A.2d 864 (Vt. 1999).

632. VT. STAT. ANN., tit. 15, § 1202, 1204 (2000); see ESKRIDGE, EQUALITY PRACTICE, *supra* note 626, at 57-82 (detailing legislative history of civil unions law); *id.* at 83-126 (reviewing state recognition of same-sex unions by Canada, Denmark, France, Germany, Netherlands, Norway, Sweden, and other western countries).

633. What each state does will be the product of that state's internal political balance between the politics of recognition and preservation, a balance easily destabilized by outside events. Roughly speaking, states in the Northeast, West Coast, and around the Great Lakes are most likely to accord recognition to lesbian and gay families, and states in the Baptist South and the Mormon West least likely. See ESKRIDGE, EQUALITY PRACTICE, *supra* note 625, at 231-37 (chart of the states).

634. See JAMES BUTTON ET AL., PRIVATE LIVES, PUBLIC CONFLICTS: BATTLES OVER GAY RIGHTS IN AMERICAN COMMUNITIES (1997); ESKRIDGE, GAYLAW, *supra* note 14, at 356-61 (app. B2) (listing state and municipal laws as of 1998). As of 1998, California, Connecticut, Hawaii, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, Rhode Island, Vermont, and Wisconsin had antidiscrimination laws. Since the publication of my book, Delaware and Maryland have joined the ranks of states with such laws.

635. For the best case study, which fully reveals the dynamic in text, see Peter M. Cicchino et al., *Sex, Lies, and Civil Rights: A Critical History of the Massachusetts Gay Civil Rights Bill*, 26 HARV. C.R.-C.L. L. REV. 549-631 (1991).

mosexual identity and (implicitly) sexuality, and so it cannot be surprising that enactment of such laws has only been a point in the continuing dialectic of recognition, remediation, and preservation.

From the very beginning, traditionalists have often been able to revoke antidiscrimination laws through popular referenda and initiatives.⁶³⁶ In 1992, Colorado for Family Values (“CFV”) took this strategy to its next level. Several municipalities in Colorado adopted anti-discrimination laws, and the governor barred state employment discrimination by executive order. CFV proposed a state constitutional amendment to preempt any state or municipal law or policy whereby homosexuality could be the basis for “any minority status, quota preferences, protected status or claim of discrimination.” In its campaign for voter ratification, CFV avoided open appeals to natural law and relied on pragmatic and constitutional arguments. Thus, its leaders argued that lesbian people did not need these “special rights” and that special rights for gays would deprive ordinary citizens of their rights to speak freely, worship as they choose, associate with whom they choose, and control the education of their children.⁶³⁷ After the voters adopted the proposed amendment, lesbians challenged it as a violation of the federal Equal Protection Clause, and the case made it all the way to the U.S. Supreme Court.

The state’s brief on appeal in *Romer v. Evans*⁶³⁸ emphasized themes of federalism, popular legitimacy, and personal liberty. That is, the state had made, in the most legitimate manner, a policy judgment that lesbian people were not to be prosecuted for sodomy, but was not prepared to spend valuable civil rights enforcement resources on their additional protection, especially given the tendency of antidiscrimination laws to interfere in “the choices people make in religious, familial, personal, and associational matters.”⁶³⁹ Jean Dubofsky’s brief

636. The first such antigay initiative repealed Boulder, Colorado’s antidiscrimination ordinance in 1974. The first “big” repeal effort was Anita Bryant’s 1977 “Save the Children” campaign against an antidiscrimination law in Dade County, Florida. Between 1977 and 1993, antigay initiatives had an unprecedented 79% success rate. See Gamble, *supra* note 600, at 258.

637. *Equal Rights — Not Special Rights!* (Colo. for Fam. Values), 1992 (official ballot materials distributed to voters as an explanation of the proposed amendment), reprinted in Robert F. Nagel, *Playing Defense*, 6 WM. & MARY BILL OF RIGHTS J. 167, 192-99 (1997); see BRANSFORD, *supra* note 597, at 40 (insider’s account of the CFV campaign themes). Compare Hans A. Linde, *When Initiative Lawmaking Is Not “Republican Government”*: *The Campaign Against Homosexuality*, 72 OR. L. REV. 19 (1993) (describing similar Oregon antigay initiative).

638. 517 U.S. 620 (1996), see also discussion *infra* Section II.C.1.

639. Brief for Petitioners at 43, *Romer v. Evans*, 517 U.S. 620 (1996) (No. 94-1039); see *id.* at 44-47 (showing how progay laws violate TFV people’s religious liberties and rights of free association, relying on Robert Duncan, *Who Wants to Stop the Church: Homosexual Rights Legislation, Public Policy, and Religious Freedom*, 69 NOTRE DAME L. REV. 393 (1994)). Nine amicus briefs “supported” the state, some of them probably harmful because

for the challengers focused on the functional consequences of the amendment from the perspective of lesbians: by preempting local antidiscrimination protections, the amendment undermined their ability to participate in the political process;⁶⁴⁰ moreover, the amendment's broad denial of state "protection" to lesbian people threatened their access to state services and protections of all sorts. Her conclusion was that the amendment was animated by antigay "antipathy" and not by the nice values in the state's brief.⁶⁴¹ In reply, the state disavowed supporters' antigay statements and insisted that "Coloradans are largely tolerant of homosexuality, yet unwilling to support governmental action which confers benefits on a relatively privileged group at the expense of the less-privileged."⁶⁴²

Surprisingly, the Rehnquist Court ruled that the antigay amendment was invalid. That Colorado's arguments did not prevail owes something to the breadth of the amendment, which effectively authorized employers, landlords, and public accommodations to discriminate against gay people but left local bars against discriminating against straight people in place. But six Justices pretended that the amendment was much broader than it clearly was, and Justice Kennedy's opinion for the Court was unprecedented in the extent to which it credited lesbian people's politics of recognition. The opinion not only referred to the respondents respectfully as gay men, lesbians, and bisexuals, but articulated the protections served by antidiscrimination laws as "normal" protections everyone else either takes for granted or enjoys — and not as the "special rights" claimed by the state and the dissenting opinion.⁶⁴³ Justice Kennedy also openly recognized that much of the support of the amendment was inspired by antigay "animus," again a striking contrast with the dissent's emphasis

of their extremist (i.e., natural law) rhetoric. See, e.g., Brief for Amicus Curiae Concerned Women for America, Inc. in Support of Petitioners, *Evans* (No. 94-1039) (arguing that homosexuality is immoral, and that "special rights" for homosexuals undermine public morality, marriage, economic liberty, and religious liberty).

640. The state supreme court had adopted this theory. See *Evans v. Romer*, 854 P.2d 1270, 1282 (Colo. 1993) (requiring heightened scrutiny for the amendment, which was struck down by the lower court on remand, and then affirmed by the state supreme court).

641. See Brief for Respondents at 36-50, *Evans* (No. 94-1039); accord Brief for Amicus Curiae American Bar Association at 10-25, *Evans* (No. 94-1039) (first ABA brief filed on behalf of gay people at the Supreme Court, arguing that the amendment served no rational purpose).

642. Reply Brief for Petitioners at 15, *Evans* (No. 94-1039). The state reported polling data showing that large majorities of Coloradans believed that "homosexuals are not really different from anyone else" and should be allowed to serve in the military and engage in private intimacy with consenting adults. *Id.* at 15 n.24.

643. Compare *Evans*, 517 U.S. at 630-31 (majority opinion), with *id.* at 638 (Scalia, J., dissenting). On the deployment of "special rights" rhetoric by anti-civil rights as well as antigay groups, see Jane S. Schacter, *The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents*, 29 HARV. C.R.-C.L. L. REV. 283 (1994).

on how tolerant Coloradans are.⁶⁴⁴ Finally, the six-Justice majority ignored *Bowers v. Hardwick*, a gap stressed by Justice Scalia in dissent.⁶⁴⁵

Although commentators predictably embraced its result and its gay-friendly reasoning, *Evans* is a mystery: the breadth of its reasoning could signal the full constitutionalization of gay people's politics of recognition, but the squirrelness of the state amendment renders the case potentially *sui generis*.⁶⁴⁶ Under the theory of my project, the meaning of *Evans* depends on the balance of the cultural politics surrounding it. The Court learned a lesson from *Hardwick*: don't commit the Constitution to one of the contending camps prematurely. The strategy of the *Evans* Justices was not to overrule *Hardwick* or to embrace the full legal equality demanded by gay people's politics of recognition, but to distance themselves from the antigay discrimination seemingly accepted in *Hardwick* and to invite feedback before taking a firm position on gay rights.

If the *Evans* Justices aimed to respect lesbian and gay people, they were not eager to disrespect TFOV people and their liberties. The year before *Evans*, a unanimous Court had ruled in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*⁶⁴⁷ that Massachusetts could not constitutionally apply its antidiscrimination law to require a private St. Patrick's Day parade to include a contingent of openly lesbian and gay marchers. The First Amendment protected the parade organizers' right to express a message through their orchestration of the parade, and the Court credited the organizers' claim that their message would be distorted by a gay contingent.⁶⁴⁸ After *Evans*, the Court considered whether the First Amendment permitted New Jersey's antidiscrimination law to require the Boy Scouts to allow openly gay men to be assistant scoutmasters, in *Boy Scouts of America v. Dale*.⁶⁴⁹ The Scouts maintained that they wanted to be silent or neutral as to issues of homosexuality — neither “anti-gay” nor conveying “approval of

644. Compare *Evans*, 517 U.S. at 632, 634-35 (majority opinion), with *id.* at 645 (Scalia, J., dissenting).

645. See *id.* at 640-43 (Scalia, J., dissenting).

646. Commentaries exploring this mystery but supporting the Court's result include Akhil Reed Amar, *Attainder and Amendment 2: Romer's Rightness*, 95 MICH. L. REV. 203 (1996); Daniel A. Farber & Suzanne Sherry, *The Pariah Principle*, 13 CONST. COMMENT. 257 (1996); Toni M. Massaro, *Gay Rights, Thick and Thin*, 49 STAN. L. REV. 45 (1996); and Louis Michael Seidman, *Romer's Radicalism: The Unexpected Revival of Warren Court Activism*, 1996 SUP. CT. REV. 67.

647. 515 U.S. 557 (1995) (also discussed in Section II.F.3).

648. For a critical appraisal, see William N. Eskridge, Jr., *A Jurisprudence of "Coming Out": Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 YALE L.J. 2411 (1997).

649. 530 U.S. 640 (2000) (discussed also in Sections II.F.3 and III.B).

homosexual conduct either.”⁶⁵⁰ Ironically, the presence of an openly gay scoutmaster presented the Scouts with a dilemma: either break their silence and appear anti-gay *or* sit tight and appear to promote homosexual conduct. They chose to resolve the dilemma by expelling the gay man and denying that the action was anti-gay. A divided Supreme Court ruled that the First Amendment protects an expressive association like the Scouts from having the state direct its message or its membership.

Table 1 summarizes the main analytical point of this part of the Article: all three IBSMs as well as their countermovements expressed their political aspirations through constitutional litigation. The libertarian assurances of the First Amendment and Due Process Clause were the basis for each group’s ongoing *politics of protection*, which was superseded by a *politics of recognition and remediation* developed by each group under the auspices of the Equal Protection Clause. To the extent each group was successful in its equal citizenship campaign, a *politics of preservation* presented constitutional arguments grounded on federalism, separation of powers, and personal liberty that could override or limit the equality each IBSM was seeking. One theme of my lengthy survey is that not only have different IBSMs followed the same constitutional tracks, but they have instinctively recognized that they are interdependent and should support one another. Thus, not only have women’s and gay rights attorneys capitalized on equal protection and First Amendment arguments pioneered by the Inc. Fund, but their extensions of civil rights constitutional doctrines have been supported by current civil rights organizations, which in turn are supported by women’s and gay groups. (And all are under the umbrella of the ACLU.) There is now an evolving ISBM constitutional vision to which each group now contributes; likewise, there is now a constitutional countervision to which each countermovement (anti-civil rights, pro-life, TFV movements) contributes. Social movements in the new millennium are a powerful institutionalized engine of constitutional change. To understand how this engine works, it is useful to visit in greater detail some of the doctrinal transformations these movements generated in the last century.

650. Brief for Petitioners at 21, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699). The Scouts took a harder line in their Reply Brief for Petitioners at 5, *Dale* (No. 99-699) (“Boy Scouting wants boys to be tolerant. But Boy Scouting also wants boys to be morally straight, to live their lives with purity. Believing that homosexual conduct, along with other sex outside of marriage, is immoral, Boy Scouting does not want to promote homosexual conduct as a legitimate form of behavior.”).

TABLE 1

THE CONSTITUTIONALIZATION OF THE POLITICS OF IBSMS

	<i>Politics of Protection</i>	<i>Politics of Recognition and Remediation</i>	<i>Politics of Preservation</i>
<i>The Civil Rights Movement</i>	<p>(1) Due process right against mob trials (<i>Moore</i>). Criminal procedure rights to counsel, juries, etc. (<i>Powell</i>)</p> <p>(2) Right to hold property and enter into contracts (<i>Buchanan</i>)</p> <p>(3) First amendment rights of association (<i>NAACP v. Alabama</i>) and protest (<i>Cox</i>)</p>	<p>(1) Right to vote (Texas Primary Cases) and serve on juries (<i>Norris</i>).</p> <p>(2) Equal protection anti-apartheid (<i>Brown; Loving</i>)</p> <p>(3) Affirmative state protection through anti-discrimination laws (<i>Heart of Atlanta</i>), voting rights protections (<i>Katzenbach</i>), desegregation decrees (<i>Swann</i>)</p>	<p>(1) Federalism and states' rights (<i>Milliken; Freeman v. Pitts</i>)</p> <p>(2) Deference to political process; institutional competence (<i>Washington v. Davis</i>)</p> <p>(3) White liberties; do not promote race consciousness (<i>Adarand</i> and Affirmative Action Cases)</p>
<i>Women's Rights Movements</i>	<p>(1) Due process privacy right to control of reproduction and sexuality (<i>Griswold; Roe</i>)</p> <p>(2) Rape reform and state enforcement of sexual assault laws</p> <p>(3) Access to jobs outside the home (<i>Goesaert</i>)</p>	<p>(1) Right to jury service (<i>Hoyt, Taylor</i>)</p> <p>(2) Equal protection challenges to laws resting on sex stereotypes (<i>Reed; Frontiero</i>)</p> <p>(3) Affirmative state protection through anti-discrimination laws, sexual harassment guidelines, suppression of porn</p>	<p>(1) Localism: state and parental responsibility (ERA defeat; <i>Hodgson</i>)</p> <p>(2) Deference to political process; institutional competence (<i>Feeney; Rostker</i>)</p> <p>(3) Rights of parents and of fetuses; do not promote abortion (Abortion Funding Cases; <i>Casey</i> and <i>Carhart</i> dissents)</p>
<i>Gay Rights Movement</i>	<p>(1) First amendment rights of association, speech, publication (<i>One, Inc.</i>)</p> <p>(2) Due process limits to police stings and witch hunts</p> <p>(3) Due process vagueness and privacy challenges to sodomy, solicitation, cross-dressing laws (<i>Boutilier; Hardwick</i>)</p>	<p>(1) Equal protection challenges to state discrimination, especially jobs (<i>Kameny</i>)</p> <p>(2) Equal protection/due process right to same-sex marriage (<i>Baker; Baehr</i>)</p> <p>(3) Anti-discrimination laws (<i>Evans</i>)</p>	<p>(1) Federalism and local control (DOMA; <i>Hardwick</i>)</p> <p>(2) Deference to political process; institutional competence (<i>Hardwick; Gays in the Military Cases</i>)</p> <p>(3) Rights of parents and of antigay association; no promo homo (<i>Dale</i>)</p>

II. IDENTITY-BASED SOCIAL MOVEMENTS AND THE EVOLUTION OF CONSTITUTIONAL DOCTRINE

One inference from the history is that the Supreme Court has accommodated the needs of IBSMs, subject to constraints imposed by the comfort levels of different Justices and by national political equilibria. In this Part, I argue that these movements have been critical to the evolution of constitutional doctrines of all sorts, and I shall document that view with an analysis of various doctrinal transformations. Let me start, though, with the logic of my hypothesis. How is it that IBSMs generate changes in constitutional doctrine?

1. *IBSMs Generate Constitutional Facts, Litigations, and Spirals.* The United States in 1900 was full of rules and practices that discriminated against and subordinated people of color, women, and gay people. Once some of those people got organized, there was plenty for them to complain about, and they brought case after case until they got some satisfaction from the political or judicial process. Because of social prejudice and stereotypes about the very people who were the objects of state discrimination, the political process was an unlikely venue for needed change.⁶⁵¹ Given their history of activism and obvious constitutional hooks for IBSM political goals, courts were a forum that would at least give outcast social groups or individuals a hearing. Once there was a serious hearing, there was the possibility for judicial relief, accompanied by doctrinal innovation supported by the facts of the cases. Social movement litigators not only brought cases presenting new angles on old issues, but they constructed records in those cases that provided justifications and factual underpinnings for new constitutional rules or exceptions to old rules. In 1930, George Sutherland would not have said that men accused of capital crimes have a due process right to counsel — but he did say that when confronted with the record compiled by civil rights counsel in *Powell v. Alabama*. Once that first case was won, other cases would follow, and constitutional doctrine would evolve, common law style. Thus, no one in 1932 could have expected that *Powell* would have been the basis for a due process right to counsel in all felony cases, but several decades of due process litigation in state as well as federal courts yielded precisely that result in 1963.⁶⁵²

651. Despite constant petitions from civil rights groups and presidents to enact legislation protecting lives and liberties of blacks, it was not until 1957 that Congress enacted any such law. (People of color usually did not even bother to petition southern legislatures for protective laws.) Lesbian people to this day have never been recognized as a group worth protecting by Congress. Women have had many more successes in state and national legislatures.

652. See *infra* Section II.A.1.b.

The common law process for such rights was not an unguided one. IBSM litigating organizations — the NAACP, the ACLU, Planned Parenthood, NOW, Lambda, and others — chose the cases they wanted the Supreme Court (or a state high court) to hear and, if victorious, then planned the next cases. The NAACP's campaign to end de jure segregation was the classic constitutional litigation campaign, carefully planned yet adaptable. Others have included Planned Parenthood's campaign for free use of contraceptives, which evolved also into an effort to decriminalize abortion; the NAACP's crusade against the death penalty; the ACLU's campaigns against sex-based discriminations and consensual sodomy laws; and Lambda's campaign for same-sex marriage. These campaigns have moved the law, even when IBSM organizations have not achieved their ultimate goals.

As we have seen, successful IBSMs generate countermovements, which have pressed their own constitutional vision through new state or national statutes and in litigation defending those laws or limiting progressive laws. The culture clash between IBSMs and countermovements has yielded *constitutional spirals*: old laws fall before IBSM constitutional arguments, often to be replaced by new laws enacted and defended by countermovements in the face of new challenges. This is what happened in the politics of abortion, from *Roe* (old laws struck down) through *Danforth* (new laws struck down in part) through *Webster* (new laws start getting upheld) through *Carhart* (newer laws come to the Court). The spiral can go the other way: anti-discrimination laws enacted in response to IBSM demands for remediation fall or are limited in the face of countermovement constitutional attack, which stimulates the IBSM to fight back on other fronts. After gay rights forces lost the TFV campaign to amend the Colorado Constitution in 1992, they turned to the U.S. Constitution and made new equal protection law (*Evans*). After Lambda lost its constitutional litigation with the Boy Scouts in *Dale*, progay activists pressed state and local governments to withdraw their support from the newly antigay Scouts (no promo scouto); these measures are pressing state courts to make new state constitutional law and will probably generate federal constitutional issues as well. In short, IBSMs rarely generate pure triumphalist law stories — instead they and their doppelgangers generate constitutional spirals that have created great complexity in individual rights law.

2. *Judicial Motivations.* IBSMs can bring cases and present them attractively, but unless judges are receptive, their arguments will get nowhere. The problem of properly motivating judges was a huge one for IBSMs throughout the century.⁶⁵³ To motivate judges to decide

653. Not only did judges have to be strongly persuaded before they would overturn government rules and practices, but the process of persuasion was doubly difficult when (as was

cases in their favor, social movement attorneys followed a variety of strategies, often all at once. *Naive strategies* assumed that judges would more or less neutrally apply the law and sought to present an expanded factual and normative context within which even a skeptical but open-minded judge would feel free to recognize the rights of a minority. Thus, in the Phillips County (*Moore*) and Scottsboro (*Powell* and *Norris*) cases, lawyers for black defendants presented the Court with scenarios where the Justices did not see their choice as being doctrinal innovation versus stare decisis; instead, they saw their choice as applying the Constitution to serve its underlying rule of law purposes versus tolerating a state of nature in the South. Once the Justices had decided these cases, the NAACP could cite them as precedent for regulating less-frightening scenarios. Viewing the evolution of doctrine from case to case provides many more examples of how judges from a range of perspectives could agree with minority claims when presented in the context of outrageous facts or new developments in formal law.⁶⁵⁴

The problem with naive strategies was that the new fact situations and novel angles on old issues gave room for judges to create favorable doctrine but did not compel them to do so. Repeat-player IBSM organizations and their allied attorneys also followed *sophisticated strategies*, which assumed that judges' decisions were influenced by their own political preferences, and sought to mold or appeal to those preferences. The preferences of the Justices can be categorized in the following way for the century:

- *Plessy Era Court (1883-1911)*.⁶⁵⁵ After Reconstruction, the Court consisted of economic libertarians and law-and-order reactionaries who were little interested in the plight of women and minorities in the United States. Minorities were unable to make headway during this period.

usually the case) the judges operated under some of the same prejudices and stereotypes as legislators and police officers.

654. In the contraception and early abortion cases, Planned Parenthood presented the Court with medical support for the legal proposition that women's "liberty" was tangibly threatened by state rules restricting their access to help in preventing or terminating pregnancies. Because the Court had never authoritatively denied women's rights to choose under those circumstances, the Justices were free to recognize such rights; because "experts" were harshly critical of elderly legal restrictions, some moderate and conservative Justices were willing to strike down the most objectionable laws, such as those in *Griswold* and *Roe*. Once the worst laws fell, Planned Parenthood urged the Court to read those decisions broadly, again supported by arrays of scientific experts that suggested the neutrality of their arguments.

655. See generally OWEN M. FISS, *TROUBLED BEGINNINGS OF THE MODERN STATE, 1888-1910* (1993) (volume 8 of the Oliver Wendell Holmes Devise, *History of the Supreme Court of the United States*); Michael J. Klarman, *The Plessy Era*, 1998 SUP. CT. REV. 303.

- *Pre-New Deal Court (1911-37)*.⁶⁵⁶ The libertarianism of the prior period extended to government overreaching in matters of physical liberty and speech as well as property regulation. Minorities could appeal to the Court's sense that the state should not over-criminalize and should conduct the criminal process fairly.

- *New Deal Court (1937-62)*.⁶⁵⁷ The nine Justices appointed by President Roosevelt were committed to upholding the constitutionality of the modern regulatory state but were also increasingly concerned about the operation of the regulatory state on minority groups. The Justices were committed to a democratic pluralism, whereby all groups would have a fair chance to sway public opinion and participate in government. Minorities could argue that deprivation of political and civil rights (voting and jury exclusions, segregation) to minorities was inconsistent with the open and pluralistic features of American democracy that set it apart from Nazi and Communist totalitarianism. This appeal of democracy-based arguments extended through the 1950s as well.

- *The High Warren Court (1962-71)*.⁶⁵⁸ After the departure of Justices Frankfurter and Whittaker, most of the Justices were out-of-the-closet liberals; they believed the Court should police the political process for both procedural defects and substantive injustices. The Court was strongly committed to racial integration, redistribution of economic and social power, and procedural justice. Racial minorities could call upon the Justices to back them up in their struggle with southern tyrants.

- *Nixon-Burger Court (1971-86)*.⁶⁵⁹ The four Nixon Justices were more conservative legal process judges particularly concerned with institutional economics, namely, the institutional costs as well as the individual benefits of protecting rights. If minorities could persuade the Court that the institutional costs of protecting certain rights were low, as with women's rights, they could prevail. But countermovement pragmatists had a receptive audience for their conservative legal proc-

656. See generally ALPHEUS MASON, HARLAN FISKE STONE: PILLAR OF THE LAW (1956); ALPHEUS MASON, WILLIAM HOWARD TAFT: CHIEF JUSTICE (1964); Michael J. Klarman, *Race and the Court in the Progressive Era*, 51 VAND. L. REV. 881 (1998).

657. See generally BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION (1998); David M. Bixby, *The Roosevelt Court, Democratic Ideology, and Minority Rights: Another Look at United States v. Classic*, 90 YALE L.J. 741 (1981).

658. See generally BERNARD SCHWARTZ, SUPERCHIEF (1983); G. EDWARD WHITE, EARL WARREN (1982).

659. See generally JEFFRIES, JUSTICE POWELL, *supra* note 171 (excellent biography of Justice Powell, the "soul" of the Nixon-Burger Court); THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T (Vincent Blasi ed., 1983).

ess arguments, especially those based on federalism and institutional competence.

- *Reagan-Rehnquist Court (1986-??)*.⁶⁶⁰ Under the presidencies of Reagan and Bush *père*, liberals disappeared from the Court, and counter-movement judges assumed pivotal roles. Localism and libertarianism reappeared as animating philosophies of the Justices. The Court as a whole has been particularly keen on protecting and expanding First Amendment liberties against state regulation. Minorities, including traditionalist ones, have been most likely to prevail when they are engaging in expressive activities and associations the state is penalizing.

Furthermore, recall that IBSMs are normative. Their ultimate political strategy — changing public norms from considering the minority's trait a tolerable or benign variation — had payoffs in constitutional litigation as well. Once Justices realized that the audience for their opinions included many critics for whom the baseline was that latinos, women, and lesbian people are just as important to the body politic as straight white men, the Justices changed the tone of their writing and made an effort to understand and appear responsive to minority claims. Thus, the conservative Burger Court was much more friendly toward women's claims for equality and privacy than the liberal Warren Court, because the Justices accepted some of the country's new views about women's role in society. Several of the Burger Court Justices were exceedingly anxious about minority sexualities, and so it fell to the more conservative Rehnquist Court to handle the delicate issues of homosexuality and the law. And the Rehnquist Court, with two female Justices, has been quite receptive to the constitutional and statutory claims of women's ongoing politics of protection and recognition.

Cynical strategies have assumed that judges are partisan and essentially just part of the political process. The most obvious punchline for this strategy is to fight for your allies to be appointed to the Court and vigorously to oppose appointment of known enemies. Twentieth century IBSMs deployed this strategy with some success. It was very important for the civil rights movement that Thurgood Marshall be appointed to the Court, not just because he could be expected to vote for their interests and their politics of recognition and remediation, but also because his mere presence in conference discredited extremist (natural differences) arguments and undermined some moderate arguments deployed by the politics of preservation. Even a conservative woman like Sandra Day O'Connor changed the Burger Court's sex

660. See generally David Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293 (1976) (his analysis of Rehnquist as favoring states rights and corporate power over individual rights and federal regulatory authority has held up over the decades).

discrimination jurisprudence and ultimately saved *Roe v. Wade* (sort of). Her appointment and that of Ruth Bader Ginsburg are both a triumph of women's politics of recognition and a means to implement it through constitutional doctrine. Although there has been no openly gay Justice in recent years,⁶⁶¹ the appointment of bachelor Justice David Souter has been the occasion for a transformation in the Court's language in majority opinions, from unashamed invocations of antigay stereotypes and rhetoric to relative civility toward lesbian and gay Americans.⁶⁶²

Minority groups have also had some success in heading off hostile appointments. All four twentieth century judges nominated for the Court but defeated by a Senate vote (John Parker by President Hoover, Clement Haynsworth and Harrold Carswell by President Nixon, Robert Bork by President Reagan) were opposed mainly by IBSMs and their allies, who viewed the nominees as prejudiced against minorities.⁶⁶³ The rejected choices were succeeded by nominees (Owen Roberts, Harry Blackmun, Anthony Kennedy) who were more receptive to equality claims, and two of whom wrote leading minority rights opinions (*Roe* and *Evans*). Other nominees were opposed by these groups but squeaked through, such as William Rehnquist and Clarence Thomas. On the whole, even the most conservative presidents have been forced to take account of IBSMs in their efforts to reshape the Court. Through their clout with Republican presidents and senators, countermovement groups have been able to block the ap-

661. Frank Murphy was a closeted gay Justice whose sexual preference was surely apparent to some of his colleagues and who, not coincidentally, was the most civil liberty-protective Justice of the twentieth century. See MURDOCH & PRICE, *supra* note 510, at 18-21. He was one of the few dissenters in *Korematsu* (unlike Douglas and Black) and a strong proponent in conference of striking down sex as well as race discrimination in the 1940s.

662. The obvious contrast is between *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986) (majority opinion's fetishistic obsession with "homosexual sodomy" as the focus of the ungendered state law and its ignorant equation of "homosexuality" and "sodomy"), and *Romer v. Evans*, 515 U.S. 620, 624-26 (1996) (referring respectfully to "gays and lesbians"), but is even more striking in *Farmer v. Brennan*, 511 U.S. 825 (1994) (Souter, J.) (respectful treatment of transsexual plaintiff, going so far as to avoid gendered references, lest the Court be thought to have prejudged the claim), and *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995) (Souter, J.).

663. The first three were opposed by civil rights groups, the fourth by civil rights, women's, and gay groups. On the Parker nomination, see KENNETH W. GOINGS, "THE NAACP COMES OF AGE": THE DEFEAT OF JUDGE JOHN PARKER (1990), and Richard L. Watson, Jr., *The Defeat of Judge Parker: A Study in Pressure Groups and Politics*, 50 MISS. VALLEY HIST. REV. 213 (1963). On the Haynsworth nomination, see JOHN P. FRANK, CLEMENT HAYNSWORTH, THE SENATE, AND THE SUPREME COURT 57-61, 92-95 (1991). On the Carswell nomination, see *id.* at 100-17. On the Bork nomination, see sources cited *infra* note 899.

pointment of open liberals and have diversified the Court by supporting the appointment of conservative Republican minorities.⁶⁶⁴

A less obvious but also a successful strategy has been for a minority group or its countermovement to show broader political support for its stance in particular cases. An appendix to the present study (on file with the *Michigan Law Review*) collects the incidence of amicus briefs, the sides they supported, and their success rate for cases discussed in this Article. Reflecting the explosion of IBSM litigating institutions, there has been a steady increase in the number of amicus briefs filed in individual rights cases. Table 2 is an aggregation of this data. The main conclusion to be drawn from the table is that the party with the most amicus briefs has usually won the case. Since the advent of the New Deal Court (around 1938), if there is a predominance of amici in a Supreme Court civil rights case, the balance of amici predicts the results in almost two out of three cases, a higher success rate than that associated with the Solicitor General during the same time span.

TABLE 2

SUPREME COURT SUCCESS RATE IN CIVIL RIGHTS CASES FOR
PARTIES SUPPORTED BY MOST AMICUS BRIEFS

Time Period	Amicus Briefs a Wash (usually b/c none filed)	Party with More Amici Wins Case	Party with More Amici Loses Case
To 1937	21 (73%)	5 (17%)	3 (10%)
1938-1968	39 (45%)	32 (37%)	16 (18%)
1969-2001	16 (18%)	47 (50%)	31 (32%)
Totals	76 (35%)	84 (40%)	50 (24%)

Source: Appendix listing amicus briefs filed in all U.S. Supreme Court cases that are both discussed in the text of this Article and were decided after full briefing. (Hence, summary dispositions and denials of certiorari are not included.) The appendix was compiled by Jillian Cutler, Lisa Mahle, and Bill Eskridge and is on file with the Michigan Law Review.

664. Compared to the U.S. Senate in particular, the Supreme Court is a virtual rainbow coalition: its nine Justices include two women, one person of color, three Roman Catholics, two Jews, and one bachelor. Five of the seven "diversity" Justices are Republican appointees.

Amicus briefs serve various functions that their sponsors or allies find useful in the case. Sometimes, amicus briefs contain important information (such as Brandeis's social data brief in *Muller*) or legal argumentation (typical of ACLU briefs) not presented to the Court by the parties' briefs. From the perspective of my project, the most important role of amicus briefs has been political and cultural signals to the Supreme Court that a civil rights complaint or defense has merit from the perspective of a variety of allied groups or institutions. The logic is that swing Justices will see themselves and the Court as exposed to fewer risks of shame or political retaliation if a broad array of interests supports a particular result. Thus, the more diverse and significant your array of amici, the more your case ought to profit; conversely, a collection of amici having similar points of view and modest constituencies does not affect the Justices' deliberations much. (My colleague Ruth Colker has suggested to me that, in recent years, the amicus effect has vanished in the general run of cases.) The jackpot strategy is to persuade the Solicitor General as well as a majority of amici to support your cause: when the United States filed an amicus brief in support of the same party that also enjoyed a predominance of filed amici, that party won the case in more than ninety percent of my sample.⁶⁶⁵

3. *Doctrinal Ideas.* Social movements did not revolutionize constitutional doctrine simply by political force, strategic cleverness, or dogged litigation campaigns. They also altered the course of doctrine by coming up with *ideas*, arguments which linked precedent and the purposes of constitutional provisions with the interests of new social groups and a country needing to adapt to them. By necessity, social movement lawyers were creative, seizing upon the legally familiar and transforming it into a doctrinal tool helpful to a minority group. Many of the great constitutional ideas of the last century were the products of this kind of transformation. Among the great ideas were an understanding of due process as entailing those guarantees of the Bill of Rights that are essential to the fair operation of an adversary system of criminal justice (Section A); constitutional protection for people's sexual privacy (Section B); an anti-subordination understanding of equal protection, requiring heightened scrutiny for suspicious classifications and denials of important state benefits or disabilities to minorities (Section C); abolition or curtailment of the death penalty as racially discriminatory (Section D); expansive state responsibility for

665. By my count, there were thirty-five such cases; the combination of the United States together with a majority of filed amici predicted the winner in thirty-two cases. Most of these were civil rights cases when the United States was often allied with the NAACP (from *Guinn* to *Cooper*), but a fair number were more recent cases where the United States has sided with state regulations opposed by civil rights and pro-choice groups (*Jefferson v. Hackney*, *Webster*, *Freeman v. Pitts*).

ongoing discriminatory attitudes and structures (Section E); and an imperial First Amendment, bringing ever-expanding conduct into its regulatory orbit (Section F). The introduction to this Article contains a more detailed roadmap of the doctrinal innovations in this part.

The new ideas pressed by IBSM attorneys were never uncritically received, because the Justices had to account for opposing arguments made by the state and (later) by countermovements and felt themselves under institutional constraints. Some of the most far-reaching IBSM ideas (such as the unconstitutionality of the death penalty) have not ultimately been accepted by the Court but have exercised a gravitational force on doctrine or have pressed it into new directions. Other ideas (such as the right to sexual privacy and the anti-subordination principle) have been accepted only in part by the Justices, who have diluted the idea with their own exceptions or limitations. Finally, and ironically, some ideas (such as suspect classifications and the imperial First Amendment) have not only become important constitutional baselines, but have been deployed by countermovements now that IBSMs have the political ability to obtain anti-discrimination laws as part of their politics of remediation. The methodology of this part will be to explore the dialogue between IBSMs, countermovements, and the Court. In this endeavor, I shall not only focus on the IBSM and countermovement arguments as reflected in their briefs and amicus briefs to the Court, but also the Justices' reactions to those arguments, as revealed in transcripts of oral argument and notes taken of the post-argument conferences when the Justices tentatively decided the cases.

A. Procedural Due Process: National Rules of Criminal Procedure, Dialectical Federalism, and Vagueness as an Anti-Discretion Doctrine

At the beginning of the century, the Due Process Clause had been interpreted to require notice and a right to be heard before the government deprived people of their liberty or property, to impose heightened notice requirements for criminal statutes, and to protect against arbitrary state interference with contract or property relations.⁶⁶⁶ Methodologically, the Supreme Court followed a history-based approach: unless state processes deviated from procedures considered fundamental by the framers of the Fifth or Fourteenth Amendment, the Justices were loathe to strike them down.⁶⁶⁷ The

666. See *Hovey v. Elliott*, 167 U.S. 409 (1897) (requiring notice and opportunity to be heard before deprivation of liberty or property); *Allgeyer v. Louisiana*, 165 U.S. 578 (1897) (liberty of contract); *Commonwealth v. Chance*, 54 N.E. 551, 554-55 (Mass. 1899) (fair warning requirement for criminal laws); Edward Corwin, *The Doctrine of Due Process of Law Before the Civil War* (pt. 4), 24 HARV. L. REV. 366, 460 (1911).

667. Compare *Twining v. New Jersey*, 211 U.S. 78, 100-14 (1908) (majority opinion, applying historical approach to allow state to require self-incrimination), *with id.* at 117-27

twentieth century's civil rights cases contributed centrally to the transformation of the Due Process Clause into an evolving guarantor of national procedural rights in criminal cases.

This transformation is exemplified in three interconnected lines of cases, all initiated by civil rights attorneys, to whom the Court responded with a steady stream of decisions ultimately guaranteeing a constitutionalized national code of criminal procedure. The Court's motivation was both libertarian and democratic. The Justices were moved by the records of southern "trials" that were inconsistent with both the rule of law and elemental standards of fairness; even conservative libertarians like Holmes and Taft were appalled by what they learned. The Hughes Court was also concerned that "southern justice" was uncomfortably like the "justice" meted out by totalitarian regimes in Germany and Russia; symbolic acts of differentiation of American democratic justice from Nazi or Communist totalitarian justice (two "axes of evil") became a strong refrain during the New Deal Court. For both symbolic and genuine reformist reasons, the Justices were willing, some eager, to create bright-line rules of criminal procedure that protected defendants of color in the South. The Bill of Rights rules applicable to federal criminal procedure, including those created by the Court's interpretations, were a natural source for guidance, and the Court used them to give more concreteness to state procedural obligations through a process that has been (oversimply) termed *selective incorporation*.⁶⁶⁸ I prefer to view the process the way the NAACP did: the Court was actively creating a *constitutional code of national criminal procedure*.⁶⁶⁹ Because the Justices could not trust southern state judges to implement this code fairly and could not themselves review the hundreds of questionable convictions each year, the Supreme Court simultaneously empowered federal district courts to enforce those rules through habeas corpus. The structure of *dialectical federalism* entailed in this process unsettled rules of res judicata in criminal cases even as it saved the lives of an increasing number of un-

(Harlan, J., dissenting) (applying similar historical approach but reasoning that state rule violated fundamental tenets of the founding era).

668. "Selective incorporation" means that the Due Process Clause of the Fourteenth Amendment (applicable to the states) "incorporates" some of the specific protections of the Bill of Rights (applicable to the federal government). It is distinguished from "full incorporation," whereby the Due Process Clause, it has been argued, incorporated all the specific protections of the Bill of Rights. See generally Louis Henkin, "Selective Incorporation" in the Fourteenth Amendment, 73 YALE L.J. 74 (1964); Jerold H. Israel, *Selective Incorporation: Revisited*, 71 GEO. L.J. 253 (1982).

669. The legal academic literature has devoted some but insufficient attention to the role of the NAACP in the Court's nationalization of criminal procedure. A notable exception is Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48 (2000) [hereinafter Klarman, *Modern Criminal Procedure*], who situates *Moore*, *Powell*, *Norris*, and *Brown* in American political and legal context.

fairly convicted defendants, especially in the South. Later, the Court gave greater teeth to the void for vagueness doctrine as a basis for invalidating broad laws which vested excessive discretion in police and prosecutors to persecute unpopular defendants — not just people of color, but also sexualized women, lesbian, and transgendered people.

1. *Selective Incorporation of Procedural Protections in Criminal Cases*

In *Hurtado v. California*,⁶⁷⁰ the Supreme Court ruled that the Due Process Clause allows states to proceed by information rather than indictment in criminal cases. Contrasting the Fifth Amendment's explicit enumeration of a defendant's right to grand jury indictment for crimes in federal court with the Fourteenth Amendment's simple requirement of due process in state criminal proceedings, the Court reasoned by negative implication that the Constitution does not require the states to follow the Fifth Amendment.⁶⁷¹ In an extensive discussion, the Court invoked the historical fact that grand jury indictment was not considered a "fundamental" or essential feature of criminal prosecutions by the founding or reconstruction generations.⁶⁷² Following the historical analysis of *Hurtado*, the Court ruled in *Twining v. New Jersey*⁶⁷³ that the Fifth Amendment's privilege against self-incrimination is only a "wise and beneficent rule of evidence" and not an "essential part of due process."⁶⁷⁴

The NAACP's appeal to reverse the mob-dominated proceedings in *Moore v. Dempsey* did not challenge the fundamental fairness principle of *Hurtado* and *Twining*, but did render their text- and history-based reasoning irrelevant. Following the NAACP's lead, the Taft Court judged the Arkansas proceedings against the metric of current understandings of procedural fairness — understandings influenced by consensus outside the South that any kind of mob-dominated or

670. 110 U.S. 516 (1884). *Hurtado* interpreted the Due Process Clause. For precedents rejecting the argument that the Privileges and Immunities Clause incorporated the Bill of Rights, see *O'Neil v. Vermont*, 144 U.S. 323 (1892); *In re Kemmler*, 136 U.S. 436 (1890); and *The Slaughter-House Cases*, 83 U.S. 36 (1873).

671. *Hurtado*, 110 U.S. at 534-38.

672. *Id.* at 521-34.

673. 211 U.S. 78 (1908).

674. *Id.* at 106. Going beyond the *Hurtado* inquiry, the Court also inquired whether the privilege against self-incrimination is "a fundamental principle of liberty," *id.*, but the Court conducted that inquiry by delving into its importance during the founding era, *id.* at 107-10, and examining the Court's own precedents, which had almost always permitted state procedural variations. *Id.* at 110-11. Justice Harlan's dissenting opinion read the history as supporting the idea that freedom from self-incrimination was a fundamental right. *Id.* at 114-27.

fraudulently run criminal trial was completely unacceptable.⁶⁷⁵ Alarmed by the lawless as well as racist regime revealed by the civil rights appeals in *Powell v. Alabama*, *Brown v. Mississippi*, and *Norris v. Alabama* (Section I.A.1), the Hughes Court was quick to distance American constitutionalism from trials that smacked of Nazi or Communist justice.⁶⁷⁶ The judiciary was not willing to tolerate convictions obviously tainted by coercion or trickery, outside pressure, or partiality by the decisionmaker, especially when it appeared that men were being sentenced to death for crimes they probably did not commit. Stated positively, the accused must be given a fair opportunity to develop his defense, which must be judged impartially. Precedent would have to accommodate the new standard. Hence, Justice Sutherland's opinion in *Powell* recognized a right to counsel, notwithstanding *Hurtado's* "inclusio unius" approach to the Constitution as a document. He ruled that the Due Process Clause embraced those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions," even though they had been "specifically dealt with in another part of the federal Constitution."⁶⁷⁷ Although Sutherland emphasized the particular circumstances of the case, including the death sentences meted out to the defendants, much of his reasoning was broader and therefore susceptible to expansive interpretation.⁶⁷⁸ In *Brown*, the coerced confession case, the state invoked *Twining* to argue that its proceedings were not governed by the Fifth Amendment's standards, an argument the Court brushed aside, for "the question of the right of the State to withdraw the privilege against self-incrimination is not here involved. * * * Compulsion by torture to extort a confession is a different matter."⁶⁷⁹

675. The NAACP's anti-lynching campaign was a normative success by the 1920s; leading Republicans, including former President (and soon to be Chief Justice) Taft supported anti-lynching legislation, which failed in Congress only because of the power of southern senators. See ROBERT L. ZANGRANDO, *THE NAACP CAMPAIGN AGAINST LYNCHING, 1909-1950* chs. 2-3 (1980).

676. Francis J. Allen, *The Supreme Court, Federalism, and State Systems of Criminal Justice*, 8 DEPAUL L. REV. 213, 218-19 (1959); see also CORTNER, A "SCOTTSBORO" CASE IN MISSISSIPPI, *supra* note 28, at 121 (linking the Court's willingness to reverse the *Brown* convictions to judicial efforts to distinguish American from totalitarian systems of justice); Klarman, *Modern Criminal Procedure*, *supra* note 669 (arguing that *Powell*, *Norris*, and *Brown* reflected the anti-totalitarian norm as well as the Justices' revulsion at lawless process yielding death sentences for apparently innocent men).

677. *Powell v. Alabama*, 287 U.S. 45, 67 (1932) (quoting *Hebert v. Louisiana*, 272 U.S. 312, 316 (1926)).

678. "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . He requires the guiding hand of counsel at every step in the proceedings against him." *Id.* at 68-69 (emphasis added).

679. *Brown v. Mississippi*, 297 U.S. 278, 285 (1936).

In *Powell*, *Norris*, and *Brown*, the Hughes Court was doing more than abandon the formal and historical reasoning in *Hurtado* and *Twining* in favor of a dynamic due process; it was also abandoning the federalism baseline of those cases, the assumption that national uniformity was not necessary or desirable as to rules of criminal procedure. The southern cases motivated the Justices to create higher minimal procedural standards, applicable nationwide to protect defendants of color who were revealed to be more vulnerable than anyone had been willing to admit, and in a political climate where mob pressure, police beatings, and racist exclusions were completely unacceptable. Although the NAACP and the ACLU did not create the incorporation thesis, their insistence on tougher constitutional standards absolutely necessary to protect defendants of color in southern state courts led several Justices to support such standards. The unwillingness of southern courts to police their own criminal justice process pushed even cautious and conservative Justices toward the norm of national standards. The selective incorporation doctrine was ultimately one mechanism by which the Court addressed this problem. The other mechanism was to create bright-line prophylactic rules to protect criminal defendants against risks associated with custodial police interrogations and segregated juries.

a. *Fifth Amendment's Privilege Against Self-Incrimination.* The coerced confession cases were key to the Court's incorporation of the self-incrimination protection into the concept of due process, because the NAACP viewed due process fairness as barring "involuntary" confessions; once the Court ratified that view in *Brown*, challengers and states alike imported the federal (Fifth Amendment) standard for voluntariness into the state cases. Unlike *Brown*, the officials in *Chambers v. Florida*⁶⁸⁰ vigorously denied torturing the thirty to forty "negro suspects," one of whom "broke" after almost a week of continuous and intense questioning. Justice Black's opinion for a unanimous Court reversed the men's convictions nonetheless. He started with the general proposition that the Due Process Clause is the critical protection of "helpless political, religious, or racial minorities" against "[t]yrannical governments."⁶⁸¹ Invoking *Brown*, Justice Black ruled that the detention of the defendants and their twenty-four-hour interrogation without charges or counsel rendered their confessions constitutionally inadmissible. *Chambers* was the basis for the Court's reversal of a number of convictions.⁶⁸²

680. 309 U.S. 227 (1940); see also *Canty v. Alabama*, 309 U.S. 629 (1940) (companion case).

681. *Chambers*, 309 U.S. at 236.

682. Compare *Lee v. Mississippi*, 332 U.S. 742 (1948) (reversing conviction of southern black defendant, on the authority of *Chambers*), and *Haley v. Ohio*, 332 U.S. 596 (1948)

The Justices' deliberations in *Chambers* focused on whether the "repeated questioning" over a long and uninterrupted period rendered the confession "involuntary,"⁶⁸³ an inquiry pretty much the same as that under the Fifth Amendment's self-incrimination clause, as the NAACP suggested.⁶⁸⁴ After *Chambers*, even the states relied on Fifth Amendment precedents in arguing the validity of convictions.⁶⁸⁵ Thurgood Marshall's brief for the petitioner in *Lyons v. Oklahoma*⁶⁸⁶ similarly relied on the Fifth Amendment cases to make his argument that the confession in *Lyons* was involuntary,⁶⁸⁷ and two Justices accepted his implicit argument that the Fifth Amendment standard was applicable to the states under the Due Process Clause of the Fourteenth.⁶⁸⁸ Morris Lavine went beyond Marshall's argument and revived the idea that due process incorporated the Bill of Rights guarantees in *Adamson v. California*,⁶⁸⁹ yet another case involving a black defendant. Justice Black and three colleagues agreed with Lavine, based upon the original intent of the framers of the Fourteenth Amendment.⁶⁹⁰ A majority of the Court, however, rejected the history-based argument and further concluded that the privilege against self-incrimination was not fundamental to the nation's ordered liberty.⁶⁹¹

(same), and *Ward v. Texas*, 316 U.S. 547 (1942) (same), and *Ashcraft v. Tennessee*, 322 U.S. 143 (1944) (same), and *Vernon v. Alabama*, 313 U.S. 540 (1941) (summary reversal) (same), and *Lomax v. Texas*, 313 U.S. 544 (1941) (summary reversal) (same), and *White v. Texas*, 310 U.S. 530 (1940) (same), with *Lisenba v. California*, 314 U.S. 219 (1941) (affirming conviction of white defendant, distinguishing *Chambers* on its facts).

683. Douglas Conference Notes for *Chambers* (Feb. 12, 1940), in Douglas Papers, *supra* note 192, Container 39 (O.T. 1939, Argued Cases, 39-195).

684. See *Bram v. United States*, 168 U.S. 532, 542-43 (1897) (stating that the Fifth Amendment requires that confessions be "free and voluntary" and protects against confessions "extracted by any sort of threats or violence," or by the "exertion of any improper influence"). See generally Petition for Writ of Certiorari and Brief in Support Thereof at 25-29, *Chambers* (1939 Term, No. 195) (relying on Fifth as well as Fourteenth Amendment precedents to make the NAACP's involuntary confession argument).

685. See, e.g., Brief for Respondent at 41-53, *Lisenba* (1940 Term, Nos. 4 & 5) (California Attorney General Earl Warren arguing that confessions were not involuntary and relying entirely on Fifth Amendment cases); see also *Ashcraft*, 322 U.S. 143, 154 n.9 (treating Fifth and Fourteenth Amendment standards for involuntary confessions as the same).

686. 322 U.S. 596 (1944).

687. Brief for Petitioner at 27-29, *Lyons* (1942 Term, No. 433).

688. *Lyons*, 322 U.S. at 605-06 (Murphy, J., joined by Black, J., dissenting).

689. 332 U.S. 46 (1947); see Brief for Appellant at 13-15, *Adamson* (1946 Term, No. 102) (making general incorporation argument); Reply Brief at 1-9, *Adamson* (1946 Term, No. 102) (urging the Court to overrule *Twining*).

690. *Adamson*, 332 U.S. at 68-92 (Black, J., joined by Douglas, J., dissenting); *id.* at 123-25 (Murphy, J., joined by Rutledge, J., dissenting) (going beyond Justice Black to urge incorporation of Bill of Rights, "plus" some unenumerated rights as well).

691. *Id.* at 50-56 (opinion of the Court); see also Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949) (providing a detailed historiographical refutation of Justice Black's argument for total incorporation).

Justice Frankfurter, the critical fifth vote, objected to the rigidity of the total incorporation approach and urged the Court to adapt the dynamic Due Process Clause to new circumstances as they became appropriate.⁶⁹²

While rejecting Justice Black's originalist campaign for "total incorporation," *Adamson*, therefore, did not reject the NAACP's nonoriginalist idea that the Due Process Clause ought to absorb Fifth Amendment's voluntariness standard for confessions. Thus, the Court not only continued to review and reverse state convictions based upon assertedly coerced confessions, but most of the opinions relied on the federal standard invalidating any confession "which is the product of other than reasoned and voluntary choice."⁶⁹³ Justice Frankfurter, the swing vote in *Adamson*, delivered the judgment of the Court in *Watts v. Indiana*,⁶⁹⁴ another NAACP case. Ignoring the *Adamson* debate, Frankfurter ruled that "[a] confession by which life becomes forfeit must be an expression of free choice" and cannot be "the product of sustained pressure by the police."⁶⁹⁵ Frankfurter tied this requirement of due process to our adoption of an "accusatorial as opposed to the inquisitorial system" of criminal procedure — a system characterized by "requirements of specific charges, their proof beyond a reasonable doubt, the protection of the accused from confessions extorted through whatever police pressures, the right to a prompt hearing before a magistrate, the right to assistance of counsel, to be supplied by government when circumstances make it necessary, the duty to advise an accused of his constitutional rights."⁶⁹⁶ *Watts* suggested an overall principle (fairness to criminal defendants in an *adversarial* system) that could be — and soon became — the basis for nationwide rules of constitutionalized criminal procedure.

As *Watts* illustrated, the Court's disinclination to incorporate the Bill of Rights *totally* had no bearing on its willingness to incorporate them *selectively*. As early as 1940 (*Chambers*), the NAACP had persuaded the Court to incorporate some self-incrimination norms into the Due Process Clause. Not only did the Fourteenth and Fifth Amendment standards converge (voluntariness), but the Court ap-

692. See *Adamson*, 332 U.S. at 59-68 (Frankfurter, J., concurring); see also *Malinski v. New York*, 324 U.S. 401, 412-20 (1945) (Frankfurter, J., concurring in part) (articulating highly dynamic understanding of due process as a basis for rejecting full incorporation).

693. *Lee v. Mississippi*, 332 U.S. 742, 745 (1948); accord *Haynes v. Washington*, 373 U.S. 503 (1962); *Spano v. New York*, 360 U.S. 315 (1962).

694. 338 U.S. 49 (1949) (Frankfurter, J., plurality opinion); see *id.* at 55 (Black, J., concurring on the authority of *Chambers*); *id.* at 56-57 (Douglas, J., concurring); *id.* at 57 (Jackson, J., concurring in the result).

695. *Id.* at 53 (Frankfurter, J., plurality opinion).

696. *Id.* at 54.

plied the voluntariness standard with similar vigor to overturn state convictions based upon hours of sustained interrogation without presence of counsel.⁶⁹⁷ The coerced confession cases played a role in the Court's decision in *Mapp v. Ohio*,⁶⁹⁸ arguably the first of what criminal procedure scholars call the selective incorporation cases. Justice Clark's opinion relied on the unified constitutional standard the Court had already developed for coerced confessions (Fifth Amendment) as a reason to create a similarly national standard for physical searches and seizures (Fourth Amendment), which were a kind of self-incrimination.⁶⁹⁹

Given *Mapp's* stated connection between the Fourth and Fifth Amendments, it was apparent that *Twining's* days were numbered. And it died, albeit by a close (5-4) vote, in a case not explicitly presenting racial issues, *Malloy v. Hogan*.⁷⁰⁰ Yet Justice Brennan's opinion for the Court started with what he considered the nationalization process initiated by *Moore* and *Brown*.⁷⁰¹ "The shift [to the federal standard] reflects recognition that the American system of criminal prosecution is accusatorial, not inquisitorial, and that the Fifth Amendment privilege is its mainstay,"⁷⁰² reasoned Brennan, echoing *Watts*. That principle, fortified by the Court's newer precedents, justified overruling both *Adamson* and *Twining*. Unmentioned in the opinion but weighing on the minds of several Justices was the fact that coerced confessions were, as Justice Black had said in *Chambers*, a means of oppressing "helpless political, religious, or racial minorities."⁷⁰³

697. See, e.g., *Blackburn v. Alabama*, 361 U.S. 199 (1960) (mentally ill black defendant charged with robbery); *Payne v. Arkansas*, 356 U.S. 560 (1958) (mentally disabled nineteen year-old black defendant accused of killing white man); *Moore v. Michigan*, 355 U.S. 155 (1957) (similar); *Harris v. South Carolina*, 338 U.S. 68 (1949) (black defendant accused of killing white man); *Turner v. Pennsylvania*, 338 U.S. 62 (1949) (white defendant).

698. 367 U.S. 643 (1961).

699. *Id.* at 656-57. The Court in *Wolf v. Colorado*, 338 U.S. 25 (1948), had ruled that the Due Process Clause absorbed the Fourth Amendment's privacy protections but not the exclusionary rule as an enforcement mechanism. *Mapp* overruled the latter holding of *Wolf*. *Mapp* is arguably the first "selective incorporation" decision, but even *Wolf*, like *Chambers*, incorporated some features of the federal constitutional standard into the Due Process Clause. This is a process the Court aggressively pursued in the 1950s. See Israel, *supra* note 668, at 285. See generally William J. Brennan, *The Bill of Rights and the States*, 36 N.Y.U. L. REV. 761 (1961) (defending partial incorporation and increasing nationalization of the rules of criminal procedure).

700. 378 U.S. 1 (1964).

701. *Id.* at 6-7; *cf. id.* at 15-21 (Harlan, J., dissenting) (disputing the Court's inferences from the *Brown* line of cases).

702. *Malloy*, 378 U.S. at 7 (citing *Rogers v. Richmond*, 365 U.S. 534, 541 (1962)).

703. *Chambers v. Florida*, 309 U.S. 227, 236 (1940). The large majority of cases raising *Chambers* issues to the Court involved black defendants convicted in southern courts. See *supra* notes 682 and 697.

b. *Sixth Amendment's Right to Counsel.* The same process occurred in the right to counsel cases, albeit with less involvement of the NAACP and more by the ACLU. The Court initially read *Powell v. Alabama* to require appointment of counsel for indigent defendants in capital cases.⁷⁰⁴ But some of *Powell's* reasoning was not limited to such cases. "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel."⁷⁰⁵ From that language, defendants argued for required counsel in felony cases even when they did not generate a death penalty. Distinguishing *Powell* as a case involving youthful and ignorant defendants in a situation of great hostility, the Supreme Court in *Betts v. Brady*⁷⁰⁶ rejected the claim for required counsel in all felony cases and ruled that the Due Process Clause does not incorporate the Sixth Amendment.⁷⁰⁷ But the Court also expanded *Powell* to require counsel when a denial would be inconsistent with "fundamental fairness, shocking to the universal sense of justice."⁷⁰⁸ As in *Adamson*, Justices Black, Douglas, and Murphy dissented on the ground that the framers of the Fourteenth Amendment intended to incorporate the Bill of Rights.⁷⁰⁹

For the next twenty years, the Supreme Court took appeals from the diminishing number of states which did not provide counsel to indigent defendants in noncapital felony cases. The inquiry was whether a particular defendant's right to a fair trial was prejudiced (in retrospect) by not having counsel; thus, the Court considered the sophistication of the defendant, the claims he raised (perhaps with the assistance of the court), and the claims an attorney would have raised for him.⁷¹⁰ Under that approach, the Court overturned a good many convictions.⁷¹¹ This ongoing review process gave rise to restiveness within the Court. As early as 1948, Justice Reed suggested that "the Due Process Clause . . . requires counsel for all persons charged with serious crimes."⁷¹² In 1960, Justices Douglas and Brennan explicitly sig-

704. See *Hamilton v. Alabama*, 368 U.S. 52, 55 (1961); *Bute v. Illinois*, 333 U.S. 640, 674 (1948); *Avery v. Alabama*, 308 U.S. 444, 445 (1940).

705. *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932); see *supra* note 678 (quoting more of this broad reasoning).

706. 316 U.S. 455 (1942).

707. Justice Roberts' opinion emphasized the nation's historical diversity in regard to providing counsel, *id.* at 465-67, and the continuing diversity of state practice, *id.* at 467-72.

708. *Id.* at 462.

709. *Id.* at 474-77 (Black, J., dissenting). Appended to their opinion was a survey documenting the movement of state policy to recognize this right. *Id.* at 477-80.

710. See *Palmer v. Ashe*, 342 U.S. 134, 135 (1951).

711. *Cash v. Culver*, 358 U.S. 633, 636 n.6 (1959) (collecting cases). The cases typically yielded passionate dissenting opinions when a conviction was *not* reversed. *E.g.*, *Bute v. Illinois*, 333 U.S. 640, 677 (1948) (Douglas, J., dissenting).

712. *Uveges v. Pennsylvania*, 335 U.S. 437, 441 (1948).

naled their desire to revisit *Betts*, a desire shared by Justice Black and probably by Chief Justice Warren.⁷¹³

One consideration motivating the Justices was the fact that the denial of counsel in noncapital felony cases bore particularly on African-American defendants.⁷¹⁴ This was given some emphasis in the briefs for petitioner and the ACLU in *Gideon v. Wainwright*.⁷¹⁵ Most of the *Betts* appeals came from southern states, and by 1962 there were only five states — all in the deep South — which did not make provision for appointment of counsel for indigents in felony cases.⁷¹⁶ Even more blunt was the amicus brief for twenty-two state governments, arguing for overruling *Betts* and explicitly noting the many cases involving defendants of color.⁷¹⁷ At oral argument, these facts were deployed to undermine Justice Harlan's concern that overruling *Betts* would interfere with the operation of state judiciaries. Abe Fortas (representing Gideon) pointed out that only a few states in the deep South would be affected, and the ACLU's Lee Rankin suggested that southern judges could not be trusted with enforcing anything but a bright-line rule.⁷¹⁸ As for Florida, where Gideon was convicted, Rankin pointed out that 65% of those incarcerated (about 5,200 persons) had not been represented by counsel — men who were for the most part poor, illiterate, and (presumably) not white.⁷¹⁹ There was no one on the Supreme Court willing to reaffirm *Betts* under these circumstances. Echoing these concerns, Justice Black's opinion for the Court in *Gideon* rested almost entirely on *Powell*; his case for overruling *Betts* was, essentially, that it was inconsistent with *Powell*.⁷²⁰

713. *Carnley v. Cochran*, 369 U.S. 506, 519 (1962) (Black, J. concurring); *McNeal v. Culver*, 365 U.S. 109, 117 (1961) (Douglas, J., concurring).

714. For cases where the Court emphasized the race of the defendant denied counsel, see, for example, *McNeal v. Culver*, 365 U.S. 109 (1961); *Moore v. Michigan*, 355 U.S. 155 (1957); and *Rice v. Olson*, 324 U.S. 786 (1945) (involving Native-American defendant).

715. 372 U.S. 335, 338 (1963); see also ANTHONY LEWIS, *GIDEON'S TRUMPET* (1964); Jerold H. Israel, *Gideon v. Wainwright: The "Art" of Overruling*, 1963 SUP. CT. REV. 211.

716. See Brief for Petitioner at 30-31, *Gideon* (1962 Term, No. 155) (only Alabama, Florida, Mississippi, North Carolina, and South Carolina did not provide counsel in felony cases); Brief of Amici Curiae American Civil Liberties Union, et al. at 48-49, *Gideon* (1962 Term, No. 155) (of 139 reported *Betts* appeals, forty-four came from Pennsylvania and eighty came from six southern states; of the eighty southern cases, nine won some kind of relief).

717. Brief for Amici Curiae State Governments at 6, *Gideon* (1962 Term, No. 155).

718. See Oral Argument, *Gideon v. Wainwright*, 372 U.S. 335 (1963), in 57 LANDMARK BRIEFS, *supra* note 199, at 616-23, 628 (Fortas); *id.* at 633-35 (Rankin). Justice Douglas snidely summarized the federalism argument as "a constitutional right to provide a system whereby people get unfair trials." *Id.* at 616.

719. See *id.* at 642, 647.

720. Justice Black started with the idea that *Powell* found the right to counsel "fundamental," *Gideon*, 372 U.S. at 341-43, noted that subsequent decisions had repeated *Powell's* finding and that *Betts* was admittedly "an abrupt break" with the reasoning in those cases, *id.* at 343-44, and closed with *Powell's* explanation as to why a man charged with a serious crime

Incorporation of Fifth and Sixth Amendment guarantees within the Fourteenth Amendment was not the last important ramification of *Powell* and *Brown*. A constant concern that tied together the coerced confession and required counsel cases was the intrinsically coercive environment of a police interrogation of an unsophisticated defendant without counsel. Justice Roberts, who authored *Betts*, had opined in the Justices' conference for *Chambers* that "these men were not entitled to be questioned; they had no lawyer; they were ignorant and did not know they had constitutional rights — That is denial of due process."⁷²¹ Likewise, the Court ruled in *Moore v. Michigan*⁷²² that a black defendant who pleaded guilty to charges of murder should have been provided counsel, because he was unaware of his constitutional rights and susceptible to manipulation by the sheriff during his confinement.

The ACLU and criminal defense lawyers were hardly satisfied with applying Fifth and Sixth Amendment standards to the states; the standards themselves needed to be tougher to protect accused persons of color — Hispanic as well as African Americans by the 1960s — against the overwhelming pressure of custodial police interrogations. The Supreme Court ruled in *Escobedo v. Illinois*⁷²³ that the police were required by the Sixth and Fourteenth Amendments to allow accused persons to speak with their attorneys if requested. In *Miranda v. Arizona*,⁷²⁴ Anthony Amsterdam's brief for the ACLU deployed police manuals to paint a verbal picture of the "inherently compelling" nature of police custodial interrogations.⁷²⁵ As *Miranda*'s attorneys pointed out, these coercive interrogations operated against the same kind of defendants as in the coerced confession cases like *Chambers* and *Watts* — the "helpless, weak" people of color, "outnumbered" by white police officers.⁷²⁶ Responding to these arguments, the Supreme Court agreed to create a new prophylactic rule: neither federal nor state law enforcement officers could interrogate a suspect without

needs a lawyer. *Id.* at 344-45; see also *id.* at 347-49 (Clark, J., concurring in the result) (also relying solely on *Powell*; the Court cannot ground the right to counsel on a distinction between capital cases like *Powell* and other felonies like *Betts* and *Gideon*).

721. Douglas Conference Notes for *Chambers* (Feb. 12, 1940) (No. 195), in Douglas Papers, *supra* note 192, Container 39. Most of the post-*Chambers* reversals based on coerced confessions involved precisely that scenario. See *supra* notes 682 and 697.

722. 355 U.S. 155 (1957). For similar cases, see *Fikes v. Alabama*, 352 U.S. 191 (1957); and *Haley v. Ohio*, 332 U.S. 596 (1948).

723. 378 U.S. 478 (1964).

724. 384 U.S. 436 (1966).

725. Brief of Amicus Curiae American Civil Liberties Union at 13-21, *Miranda* (1965 Term, No. 759). Chief Justice Warren borrowed heavily from this material for his opinion in *Miranda*, 384 U.S. at 445-58.

726. Brief for Petitioner at 35-38, *Miranda* (1965 Term, No. 759) (quoting *Chambers*, 309 U.S. at 241).

warning him that anything he says might be used against him and informing him of his (*Escobedo*) right to an attorney, including one provided by the state if he cannot afford one (*Gideon*). *Miranda* was more controversial than *Malloy* or *Gideon*, as it represented a much sharper departure from current police practices. Congress in 1967 sought to override its holding, and the Supreme Court after Earl Warren retired created a number of restrictions (or loopholes, depending on one's perspective) in the *Miranda* rule.⁷²⁷ Nonetheless, the Rehnquist Court has recently reaffirmed *Miranda* as a workable constitutional rule and invalidated the congressional override.⁷²⁸

c. *Sixth Amendment's Right to Jury Trial by Cross-Section of the Community*. IBSM cases figured very differently in the Due Process Clause's incorporation of the Sixth Amendment's right to jury trials in criminal cases. Race discrimination cases strongly contributed to the public value that juries serve a representative function and should therefore reflect a rough cross-section of the community. I have little evidence to argue that the decision to apply the Sixth Amendment's jury trial right to the states was motivated by the race cases, but they did influence the Court's thinking about what features of the federal system of criminal juries was necessary to incorporate. The race and sex discrimination cases, moreover, pressed the Court to consider the representativeness principle essential to the functioning of proper juries in criminal cases and to conceive of arbitrary exclusion of jurors as violations of jurors' as well as defendants' rights.

Recall *Norris*, where the Court overturned a conviction because no person of color had served on a jury "within the memory of witnesses who had lived there all their lives."⁷²⁹ The Court enforced *Norris* in cases where a complete exclusion of blacks generated a strong inference of purposeful discrimination,⁷³⁰ but also in several less dramatic cases, where some but few people of color had served on juries. A leading case was *Smith v. Texas*.⁷³¹ Although blacks constituted twenty percent of the population and ten percent of the poll-tax payers of

727. See 18 U.S.C. § 3501 (1994) (seeking to return judicial review of confessions to the old "voluntariness" standard and to render the *Miranda* requirement unenforceable).

728. *Dickerson v. United States*, 530 U.S. 428 (2000).

729. *Norris v. Alabama*, 294 U.S. 587, 591 (1935).

730. For cases where the Court applied *Norris* to overturn convictions of black defendants based on evidence that people of color had not served on juries within memory, see *Hernandez v. Texas*, 347 U.S. 475 (1954) (Mexican Americans excluded); *Hill v. Texas*, 316 U.S. 400 (1942); *Pierre v. Louisiana*, 306 U.S. 354 (1939); *Hale v. Kentucky*, 303 U.S. 613 (1938); and *Hollins v. Oklahoma*, 295 U.S. 394 (1935). See also *Arnold v. North Carolina*, 376 U.S. 773 (1964) (one in twenty-four years); *Eubanks v. Louisiana*, 356 U.S. 584 (1958) (one in eighteen years); *Patton v. Mississippi*, 332 U.S. 463 (1947) (none selected over thirty-year period).

731. 311 U.S. 128 (1940).

Harris County, Texas, only five of the 384 persons serving on grand juries between 1931 and 1938 were people of color. The issue on appeal was whether those bad numbers made out an equal protection claim. Justice Black's opinion for a unanimous Court held that they did: the disproportion between eligible people of color and those actually called to serve on juries could not have come by chance, and the jury commissioners' explanation (they chose people they knew) was insufficient. What is important for my purposes is the way Black framed the issue at the outset:

It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body *truly representative of the community*. For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it, but is at war with our basic concepts of a democratic society and a representative government.⁷³²

The principle of representativeness not only animated the body of law created by the Supreme Court to police state jury selection, but also influenced the Court's conceptualization of the appropriate rules for jury selection in federal courts.

A year after *Smith v. Texas* announced the principle of representativeness for state juries, the Court ruled in *Glasser v. United States*,⁷³³ that the federal statutory bar to race discrimination in federal court jury selection bespoke a design to ensure that federal juries are "a cross-section of the community." The Court applied the *Glasser* principle beyond the race context in *Thiel v. Southern Pacific Co.*⁷³⁴ The majority opinion held that it was a violation of the statutory cross-section policy to exclude from federal jury venires people who worked for a daily wage. Dissenting on that issue, Justice Frankfurter justified *Smith* and *Glasser*: citizens of color should not be excluded from jury venires "partly as assurance of a diffused impartiality" in the functioning of a jury, and "partly because sharing in the administration of justice is a phase of civic responsibility."⁷³⁵ Thus, there are two important interests underlying the representativeness principle: the interest of the defendant in receiving a fair trial, and the interest of the excluded jurors in performing their duty of citizenship.

In *Ballard*, the Court extended this reasoning to overturn an indictment by a federal grand jury that unlawfully excluded women.⁷³⁶

732. *Id.* at 130 (emphasis added).

733. 315 U.S. 60, 86 (1941).

734. 328 U.S. 217 (1946).

735. *Id.* at 227 (Frankfurter, J., dissenting); *see id.* at 224 (opinion for the Court) (similar).

736. *Ballard v. United States*, 329 U.S. 187, 192-94 (1946), *discussed in* Section I.B.2.

But in *Fay v. New York*, the Court ruled that *Smith's* principle of representativeness did not extend to exclusions of women from juries and that the *Glasser/Ballard* cross-sectionality principle did not extend to state courts as a constitutional matter.⁷³⁷ Four dissenting Justices argued that the Equal Protection Clause "prohibits a state from convicting any person by use of a jury which is not impartially drawn from a cross-section of the community."⁷³⁸ Justice Jackson's opinion for the Court responded that the due process standards for reviewing state jury exclusions (*Fay*) are much more lenient than the federal statutory and supervisory standards for reviewing federal jury exclusions (*Ballard*), for the Sixth Amendment and its caselaw had not been incorporated into the Due Process Clause at that time.⁷³⁹

Even in race cases, the Court did not require proportional representation of minorities on juries. In *Swain v. Alabama*,⁷⁴⁰ a divided Court upheld a conviction against evidence that black people made up twenty-five percent of the jury-eligible population, but only ten to fifteen percent of the names drawn for possible jury service, and zero percent of the people actually serving (because the prosecution struck minority jurors peremptorily). The NAACP and ACLU continued to press for a more generous interpretation of *Smith's* representativeness principle. In that campaign, they received a windfall from the Justice who authored *Swain*, Byron White.

Justice White wrote for the Court in *Duncan v. Louisiana*,⁷⁴¹ holding that the Sixth Amendment's jury trial right in criminal cases is applicable to the states through the Due Process Clause. The race discrimination cases may have played some (but not a major) role in the Court's decision,⁷⁴² but the decision played an important role in the

737. *Fay v. New York*, 332 U.S. 261, 284-90 (1947).

738. Citing *Smith* and *Glasser*, the dissenters explained: "That means that juries must be chosen without systematic and intentional exclusion of any otherwise qualified group of individuals. Only in that way can the democratic traditions of the jury system be preserved." *Id.* at 296-97 (Murphy, J., joined by Black, Douglas & Rutledge, JJ., dissenting) (citation omitted).

739. *Id.* at 287-89. Nor had the Court extended heightened equal protection scrutiny to sex discriminations the way it had to race discriminations. This doctrinal lay of the land explains why it was difficult for the Court to overturn Gwendolyn Hoyt's conviction in 1961. See *supra* Section I.B.2.

740. 380 U.S. 202 (1965).

741. 391 U.S. 145 (1968).

742. *Duncan* involved a misdemeanor prosecution of a black man who allegedly assaulted a white man, in the sort of scuffle that rarely yields an arrest, much less a prosecution plus jail time. Defendant was convicted before a white judge. The Court ruled that the Due Process Clause (incorporating the Sixth Amendment's jury trial right) entitled him to a jury trial; an impartial, integrated jury would not likely have convicted. Justice White's opinion did not place great emphasis on the early race cases and did not mention *Smith's* representativeness principle at all. Presumably, the most important factor in the Court's willingness to incorporate was the momentum from the Court's earlier decisions, like *Malloy* and *Gideon*.

Court's thinking about juries in criminal cases. Once the federal and state standards were ruled to be similar, it was open to the Justices to merge the *Smith* and *Glasser* principles, which had been kept formally separate since *Fay*. The Court did precisely that. Thus, in evaluating a due process challenge to a six-person state jury, the Court ruled that the number of persons on a criminal jury must "be large enough to promote group deliberation . . . and to provide a fair possibility for obtaining a representative cross-section of the community."⁷⁴³ This doctrinal development opened the door for more aggressive judicial policing of the composition of state juries — and to a reconsideration of *Fay* and *Hoyt* as well as *Swain*.

The ACLU's Women's Rights Project argued to the Court in *Taylor v. Louisiana*⁷⁴⁴ that *Hoyt* was inconsistent with the norm that juries should be cross-sections of the community, a norm that *Duncan* made applicable to the states. A near-unanimous Court agreed, invalidating Louisiana's requirement that women opt-in to be eligible for jury service. Following *Duncan*, the decision rested on the Due Process and not the Equal Protection Clause. "The unmistakable import of this Court's opinions, at least since 1940, *Smith v. Texas* . . . is that the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial."⁷⁴⁵ Hence, a system that requires women to opt into jury service that is routinely required of men is unconstitutional for the reasons developed in *Ballard*.⁷⁴⁶

The norm that civil rights and women's politics of recognition suggested was that juries should be microcosms of a diverse society. Adoption of such a representativeness principle as a matter of due process law provided a doctrinal basis for civil rights groups to press for greater judicial monitoring of race-based peremptory challenges by state prosecutors. In *People v. Wheeler*,⁷⁴⁷ the California Supreme Court declined to follow *Swain* for this reason; the court ruled that trial judges must require prosecutors to provide a neutral reason for a pattern of race-based deployments of their peremptory challenges. Based upon *Wheeler* and *Taylor*, various civil rights groups petitioned

743. *Williams v. Florida*, 399 U.S. 78, 100 (1970); *accord Apodaca v. Oregon*, 406 U.S. 404, 410-11 (1972); *Carter v. Jury Comm'n*, 396 U.S. 320, 330 (1970) (racial exclusion, following *Smith*).

744. 419 U.S. 522 (1975).

745. *Id.* at 528; *see id.* at 530-31 (invoking the dual interests articulated by the *Thiel* dissent).

746. *Id.* at 531-33; *see id.* at 533-37 (overruling *Hoyt*).

747. 583 P.2d 748 (Cal. 1978).

the U.S. Supreme Court for a reconsideration of *Swain*.⁷⁴⁸ In *Batson v. Kentucky*,⁷⁴⁹ the Court overruled *Swain* and essentially adopted the California approach as the federal constitutional rule — sort of a reverse-incorporation move. Justice Powell's opinion for the Court invoked both the Equal Protection Clause as applied in *Norris* and *Smith*, and the Sixth Amendment representativeness idea as recognized in *Duncan's* progeny. When the Court extended *Batson* to cases where the prosecutor struck jurors of a race different from that of defendant, it relied more strongly on the representativeness principle and the *Thiel* idea that the juror's as well as the defendant's rights are implicated.⁷⁵⁰

The independent force of the representativeness principle and the rights of prospective jurors also justified the extension of *Batson* to police other kinds of peremptory challenges. In *J.E.B. v. Alabama ex rel. T.B.*,⁷⁵¹ the Supreme Court extended *Batson's* rule to sex-based peremptory challenges. Justice Blackmun's opinion for the Court rested on Sixth Amendment and due process values as much as those of the Equal Protection Clause:

Discrimination in jury selection, whether based on race or on gender, causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process. The litigants are harmed by the risk that the prejudice that motivated the discriminatory selection of the jury will infect the entire proceedings. The community is harmed by the State's participation in the perpetuation of invidious group stereotypes and the inevitable loss of confidence in our judicial system that state-sanctioned discrimination in the courtroom engenders.⁷⁵²

Note how diversity informs the choreography of the courtroom, which the Court considered critical to the legitimacy of the process. This idea would have been inconceivable before the civil rights and women's rights movements reshaped American public norms.

748. See Brief of Amici Curiae the NAACP Legal Defense and Education Fund, Inc., et al. at 37-46, *Batson v. Kentucky*, 476 U.S. 79 (1986) (No. 84-6263); Brief for Amicus Curiae the Lawyers' Committee for Civil Rights Under Law at 7-11, *Batson* (No. 84-6263); Brief for Amici Curiae Michael McCray, et al. at 16, *Batson* (No. 84-6263) (the use of peremptory challenges to exclude jurors on the basis of race "offends basic notions of equality and distorts the representative function of the jury").

749. 476 U.S. 79 (1986). If the judge detects a pattern of discriminatory peremptory challenges by the prosecutor, the judge is obliged to require an explanation and to invalidate the challenges if the prosecutor cannot provide a neutral (non-race-related) reason.

750. *Powers v. Ohio*, 499 U.S. 400, 402 (1991); cf. *id.* at 418 (Scalia, J., dissenting) (viewing the discrimination as affecting only the criminal defendant and therefore finding it constitutionally harmless).

751. 511 U.S. 127 (1994).

752. *Id.* at 140 (citation omitted).

The dissenters in *J.E.B.* complained that this extension of *Batson* was an exercise in political correctness that would spell the end of peremptory challenges, because other IBSMs would surely seek to insert their trait.⁷⁵³ And so they have. Thirteen years after *Wheeler* held that the state constitution's requirement that a jury be drawn from a "representative cross-section of the community" is violated when a "cognizable group" is excluded from the jury, the California Court of Appeals extended that decision's rule to people excluded for being gay or lesbian, in *People v. Garcia*.⁷⁵⁴ Whereas Justice Blackmun denigrated evidence that men and women view matters differently in *J.E.B.*, the California judges concluded that the purpose of cross-sectionality is to foster diverse perspectives within the jury room, to assure that "the facts will be viewed from a variety of angles."⁷⁵⁵ The court also emphasized that any official exclusion of lesbians and gay men undermines the community as well. "If we deny that civic responsibility to any group . . . we deprive them of part of their membership in the community, and while that has an impact on the excluded group, it must inevitably damage the community as well."⁷⁵⁶ This last point is a linchpin of gay people's politics of recognition: the state should not deny gay people the duties of citizenship (like jury service and military obligations and marital commitment) any more than it should deny them its benefits and privileges.⁷⁵⁷

Although the U.S. Supreme Court has never endorsed California's any-cognizable-group approach, the line of thinking opened up by *Norris* and *Smith* — and now deepened by *J.E.B.* and *Garcia* — is now critical to the way the state thinks about who is on the jury. On the one hand, the race, sex, and sexual orientation cases illustrate the way in which jury service has become interconnected with the idea of full and equal citizenship in our polity. Citizenship entails duties as well as benefits; just as required military service, required jury service has been a symbolic battleground for group equality claims. On the other hand, these cases illustrate an important feature of fairness in criminal trials: in a country where the state and society have long treated race,

753. See *J.E.B.*, 511 U.S. at 161-62 (Scalia, J., dissenting).

754. 92 Cal. Rptr. 2d 339 (Cal. Ct. App. 2000) (applying the test formulated in *Rubio v. Superior Court*, 593 P.2d 595 (Cal. 1979)). The legislature codified the court's rule in 2000 Cal. Stat. ch. 43 (June 27, 2000).

755. *Garcia*, 92 Cal. Rptr. 2d at 344.

756. *Id.* at 346.

757. See William N. Eskridge, Jr., *The Relationship Between Obligations and Rights of Citizens*, 69 FORDHAM L. REV. 1721 (2001); Paul R. Lynd, Comment, *Juror Sexual Orientation: The Fair Cross-Section Requirement, Privacy, Challenges for Cause and Peremptories*, 46 UCLA L. REV. 231 (1998). The Lynd comment also addresses concerns about inappropriate "outing" of possible gay or lesbian jurors and the practical problems with identifying antigay patterns of peremptory challenges.

sex, and sexual orientation as fundamental traits, a jury will not be considered a neutral collection of decisionmakers if stacked to favor only one race, sex, or sexual orientation.

2. *Habeas Corpus and Dialectical Federalism: Federal Courts as Monitors of State Criminal Proceedings*

The precise guarantees of the Due Process Clause in criminal cases cannot be understood without an account of the procedures by which they are enforced. The traditional mechanism for enforcement of constitutional rights is by the state trial judge, with review by the state appeals courts and, potentially, the U.S. Supreme Court. For people of color in the twentieth century, this was impractical. The due process defects, such as lack of adequate counsel and coerced confessions, typically precluded effective appeal. Even when direct appeal could present the proper arguments, many state judges were either prejudiced or cowed by public opinion, especially in rape cases, and review by the Supreme Court was rarely attainable. A partial solution to this dilemma has become the system of “dialectical federalism”: federal district courts monitor state trials for constitutional errors through the writ of habeas corpus.⁷⁵⁸

Dialectical federalism is a product of the twentieth century, specifically in response to challenges to convictions of black men pressed by civil rights attorneys. Federal courts before 1867 did not have statutory authority to free state prisoners on writs of habeas corpus.⁷⁵⁹ The Habeas Corpus Act of 1867 granted federal courts that authority but did not specify the conditions under which it should be exercised.⁷⁶⁰ Apparently there were few such petitions before 1900. The first major habeas case of the new century was *Frank v. Mangum*,⁷⁶¹ involving the conviction of Leo Frank for the murder of a child. An anti-Semitic mob atmosphere surrounded the trial, and he was convicted of a crime there is every reason to believe he did not commit. After unsuccess-

758. The term is taken from Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1977). The idea that “jurisdictional redundancy” can improve the overall functioning of a two-tier adjudicatory system is defended in Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639 (1981).

759. See *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 98 (1807) (dictum), criticized in ERIC M. FREEDMAN, *HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY* 29-41 (2001).

760. Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385.

761. 237 U.S. 309 (1915). For background, especially linking the case to anti-Semitism in the South, see LEONARD DINNERSTEIN, *THE LEO FRANK CASE* (1968); HARRY GOLDEN, *A LITTLE GIRL IS DEAD* (1965); and ROBERT SEITZ FREY & NANCY THOMPSON-FREY, *THE SILENT AND THE DAMNED: THE MURDER OF MARY PHAGAN AND THE LYNCHING OF LEO FRANK* (1988).

fully appealing the conviction,⁷⁶² Louis Marshall, Frank's pro bono attorney, filed a federal habeas corpus petition asserting that the mob domination violated both due process and equal protection guarantees. The district judge denied the petition because he did not believe the habeas law gave him "supervisory power over the action of the State courts," and also because he believed himself bound by the rejection of Frank's federal claims by the Supreme Court on direct appeal.⁷⁶³

The Court took the habeas appeal for review and affirmed, with Justices Holmes and Hughes in dissent. Justice Pitney's confusing opinion for the Court agreed with Marshall that the federal habeas court had authority to adjudicate the due process claim⁷⁶⁴ and that the prior determinations were not *res judicata*.⁷⁶⁵ But Frank's claim was defeated by the state courts' findings of fact, which could be disregarded only if they were clearly erroneous.⁷⁶⁶ The opinion also suggested, and may have held, that habeas was not available unless the prisoner could show that the state had failed to provide adequate "corrective process" (such as an appeal) for errors made at trial.⁷⁶⁷ The habeas petition was dismissed. Although the governor commuted Frank's death sentence because of problems with the trial, a mob of citizens removed Frank from state custody and lynched him.⁷⁶⁸

The Frank case was the first time the Court had focused on a case where local prejudices and mob pressure arguably rendered a fair trial impossible; at least two of the Justices (Hughes and Holmes) were personally upset by the matter, and at least two future Justices (Brandeis and Frankfurter) were furious at the Court's excessive deference to the state proceedings. But the deference holding of *Frank* suggested that the habeas right might not have much teeth. Eight years later, the NAACP brought its habeas appeal in *Moore v. Dempsey* to the Court. Relying on *Frank*, the state argued that federal habeas courts had to defer to state court findings of fact. In both his brief and his oral argument, U.S. Bratton, counsel for the appellants, ignored *Frank* and sought to "get a mental picture in the minds of the Court as to the exact conditions in Arkansas," which "were such that it

762. *In re Frank*, 235 U.S. 694 (1914).

763. *Frank* Transcript at 15, quoted in FREEDMAN, *supra* note 759, at 58.

764. *Frank*, 237 U.S. at 331.

765. *Id.* at 334.

766. *Id.* at 336.

767. *Id.* at 335.

768. The anti-Semitic violence illustrated by the *Frank* case helped forge a lasting alliance between Jews and African Americans through the century. See CLIVE WEBB, *FIGHT AGAINST FEAR: SOUTHERN JEWS AND BLACK CIVIL RIGHTS* (2001). Marshall, for example, became a leading attorney for the NAACP after his work on the *Frank* case.

was preposterous to have imagined a fair trial was had.⁷⁶⁹ Most of the Justices got the message. Without questioning *Frank* directly, Justice Holmes's opinion in *Moore* insisted that the federal habeas judge had a "duty of examining the facts for himself when if true as alleged they make the trial absolutely void."⁷⁷⁰

It is a debated question whether *Frank* and *Moore* are logically inconsistent,⁷⁷¹ but *Moore* clearly invited much greater federal habeas scrutiny than *Frank*. *Moore* allowed the habeas court to characterize constitutional claims as involving "mixed" issues of law and fact, whereas *Frank* saw them as just unreviewable issues of fact. Professor Frankfurter and Justice Brandeis certainly saw the cases as practically inconsistent; the latter opined that the new approach came about because "the Court had changed."⁷⁷² There were five new Justices (including libertarians Brandeis and Taft), and public norms were more sensitive to the abuses of racist mobs. According to contemporaries, the different stance in the cases owed much to the nation's alarm at greatly higher levels of racial violence and lynchings following World War I, and to the NAACP's public campaign for federal anti-lynching legislation.⁷⁷³ This, combined with the negative reaction to the *Frank* decision and its shocking aftermath, surely influenced the Justices' willingness to allow habeas scrutiny of egregious due process violations in state criminal proceedings.

The NAACP took advantage of this greater procedural liberality which it had won in *Moore* and without which many of the selective incorporation cases would not have reached the Supreme Court.⁷⁷⁴

769. Letter from U.S. Bratton to Walter F. White (Jan. 11, 1923), quoted in FREEDMAN, *supra* note 759, at 83.

770. *Moore v. Dempsey*, 261 U.S. 86, 92 (1923); see *id.* at 91 (if the "whole proceeding" were a "mask" and state courts failed to "correct the wrong" then federal courts were available to secure constitutional rights).

771. The conventional wisdom is that the cases are inconsistent, e.g., Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 485-89 (1963) (*Moore* was a mistaken departure from *Frank*); Gary Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 HARV. C.R.-C.L. L. REV. 579, 646-48 (1982) (*Moore* was a good departure), a wisdom challenged by *Fay v. Noia*, 372 U.S. 391, 457-58 (1963) (Harlan, J., dissenting); FREEDMAN, *supra* note 759, at 86-94.

772. Melvin I. Urofsky, *The Brandeis-Frankfurter Conversations*, 1985 SUP. CT. REV. 299, 316 (quoting from a conversation of July 3, 1923).

773. Note, *Mob Domination of a Trial as a Violation of the Fourteenth Amendment*, 37 HARV. L. REV. 247, 250 (1923). On the race riots and increased lynching activities after the war, see MICHAEL R. BELKNAP, *FEDERAL LAW AND SOUTHERN ORDER: RACIAL VIOLENCE AND CONSTITUTIONAL CONFLICT IN THE POST-BROWN SOUTH* 8 (1987); and STEWART E. TOLNAY & E.M. BECK, *A FESTIVAL OF VIOLENCE: AN ANALYSIS OF SOUTHERN LYNCHINGS, 1882-1930* at 31 (1995).

774. There was a practical reason for this phenomenon. Sometimes, the NAACP did not become involved until after the defendant's appeals of death sentences were exhausted or well under way. In such cases, the availability of a federal hearing into alleged improprieties was literally a life or death matter for potentially innocent defendants.

Three race discrimination cases involving black defendants convicted of serious offenses in North Carolina by all-white juries formed the core of the Supreme Court's next leading habeas appeals, reported as *Brown v. Allen*.⁷⁷⁵ Judge John Parker — the man the NAACP vetoed for the Supreme Court in 1930 — spoke for many southern judges in objecting to the increase in habeas petitions, especially in the South, after *Moore*, an increase that became a boom after World War II.⁷⁷⁶ His view was that habeas petitions should be rejected if either the Supreme Court had denied review on direct appeal *or* the state courts had thoroughly considered the federal claim and resolved it as a matter of fact against the defendant.⁷⁷⁷ The appeals in *Brown* presented both issues. As to the first issue, Justice Frankfurter wrote for a bare majority of the Court that denial of certiorari should have no preclusive effect.⁷⁷⁸

As to the second issue, the Court was substantially of one philosophical view but divided as to its articulation. Justice Reed's plurality opinion rejected the Parker view that prior state adjudications were ordinarily *res judicata* but was willing to defer to state court findings of fact, but not law, and then only if "the state process has given fair consideration to the issues and the offered evidence, and has resulted in a satisfactory conclusion."⁷⁷⁹ Within the Court, Justice Frankfurter vigorously defended the writ of habeas corpus against dilution by deference. "The uniqueness of *habeas corpus* in the procedural armory of our law cannot be too often emphasized . . . [T]he unavailability of the writ in totalitarian societies [is] naturally enough regarded as one of the decisively differentiating facts between our democracy and totalitarian governments."⁷⁸⁰ His published opinion required federal habeas judges to accept state determinations of historical fact, "[u]nless a

775. 344 U.S. 443 (1952). For an exhaustive analysis of the Justices' deliberations over two Terms of the Court, see FREEDMAN, *supra* note 759, at 106-30.

776. See John J. Parker, *Limiting the Abuse of Habeas Corpus*, 8 F.R.D. 171 (1949); John W. Winkle, III, *Judges as Lobbyists: Habeas Corpus Reform in the 1940s*, 68 JUDICATURE 263 (1985).

777. *E.g.*, *Speller v. Allen*, 192 F.2d 477 (4th Cir. 1951) (*per curiam*) (panel including Parker, C.J.), *aff'd sub nom. Brown v. Allen*, 344 U.S. 443 (1953).

778. *Brown*, 344 U.S. at 488-97 (Frankfurter, J.) (stating that he spoke for a majority of the Court on the weight-of-certiorari-denied issue). The vote on this issue was 6-3 at conference, with Reed and Minton believing denial of certiorari should have some weight but should not be preclusive. Douglas Conference Notes for *Daniels v. Allen* (Oct. 27, 1952) (No. 20), in *Douglas Papers*, *supra* note 192, Container 223.

779. *Brown*, 344 U.S. at 458, 463 (opinion of Reed, J.).

780. Memorandum from Justice Frankfurter to The Brethren re Nos. 20, 22, 31, and 32 (Dec. 31, 1952) at 1, in *Burton Papers*, *supra* note 249, Container 230, Folder 13. Frankfurter here was much more aggressively liberal than his legal process philosophy was in other kinds of cases, explicable surely by his revulsion at the *Frank* case and his personal involvement as an adviser to the NAACP.

vital flaw be found in the process of ascertaining such facts,” but fully to adjudicate “mixed questions or the application of constitutional principles to the facts as found,” for as to those issues “[t]he State court cannot have the last say when it, though on fair consideration and what procedurally may be deemed fairness, may have misconceived a federal constitutional right.”⁷⁸¹ Justices Black and Douglas read *Moore* as standing for the “principle that it is never too late for courts in habeas corpus proceedings to look straight through procedural screens in order to prevent forfeiture of life or liberty in flagrant defiance of the Constitution.”⁷⁸²

Alone on the Court, Justice Jackson urged adoption of a restrictive reading of *Frank*, whereby habeas was only available for prisoners with no effective state remedy.⁷⁸³ Jackson’s draft opinion of December 29, 1952 situated the debate about habeas within the larger revolution the race cases were facilitating in the rules of criminal procedure binding on the states.⁷⁸⁴

I can not exonerate the state courts from some responsibility for the extension of federal interference. One is sometimes shocked at the callousness with which the rights of defendants are treated, *particularly where the defendant happened to be of particularly unpopular groups in the locality*. We cannot claim either that federal justice is free of that. But it has been lawless procedures and savage penalties which were discreditable to the profession that originally moved the federal government into the state field [*Moore*] . . . [T]here were . . . cases of obtaining confession by the most brutal third degree methods of criminal and physical abuse of the person and by acts of terrorism which, given jurisdiction, no decent court could condone [*Brown v. Mississippi; Chambers*]. There were instances of virtual denial of counsel to the accused [*Powell*] and there were flagrant violations in some parts of the country of the federal statute which prohibits discrimination of a racial character in the selection of juries [*Norris*].

781. *Brown*, 344 U.S. at 506-08 (Frankfurter, J.); *see id.* at 487-88 (opinion of Burton & Clark, JJ.) (substantially agreeing with Frankfurter).

782. *Id.* at 553-54 (Black, J., dissenting). On the merits, Frankfurter, Black, and Douglas felt the habeas petitions should have been granted. *Id.* at 554-60 (Frankfurter, J., dissenting on the merits of the habeas petitions). The remainder of the Justices agreed with Reed that they were properly denied.

783. *Id.* at 532, 545 (Jackson, J., concurring in the result). Jackson’s position was developed after the conference of October 27, 1952, for Jackson is represented in Douglas’s notes as agreeing with Frankfurter on the certiorari issue and not as dissenting on the state court preclusion issue.

784. Jackson’s Draft Opinion in *Brown* (Nos. 20, 22, 31 & 32) (Dec. 29, 1952) at 4-5, in Robert H. Jackson Papers, Library of Congress, Container 120 (Opinion Notes: Habeas Corpus) (emphasis added) [hereinafter Jackson Papers]; *see* FREEDMAN, *supra* note 759 (excellent analysis of Jackson’s stance within conference). I have added both emphasis and bracketed reference to race and gender cases that illustrated Jackson’s points and that he likely would have had in mind when he wrote the draft.

These decisions, however . . . have left the boundaries of federal power to interfere and of the grounds upon which interference may be based so vague and indefinite that no prisoner is wholly without hope of release if he can only get his case here

Jackson deleted this candid discussion in his published opinion, but the draft illustrates three important points. First, the rules of deference in habeas cases had become increasingly liberalized and therefore increasingly inconsistent with the policies underlying *res judicata*. Second, the Justices were aware that their liberalization of habeas was largely driven by their reactions to the savage injustices against people of color. Third, a traditionalist position existed within the Court which, for institutional and rule of law reasons, urged the return to what was supposed to have been the habeas rules of the nineteenth century.

Justice Jackson's position had a receptive audience in Congress,⁷⁸⁵ but the Court moved in precisely the opposite direction under Chief Justice Earl Warren. In Warren's opinion in *Townsend v. Sain*,⁷⁸⁶ the Court created liberal bright-line rules to guide habeas judges' decisions whether to hold *Brown v. Allen* evidentiary hearings.⁷⁸⁷ Justice Brennan's opinion in *Fay v. Noia*⁷⁸⁸ interpreted *Moore* as not only overruling *Frank*, but as also suggesting that habeas defendants not be required to exhaust all state remedies.⁷⁸⁹ Justice Harlan (who had succeeded to the Jackson seat) dissented from that reading of *Moore* and articulated an understanding of habeas that was more in tune with traditional notions: so long as the state provided an adequate process for constitutional objections to be heard by an impartial decisionmaker, its judgments in criminal cases ought ordinarily to be conclusive.⁷⁹⁰ *Fay* was not a race case, and after 1963 race-based prosecutions in the South failed to play the determinative role they did before 1963, but the leading civil rights groups (the NAACP and the ACLU) remained

785. See Bruce R. Ewing, Habeas Corpus Legislation in the United States Congress, 1955-66 (unpublished manuscript, on file with author); see also Louis H. Pollak, *Proposals to Curtail Federal Habeas Corpus for Prisoners: Collateral Attack on the Great Writ*, 66 YALE L.J. 50 (1956).

786. 372 U.S. 293 (1963) (yet another coerced confession case).

787. Where facts were in dispute that would constitute a constitutional violation, district judges were instructed to hold evidentiary hearings if there were no determinative state court findings of fact *or* if such findings were not supported by the record as a whole (which *must* be scrutinized by the district judge) *or* there was newly discovered evidence *or* there were some other reasons to believe the defendant did not receive a full and fair state hearing. *Id.* at 312-18.

788. 372 U.S. 391 (1963).

789. See *id.* at 411 n.22, 421 (*Moore* overrules *Frank*); *id.* at 424-25 n.36 (*Moore* left open the possibility that procedural defaults not be held against the habeas petitioner).

790. *Id.* at 449-63 (Harlan, J., dissenting) (substantially following Bator, *supra* note 771); see also *Townsend*, 372 U.S. at 325-34 (Stewart, J., dissenting).

the most active political as well as legal proponents of liberal procedures in habeas cases, surely because constitutional violations unremedied in state courts continued to bear disproportionately upon people of color, especially black and latino men.

Correlatively, the pragmatists who were taking charge of the new politics of preservation made law and order — which many in their audience understood as “control of crimes by people of color” — their most popular calling card. The nation’s turn to the right in the 1968 election repopulated the Court with Justices friendly to the Jackson-Harlan position. Since his appointment in 1971, Justice Rehnquist has carried out a campaign to replace *Fay* and *Brown* with a regime such as the one he outlined to Justice Jackson, for whom he clerked during the *Brown v. Allen* Term: follow ordinary principles of res judicata and deny habeas petitions so long as the prisoner had a full and fair chance to litigate his claims in the state courts.⁷⁹¹ Although this campaign has been successful in overruling *Townsend* and *Fay*,⁷⁹² it has not directly challenged *Brown* and *Moore*. Nor did Congress override the rules created by these early race cases when in 1996 it created new restrictive statutory standards for habeas cases.⁷⁹³ The preservationists have created many procedural roadblocks to habeas relief, but the core holdings of *Brown* and *Moore* remain not only good law, but have saved the lives of hundreds of men denied their constitutional rights by the modern variation of the Phillips County proceedings, to wit: on the basis of their own incriminating statements made without lawyers present, indigent persons of color are still railroaded to capital convictions as their public defenders slumber, and their only possible rescue from the electric chair is at the hands of a federal habeas judge. Thus, even in the heyday of the law-and-order politics of preservation,

791. Habeas Corpus, Then and Now, Or, ‘If I Can Just Find the Right Judge, Over These Prison Walls I Shall Fly,’ Memorandum from Law Clerk Rehnquist to Justice Jackson in *McGee* (1951 Term, No. 517), in Jackson Papers, *supra* note 784, Container 120 (Legal File 1952 Term, *Brown v. Allen*, Nos. 32, 22, 20, 31). It is discussed by Saul Brenner, *The Memos of Supreme Court Law Clerk William Rehnquist: Conservative Tracts or Mirror of His Justice’s Mind?*, 76 JUDICATURE 77 (1992). Rehnquist advanced a similar policy vision when he headed the Office of Legal Counsel and has followed this stance on the Court. Larry W. Yackle, *The Habeas Hagioscope*, 66 S. CAL. L. REV. 2331, 2353-55 (1993) (Rehnquist’s DOJ proposal), *id.* at 2367-72 (Chief Justice Rehnquist’s appointment of the Powell Committee to draft habeas reform legislation), *id.* at 2376-2416 (decisions of the Rehnquist Court creating new procedural limitations on the availability of habeas relief).

792. See *Wainwright v. Sykes*, 433 U.S. 72 (1977), *confirmed in* *Coleman v. Thompson*, 501 U.S. 722, 749-51 (1991) (overruling *Fay*’s “deliberate bypass” standard for procedural default by habeas petitioners and adopting a tougher standard); *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992) (overruling *Townsend* and adopting more restrictive standards for district court hearings in habeas cases).

793. 28 U.S.C. § 2254(e)(2) (added in 1996); see Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1, 37-47 (1997).

1973-95, federal courts granted habeas relief in forty percent of the capital cases that came before them.⁷⁹⁴

3. *The Vagueness Doctrine as a Mechanism for Restricting Law Enforcement Discretion*

Anglo-American law at the turn of the nineteenth century considered problematic penal laws whose bars were expressed in language that was excessively *vague*. This idea required judges either to interpret such statutes narrowly (the rule of lenity) or to strike them down (the void-for-vagueness doctrine). The animating purpose of these doctrines was notice: it is inconsistent with the transparent rule of law for the state to punish people without giving them clear guidance as to what conduct is transgressive.⁷⁹⁵ By the end of the century, these doctrines flourished more than ever before, but under a different rationale. Most scholars and judges either rejected or deemphasized the notice rationale and stressed structural ones: vague criminal laws cannot be tolerated because they encourage police, prosecutors, and judges to engage in illegitimate and risky lawmaking, as they expand those laws to fit their own moral codes and because some of these laws discourage people from exercising their freedoms to speak, walk about, and be nonconforming. IBSMs played a critical role in this transformation, because racial, sexual, and gender minorities were often the victims of unbridled police discretion, and once they became legally organized they challenged these abuses.

The void-for-vagueness doctrine had its origins in substantive due process review of criminal sanctions for violating economic regulations, and most of the earliest cases involved such statutes; notice to potential wrongdoers was the announced policy. With the decline of substantive due process during the New Deal period, litigants and the Court applied the vagueness doctrine to a broader array of public order and morals statutes and ordinances, many of which not only carried criminal penalties but also touched on people's speech and association.⁷⁹⁶ Anthony Amsterdam's brilliant student note, published in

794. JAMES S. LIEBMAN ET AL., *A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973-1995* at App. D (2000). For every 100 death sentences imposed in this period, 47 were overturned on appeal or collateral attack in state courts, even before habeas review. *Id.*, pt. II, at 5-6. This suggests the hypothesis that dialectical federalism has some backward bite: knowing that they are being monitored, state judicial processes catch most errors — but not so many that further review is not useful.

795. *E.g.*, *Winters v. New York*, 333 U.S. 507, 524 (1948) (Frankfurter, J., dissenting); *McBoyle v. United States*, 283 U.S. 25, 27 (1931) (rule of lenity); *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926).

796. *See, e.g.*, *Sweezy v. New Hampshire*, 354 U.S. 234 (1957) (law barring subversives from serving in public universities); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952) (licensing ordinance barring movies considered "sacrilegious"); *Hague v. CIO*, 307 U.S. 496

1960, maintained that the notice policy could not justify or explain the Court's range of decisions and must be supplemented with a second rationale: the Court was properly inclined to strike down broadly phrased laws that gave police and other enforcers too much discretion to pick on unpopular people and points of view.⁷⁹⁷ While Amsterdam did not emphasize how some of the important precedents involved racial minorities, a case that best illustrated his thesis was *Herndon v. Lowry*.⁷⁹⁸ The defendant was a black man convicted of violating Georgia's "incitement to insurrection" statute, by circulating to minority audiences literature indicating that the Communist Party opposed apartheid and other policies unfair to them and by soliciting blacks to join that party. Ignoring the notice rationale, Justice Roberts' opinion for the Court struck down the law as vague, as it amounted to a "dragnet which may enmesh anyone who agitates for a change of government."⁷⁹⁹

The Amsterdam note had the good fortune to be published just before thousands of civil rights protesters were arrested in connection with the sit-ins and marches of 1960-63. His argument that arbitrary enforcement as well as notice undergirded the void-for-vagueness doctrine had an immediate appeal to civil rights lawyers and, ultimately, judges. Solicitor General Cox and the Inc. Fund argued that broadly phrased trespass and disturbing the peace laws could not constitutionally be applied to peaceful sit-in protesters, for both notice and arbitrary enforcement reasons.⁸⁰⁰ As to notice, the argument was that the

(1939) (permits to march or parade could be denied to prevent "disorderly assemblage"); *Stromberg v. California*, 283 U.S. 359 (1931) (overturning the conviction of a Communist sympathizer for flying a red flag — first time void-for-vagueness was applied to protect individual rather than economic rights).

797. See Anthony Amsterdam, Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 80, 88-90 (1960). "The common fault of . . . [vague statutes] is that each injects into the governmental wheel so much free play that in the practical course of its operation it is likely to function erratically . . . and to result in a significant number of impermissible public-versus-private-interest resolutions which are beyond the effective discovery or appraisal of the Court." *Id.* at 90.

798. 301 U.S. 242 (1937). An earlier race case was *United States v. Reese*, 92 U.S. 214 (1875) (overturning conviction of white election official who refused to count the vote of a black man). Compare *Screws v. United States*, 325 U.S. 91 (1945) (reversing conviction of white sheriff for fatal beating of black man and remanding for new trial; vagueness problem solved by reading a scienter requirement into the federal criminal statute), with *Beauharnais v. Illinois*, 343 U.S. 250 (1952) (upholding against void-for-vagueness attack conviction of white man for publishing racist literature).

799. *Lowry*, 301 U.S. at 263. Four Justices believed that Lowry's conduct was legally found to be intentional incitement to forcible overthrow of apartheid. *Id.* at 264-78 (Van Devanter, J., dissenting) (describing the anti-apartheid pamphlets and allegedly subversive goals in greater detail). For an earlier case where a unanimous Court struck a law aimed at harassing Chinese merchants, see *Yu Cong Eng v. Trinidad*, 271 U.S. 500 (1926) (Taft, C.J.).

800. Brief for Petitioners at 28-36, *Garner v. Louisiana*, 368 U.S. 157 (1961) (1961 Term, Nos. 26-28); Brief for Amicus Curiae the United States at 34-36, *Garner* (1961 Term, Nos.

protesters were engaged in valuable normative activities that reasonable people might expect not to be criminal; because "their object was to prick the conscience of the community and of the Nation," the vagueness doctrine was fully mobilized.⁸⁰¹ "Equally dangerous is the absence of a clear guide for the policeman who must initially administer the law," whose open-endedness could be "a license for abuse of power or for discriminatory enforcement, especially in an area, as here, where the pressures of local prejudice invite misuse of authority."⁸⁰² Although the Supreme Court only decided one sit-in case on vagueness grounds,⁸⁰³ these kinds of arguments figured into the Court's overturning all the convictions. In the protest march cases, the Court invoked the vagueness doctrine to overturn the application of disturbing the peace and loitering laws by white police against civil rights protesters.⁸⁰⁴

Amsterdam's concern that vague statutes risked arbitrary enforcement had even more relevance to the cases brought by the NAACP against state laws seeking to suppress its activities. In *Button*, the NAACP maintained that Virginia's law barring its legal activities was so broadly worded as to invite arbitrary (i.e., racially biased) enforcement and to discourage even lawful activities. Agreeing, the Supreme Court issued one of its leading pronouncements on the void-for-vagueness doctrine. "The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application."⁸⁰⁵ The Court bluntly said, "a vague and broad statute lends itself to selective enforcement against unpopular

26-28); Brief for Amicus Curiae the United States at 25 ff., *Griffin* (1963 Term, Nos. 6, 9, 10, 12 & 60) [hereinafter U.S. *Griffin* Brief].

801. U.S. *Griffin* Brief, *supra* note 800, at 30 (citing *Button* and *Lowry*). The argument here was probably inspired by the old notion that the rule of lenity is most readily applicable to conduct that is *malum prohibitum* (wrong only because the law prohibits it) rather than *malum in se* (intrinsically wrong).

802. *Id.* at 31.

803. See *Bouie v. City of Columbia*, 378 U.S. 347, 352 (1964) (overturning trespass conviction because it was enforced by authorities much more broadly than its plain language would have suggested).

804. *Shuttlesworth v. Birmingham*, 382 U.S. 87, 90-92 (1965); *Cox v. Louisiana*, 379 U.S. 536, 551-52 (1965); see *id.* at 579 (Black, J.) (arguing that the void-for-vagueness doctrine protects against "government by the moment-to-moment opinions of a policeman on his beat"). For a later case to the same effect, see *Gregory v. City of Chicago*, 394 U.S. 111 (1969).

805. *NAACP v. Button*, 371 U.S. 415, 432-33 (1963).

causes.”⁸⁰⁶ From these cases, Amsterdam amended his student note to identify a third policy served by the void-for-vagueness doctrine: broadly phrased statutes that touch on people’s fundamental liberties, especially those covered by the First Amendment, require particularly skeptical judicial attention, for their uncertainty will chill citizens’ exercise of their rights.⁸⁰⁷

The civil rights protest decisions and the post-*Gideon* availability of counsel in felony (and later misdemeanor) cases contributed to a small boom of challenges by sex and gender nonconformists to vagrancy and public morality laws.⁸⁰⁸ The same policies were applicable: such laws often failed to provide fair warning, gave the police discretion to harass sexual nonconformists, and in some cases chilled people’s exercise of their First Amendment or privacy rights. In *Harris v. State*,⁸⁰⁹ the Alaska Supreme Court invalidated a crime against nature law on vagueness grounds. The court linked vagueness’s notice policy with yet another concern, statutory obsolescence. Almost all of the Supreme Court’s vagueness cases had involved either new laws going after fresh social or political ills *or* old laws whose core prohibitions were easily supportable. *Harris* involved an old statute whose meaning was no longer very clear because social morals had changed. And it was a statute whose core prohibition (nonprocreative sex) was no longer *malum in se*. “[T]he widening gap between our formal statutory law and the actual attitudes and behavior of vast segments of our society can only sow the seeds of increasing disrespect for our legal institutions.”⁸¹⁰ Other state courts were deploying an invigorated void-for-vagueness doctrine as a basis for invalidating laws restricting public indecency, abortion, and other morals laws. The Supreme Court seemed potentially receptive to this kind of thinking, as it had

806. *Id.* at 435; *see id.* at 445 (Douglas, J., concurring) (linking his skepticism about the law to the apparent legislative purpose to “penalize the NAACP because it promotes desegregation of the races”). This theme — the South’s war against the NAACP and, with it, defiance of *Brown* — was one raised by several other Justices at conference. *See* Brennan Notes for the Gray Conference, in Brennan Papers, *supra* note 129, Box 1: 76, Folder 1; *see also* *Dombrowski v. Pfister*, 380 U.S. 479 (1965) (deploying the void-for-vagueness doctrine to strike a southern law aimed at chilling the NAACP’s advocacy).

807. Anthony L. Amsterdam, *Federal Constitutional Restrictions on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers and the Like*, 3 CRIM. L. BULL. 205 (1967).

808. *E.g.*, *In re Davis*, 51 Cal. Rptr. 702 (Cal. Ct. App. 1966) (invalidating public indecency law); *State v. Sharpe*, 205 N.E.2d 113 (Ohio 1966) (invalidating statute barring solicitation to commit “unnatural acts”). *See generally* Robin Yeaman, *Recent Developments, Constitutional Attacks on Vagrancy Laws*, 20 STAN. L. REV. 782 (1968).

809. 457P.2d638 (Alaska 1969).

810. *Id.* at 645. For other state court decisions to the same effect, *see* *Franklin v. State*, 257 So.2d 21 (Fla. 1971) (*per curiam*), and *Commonwealth v. Balthazar*, 318 N.E.2d 478 (Mass. 1974) (narrowing construction exempting sodomy between consenting adults from the crime against nature law).

consistently invalidated, on vagueness grounds, old-fashioned state licensing standards for censoring movies that depicted “sacrilegious” or “immoral” activities or “sexual promiscuity.”⁸¹¹

The U.S. Supreme Court implicitly endorsed an anti-obsolescence feature of the void-for-vagueness doctrine in *Papachristou v. City of Jacksonville*,⁸¹² a decision that applied stricter vagueness scrutiny for laws restricting fundamental liberties outside the First Amendment. Jacksonville made it a crime to be “vagabonds” or “lewd, wanton and lascivious persons” or “habitual loafers” (and so forth). The lead defendants were two white women and two black men who were doing nothing more sinister than riding around together in an automobile. On appeal of their conviction to the Supreme Court, they argued that the state and local “vagrancy laws are archaic vestiges of long-past economic conditions and social philosophies”⁸¹³ which posed risks of unfairness, arbitrary enforcement, and chilling of people’s fundamental right to walk around and loaf together.⁸¹⁴ The Justices were unanimous in their judgment that the law was void for vagueness. In conference, they were less concerned about notice than about the discretion these laws gave “police or judges . . . to go after anyone they do not like.”⁸¹⁵ A secondary theme of the conference was the obsolescence of these laws. The Chief Justice scoffed, “This ordinance wins a prize — but most of them are on their way out.”⁸¹⁶ Justice Douglas’s opinion for a unanimous Court ruled that the “archaic” law was unconstitutionally vague, because it “makes criminal actions which by modern standards are normally innocent,” and which are indeed fundamental freedoms traditionally enjoyed by Americans; was “not intelligible to the poor among us, the minorities, the average householder”; and seemed to be enforced mainly against “nonconformists” and “suspicious persons.”⁸¹⁷ *Papachristou* did not disturb the conventional wis-

811. See *Winters v. New York*, 333 U.S. 507 (1948) (leading case); see also *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 682-83 (1968) (summarizing cases).

812. 405 U.S. 156 (1972).

813. Brief for Petitioners at 14, *Papachristou* (No. 70-5030);

814. See *id.* at 13 (listing policies the vagueness doctrine embodies and suggesting how they applied in this case). The substantive obsolescence of the laws was a major theme of the Oral Argument in *Papachristou*. See Rebuttal of Petitioner at 43-44, *Papachristou* (No. 70-5030) (Supreme Court Library).

815. Douglas Conference Notes for *Papachristou* (Dec. 10, 1971) in Douglas Papers, *supra* note 192, Container 1558 (Douglas’s own remarks, which explicitly relied on the Amsterdam note). Similar observations were made by Burger, Brennan, and Stewart.

816. *Id.*

817. *Papachristou*, 405 U.S. at 162-63, 169, 170. For all these reasons, the Court followed *Harris v. State*, 457 P.2d 638 (Alaska 1969), in ruling that this kind of statute was inconsistent with the evenhanded rule of law. “The rule of law, evenly applied to minorities as well as majorities, to the poor as well as the rich, is the great mucilage that holds society together.”

dom that the twin policy bases for the void-for-vagueness doctrine were fair notice and arbitrary enforcement, but expanded the lesson of the protest cases of the 1960s: the Court will be particularly vigilant when broad ill-defined statutes touched upon any fundamental rights (not just First Amendment ones), especially when the statutory values were obsolete.

Papachristou's concerns with substantive obsolescence and unguided and arbitrary enforcement of rules restricting women's fundamental rights were precisely the concerns Justices Brennan and Douglas had in *Roe v. Wade*,⁸¹⁸ which involved a 100 year old statute barring all abortions, excluding *only* those rendered "by medical advice for the purpose of saving the life of the mother." Although the challengers had only perfunctorily made a vagueness attack on the statute (and the amici made no presentations along this line), Douglas and Brennan pressed this as one basis for overturning the Texas law, with Stewart and Marshall agreeing.⁸¹⁹ In May 1972, Justice Blackmun circulated an opinion avoiding the right to privacy issues and deciding *Roe* solely on vagueness grounds: the curt exception for abortions procured by medical advice for the purpose of saving the life of the mother left many questions unanswered (e.g., who can render "medical advice"? how sure does he have to be that the mother will die?) and therefore did not give fair notice to medical professionals as to when they were justified in performing abortions.⁸²⁰ This superficial treatment of both the abortion issue and the void-for-vagueness doctrine did not fly with the Brethren,⁸²¹ and the abortion cases were carried over to the next term. Although Justice Blackmun abandoned his void-for-vagueness draft for a much more far-reaching right to privacy opinion, in retrospect a vagueness decision might have been prefer-

Papachristou, 405 U.S. at 171. For the opinion author's views about vagrancy laws, see William O. Douglas, *Vagrancy and Arrest on Suspicion*, 70 YALE L.J. 1 (1960).

818. See Memorandum from Justice Brennan to Justice Douglas regarding *Papachristou* (Dec. 30, 1971), in Douglas Papers, *supra* note 192, Container 1558.

819. See Douglas Conference Notes for *Roe v. Wade* (Dec. 16, 1971), in Douglas Papers, *supra* note 192, Container 1590 (Nos. 70-18, 70-40: *Roe v. Wade* and *Doe v. Bolton*).

820. Memorandum of Justice Blackmun regarding *Roe v. Wade* (May 18, 1972), in Brennan Papers, *supra* note 129, Box I: 285, Folder 7 (Opinions, No. 70-18: *Roe v. Wade*).

821. For several reasons: (1) the Court had just upheld the D.C. abortion law against vagueness attack, *United States v. Vuitch*, 402 U.S. 62 (1971), and Justice White circulated a dissenting opinion demonstrating that Justice Blackmun's draft was not consistent with the earlier decision; (2) Justice Brennan opined that four of the seven participating Justices had also agreed at conference to strike the Texas law on the broader right to privacy ground, see Memorandum from Justice Brennan to Justice Blackmun (May 18, 1972), in Brennan Papers, *supra* note 129, Box I: 285, Folder 9 (Opinions, No. 70-40: *Doe v. Bolton*); (3) the Court could not avoid the right to privacy question by the vagueness decision in *Roe*, unless it dismissed the appeal in *Doe*, where the Court was faced with a much more particularized and modern abortion law, as to which vagueness was not a plausible doctrinal response.

able in *Roe*, as it would have swept away the obsolescent (nineteenth century) statutes like that in Texas and might have stimulated more precise legislation that could have been more thoughtfully tested against a privacy rationale.

Just as the void-for-vagueness doctrine ultimately provided no traction for the Supreme Court in the abortion cases, neither did it in a variety of cases brought by sexual and gender minorities. Recall *Fleuti* and *Boutilier*, where the Warren Court considered whether gay or bisexual men fell under the immigration law exclusion of people “afflicted with psychopathic personality” (Section I.C.1). The Ninth Circuit opinion in *Fleuti* found the law void for vagueness, citing the indeterminacy of the statutory term even among doctors and suggesting that whatever medical consensus there had been in 1952 for the idea that “homosexuals” were “psychopathic,” that consensus had utterly disappeared by the mid-1960s.⁸²² The logic of the civil rights cases was directly applicable to the psychopathic personality cases, except that the Supreme Court had the option of giving federal statutes a narrowing construction rather than voiding them entirely, as Justice Douglas strongly urged in both *Fleuti* and *Boutilier*.⁸²³ The other big difference was that the immigration cases involved sexual rather than racial minorities, and the Justices’ own prejudices or stereotypes about gay or bisexual men influenced their legal analysis.⁸²⁴ The Warren Court not only construed the vague immigration laws in the most broadly antigay manner in *Boutilier*, but refused to hear other void-for-vagueness challenges brought by lesbian defendants.⁸²⁵

822. See *Fleuti v. Rosenberg*, 302 F.2d 652, 658 & n.19 (9th Cir. 1962), *aff’d on other grounds and vacated*, 374 U.S. 449 (1963).

823. See Douglas Conference Notes for *Fleuti* (Mar. 29, 1963), in Douglas Papers, *supra* note 192, Container 1281 (O.T. 1962, Argued Memos, No. 248); Douglas Conference Notes for *Boutilier v. INS*, 387 U.S. 118 (1967), in Douglas Papers, *supra* note 192, Container 1391 (O.T. 1966, Argued Memos, No. 440). These cases also involved immigration law, where the Court strongly defers to Congress — but also where the Court often imports constitutional values into its construction of statutes. See Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990).

824. Recall from Section I.C.1, that Justice Goldberg (the fifth vote to overturn the Ninth Circuit in *Fleuti*) found the alien “more than a homosexual — he had such a dominant sex drive that he performed [sexual acts] publicly — he was a psychopath in the conventional sense.” See *supra* notes 528-529 and accompanying text. In *Boutilier*, Justice Stewart was persuaded that “Congress intended to bar homos.” Douglas Conference Notes for *Boutilier* (Mar. 17, 1967), in Douglas Papers, *supra* note 192, Container 1391 (O.T. 1966, Argued Memos, No. 440). Strongly homophobic Justice Clark lobbied hard for a reversal in *Fleuti*, 374 U.S. at 463-68, and wrote the opinion for the Court in *Boutilier*, 387 U.S. 118.

825. *E.g.*, *Talley v. California*, 390 U.S. 1031 (1968) (denying certiorari to gay couples’ vagueness challenge to a “lewd conduct” arrest for kissing one another in the Black Cat Beer Bar).

The Burger Court was no more receptive, even after *Papachristou*. In two cases brought to the Supreme Court in 1973 and 1975, gay rights attorneys argued that statutes making the crime against nature a serious felony had the same vices as the vagabond laws struck down in *Papachristou*: they were old, normatively outdated laws deploying language that no one understood anymore and therefore vesting the police with broad discretion to invade people's fundamental liberty (in this case, privacy). These plausible arguments did not even generate full briefing and oral argument in the gay-avoiding Burger Court; over dissenting opinions by Justice Brennan, Court majorities denied the vagueness challenges summarily, on the ground that previous state court constructions of the old statutes had made them determinate enough to satisfy the Due Process Clause.⁸²⁶ This reasoning contrasts strikingly with that in the race cases, where the Court discounted prior judicial constructions as a way to meet vagueness challenges.⁸²⁷

Was *Papachristou* an aberration, limited to race cases? Although the U.S. Supreme Court has not applied *Papachristou* broadly outside the race arena, state courts have done so. For example, dozens of municipalities between 1845 and 1945 had adopted ordinances making it a crime to dress in the "attire of the opposite sex"; police had traditionally used such laws to harass cross-dressers and (later) transsexuals — who fought back in the 1970s with *Papachristou* lawsuits. Although the U.S. Supreme Court would not touch these cases, state court judges found the laws vague mainly because of their obsolescence: current dress codes made it unclear exactly what constituted "attire of the opposite sex," and this normative muddiness meant that "innocent" dress decisions could fall within the statute's domain.⁸²⁸ Other sex crime laws met the same fate, usually at the hands of state and not federal judges. The leading case was *Pryor v. Municipal Court*,⁸²⁹ which involved a challenge by the National Committee for Sexual Civil Liberties against California's "lewd vagrancy" law. The challeng-

826. See, e.g., *Wainwright v. Stone*, 414 U.S. 21 (1973) (per curiam) (summarily reversing lower court opinion holding Florida's crime against nature law vague); *Rose v. Locke*, 423 U.S. 48 (1975) (similar for Tennessee's law); see also *Mayes v. Texas*, 416 U.S. 909 (1974) (denying certiorari to a vagueness challenge to Houston's nineteenth century cross-dressing law). Contrast *Perkins v. North Carolina*, 234 F. Supp. 333, 336, 340 (D.N.C. 1964) (offering, in dicta, heavy criticism of obsolescent sodomy law).

827. See *Bouie v. City of Columbia*, 378 U.S. 347 (1964) (refusing to find that previous state court construction saved a statute drafted more narrowly than it was applied); cf. *Gregg v. Georgia*, 428 U.S. 153, 200-02 (1976) (joint opinion) (holding that state judiciary's narrowing construction of death penalty "aggravating circumstances" solved vagueness problem).

828. See, e.g., *City of Columbus v. Rogers*, 324 N.E.2d 563, 565 (Ohio 1975) (leading case); see also Eskridge, *Establishing Conditions*, *supra* note 555, at 861-63 (collecting unreported as well as reported state court decisions striking down old cross-dressing ordinances).

829. 599 P.2d 636 (Cal. 1979).

ers demonstrated that the broadly phrased law invited discretionary enforcement, in this case against gay and bisexual men. Following *Papachristou*, Justice Matthew Tobriner found the law vague but repaired the vagueness by narrowing the statute to open sexual solicitation in a public place by anyone.⁸³⁰

Cases like *Pryor* might have signaled that the U.S. Supreme Court could rely on lower courts, including state courts, to implement *Papachristou*. Also, as Chief Justice Burger had observed in the *Papachristou* conference, states and cities were updating or weeding these old statutes out of their criminal codes. Although the Court reaffirmed the three policy concerns of the void-for-vagueness doctrine,⁸³¹ the Justices took very few cases after 1972. Some of the new generation of laws, however, were suspicious under the *Papachristou* criteria, including those empowering the police to stop individuals and ask them to identify themselves, move on, or both.⁸³² Police and other law and order groups supported such statutes — as did a growing number of racial minorities and poor people who have always been the primary victims of crime.⁸³³ In *City of Chicago v. Morales*,⁸³⁴ the Court faced an “anti-gang” ordinance empowering police to order people they believed to be gang members loitering with other persons to disperse and making failure to obey such an order a crime. As amici, the United States, thirty-two states and territories, and the National League of Cities supported the ordinance, with the Inc. Fund, other civil rights groups, and defense lawyers attacking it as inconsistent with *Papachristou*. Two briefs merit attention. Representing a rainbow coalition of Chicago neighborhood organizations, Professors Dan Kahan and Tracey Meares argued that the full force of *Papachristou*’s fierce review should be limited to settings where “discretionary policing techniques the coercive incidence of which is concentrated on a

830. *Id.* at 645-46; accord *State v. Phipps*, 389 N.E.2d 1128 (Ohio 1979). See generally Eskridge, *Establishing Conditions*, *supra* note 555, at 857-61 (surveying similar cases in various states).

831. *E.g.*, *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972) (reaffirming three policies of vagueness doctrine [fair warning, arbitrary enforcement, chilling effect on exercise of First Amendment liberties] but upholding anti-noise ordinance challenged by black protesters).

832. See *Kolender v. Lawson*, 461 U.S. 352 (1983) (striking down law requiring people to provide “credible and reliable” identification when requested by police, as vesting them with too much enforcement discretion).

833. On the new wave of loitering ordinances, see Dan M. Kahan & Tracey Meares, *Foreword: The Coming Crisis in Criminal Procedure*, 86 GEO. L.J. 1153, 1156-59 (1998); Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551 (1997); and Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775 (1999).

834. 527 U.S. 41 (1999).

politically disempowered minority.”⁸³⁵ Representing their own rainbow coalition, Professors Stephen Schulhofer and Randall Kennedy vigorously opposed Kahan and Meares’ suggestion: constitutional law, they argued, should never depend on the race of those burdened or benefited, and the idea of community policing does not entail the kind of open-ended ordinance as the one Chicago adopted.⁸³⁶

A divided Supreme Court reaffirmed the *Papachristou* approach. Six Justices ruled that the ordinance did not give the police sufficient standards to prevent the law from being deployed in an arbitrary way.⁸³⁷ Justice Thomas’ dissenting opinion powerfully attacked a broad reading of *Papachristou*. Like Kahan and Meares, Thomas emphasized the overriding need for the city, and especially its minority communities, to vest police officers with effective means to break up the vicious cycle of gangs.⁸³⁸ His opinion suggests, I think, that *Papachristou* ought to be applied with greater lenity toward the police perspective when there is an overriding need and, perhaps, when there is no reason to believe the police will exercise their discretion discriminatorily.⁸³⁹ Unlike Kahan and Meares, Thomas examined the arbitrary enforcement concern from the perspective of the historical nature of policework: orders for potential troublemakers to disperse have long been at the core of the job of “peace officers,” and that fact ought to discourage the notion that police would exercise their authority under the anti-gang ordinance arbitrarily.⁸⁴⁰

835. Brief of Amicus Curiae Chicago Neighborhood Organizations at 6, *Morales* (No. 97-1121). Kahan and Meares argued that other constitutional doctrines apply with different force when there is suspicion that the political process is picking on marginalized people or interests and the same should be true of *Papachristou*. *Id.* at 6-9. Now that people of color are well-represented in the political process, and better represented in police forces, their concerns have shifted toward protecting their communities against crime and *Papachristou*’s concern about arbitrary enforcement targeting minorities is greatly ameliorated. *Id.* at 9-14.

836. Brief of Amici Curiae Chicago Alliance for Neighborhood Safety, [et al.] at 25-29, *Morales* (No. 97-1121).

837. *Morales*, 527 U.S. at 60-63 (Stevens, J., for the Court on this issue); *see id.* at 64-67 (O’Connor, J., concurring in part); *id.* at 69-70 (Kennedy, J., concurring in part). Only Justices Stevens, Souter, and Ginsburg believed the notice was insufficient. *Id.* at 59-60 (Stevens, J., for a plurality).

838. *Id.* at 107-11 (Thomas, J., dissenting).

839. Unlike Kahan and Meares, Justice Thomas believed *Papachristou* to have been wrongly decided and roundly denounced its language about the fundamental right of people to walk around and loiter. *Id.* at 112-14.

840. *Id.* at 110-11. In another doctrinal innovation, Thomas proposed that enforcement problems should not be anticipated through prophylactic rules such as the void-for-vagueness doctrine, but should only be addressed as they arise. *Id.* at 113-14.

B. *Substantive Due Process: The Right to Sexual Privacy*

There was no explicitly recognized constitutional “right of privacy” in 1900, but there was a nascent constitutionalization of what Louis Brandeis and Samuel Warren famously called a “right to be let alone.”⁸⁴¹ In one line of cases, the Court recognized *bodily integrity* as a species of liberty substantively protected against state interference by the Due Process Clause. For example, in *Union Pacific Railroad v. Botsford*,⁸⁴² the Court ruled that the state could not require a personal injury plaintiff to submit to a medical examination. Another line of due process cases treated *family governance* as a species of liberty and gave it protection against excessive state regulation.⁸⁴³ The leading case was *Meyer v. Nebraska*,⁸⁴⁴ which struck down a law barring the teaching of German in schools, as an infringement on parents’ rights to rear their children. A third line of cases recognized the idea of *inaccessibility*: the state is barred, by the Fourth Amendment especially, from invading or snooping into people’s private spaces without a proper warrant.⁸⁴⁵

Privacy as bodily integrity, family governance, and inaccessibility have had continuing relevance for modern constitutional law, but the dominant mode of privacy discourse in the second half of the twentieth century was that introduced by IBSMs: *sexual privacy*. By this, I mean the freedom of individuals and couples to make their own choices and decisions about sexual satisfaction, without being forced into natural law roles by the state. It is a synthesis of the earlier-established modes of thinking about privacy, but with a sexualized or

841. Louis D. Brandeis & Samuel D. Warren, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890); see also ANITA L. ALLEN, *UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY* (1988). Ironically, Brandeis and Warren’s right to be let alone was mainly articulated as we would call informational privacy, a tort cause of action for persons whose private affairs were exploited by others. For an intellectual history of the different constitutional ramifications of this idea, see Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335.

842. 141 U.S. 250 (1891), *essentially overruled by* *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941); see also *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (allowing state-required vaccination, notwithstanding invasion of personal liberty involved).

843. See *Maynard v. Hill*, 125 U.S. 190 (1888) (noting the importance of marriage).

844. 262 U.S. 390 (1923); see also *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (striking down state law requiring all children to attend public schools); *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (striking down federal law regulating child labor).

845. See *Boyd v. United States*, 116 U.S. 616, 630 (1886) (holding that Fourth Amendment protects the “sanctities of a man’s home and the privacies of life”); THOMAS M. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* 299-300 (1868) (similar). For an extension of Brandeis’s tort-protecting “right to be let alone” to the Fourth Amendment, see *Olmstead v. United States*, 277 U.S. 438, 471-73 (1928) (Brandeis, J., dissenting).

romantic focus.⁸⁴⁶ A constitutional right to sexual privacy would have seemed odd, incoherent, or even scandalous to the framers of the Fourteenth Amendment but gained a foothold in the Court because middle class American mores steadily shifted from sex as procreation to sex as pleasure and interpersonal intimacy.⁸⁴⁷ This shift rendered increasingly obsolete laws making it a crime to engage in nonprocreative sex (crimes against nature), to engage in procreative sex but with contraceptives, and to negate the byproduct of procreative sex through abortion. The unevenness of the political process in updating sexual crimes drove women and lesbian people into court to challenge these laws as a violation of what came to be called a right of privacy. As he had done in the selective incorporation and dialectical federalism cases, Justice William Brennan was the primary conduit through which new social mores and the views of women and gay people filtered into the Court's due process jurisprudence.

Before the Supreme Court, the earliest link between sexual choice and the Constitution came in Jonah Goldstein's 1919 brief appealing Margaret Sanger's conviction for violating New York's anti-contraception statute. The brief explicitly celebrated the joy people can find in marriage and parenting but insisted that both be the result of the voluntary choice of the man and the woman — not “compulsory motherhood” forced upon them by state prohibitions and regimes of ignorance.⁸⁴⁸ Reflecting Sanger's views, the brief implicitly valorized the sexual relationship between a man and a woman as an end in itself and not as a means toward procreation. Goldstein then tied this human good to the Due Process Clause and to the cases recognizing some kind of privacy right:

Personal “liberty” includes not only freedom from physical restraint, but also the right “to be let alone,” to determine one's mode of life . . . and is invaded not only by a deprivation of life, but also by a deprivation of

846. Thus, sexual privacy entails freedom to deploy one's body as the individual rather than the state sees fit (bodily integrity); to form families we choose rather than those dictated by the state (family governance); and to engage in intimate activities in private places (physical inaccessibility).

847. On changing sexual mores, see JOHN D'EMILIO & ESTELLE FREEDMAN, *INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA* (1988), and PHILIP JENKINS, *MORAL PANIC: CHANGING CONCEPTS OF THE CHILD MOLESTER IN MODERN AMERICA* (1998). The best contemporary sources are KATHARINE BEMENT DAVIS, *FACTORS IN THE SEX LIFE OF TWENTY-TWO HUNDRED WOMEN* (1929), and Havelock Ellis's treatises on sexual practices in England and the United States.

848. Brief on Behalf of the Plaintiff-in-Error at 40-41, *Sanger v. New York*, 251 U.S. 537 (1919) (1919 Term, No. 75). “*The man and the woman have as much natural right to say how many children they will bring into the world and when, as to say when and whom and why they will marry. . . . Barbarous peoples coerce their women into matrimony; civilized people coerce them into maternity under [anti-contraception laws].*” *Id.* at 43 (emphasis in original).

those things which are necessary to the enjoyment of life according to the nature, temperament and lawful desires of the individual.⁸⁴⁹

This claim was way ahead of the judicial and legal culture of 1919,⁸⁵⁰ and perhaps of 1939 as well, for Planned Parenthood abandoned such a sweeping claim in *Tileston*. Morris Ernst's brief for Dr. Tileston emphasized the "consensus of opinion among physicians" as well as lay people that access to contraceptives is essential to the life and health of married women.⁸⁵¹

But the social trends giving rise to the claim of autonomy to "determine one's mode of life" continued unabated: men as well as women wanted the freedom to choose the sexual relationship most congenial to them, not that dictated by the state. When the Court struck down Oklahoma's sterilization law in *Skinner v. Oklahoma*,⁸⁵² it recognized as "basic civil rights of man" the ability to form marital relationships and to procreate.⁸⁵³ Professor Fowler Harper revived and expanded on Sanger and Goldstein's argument in his landmark brief for appellants in *Poe*. His main argument was that the state cannot regulate "the most sacred relationship between a man and his wife," but much of his analysis supported the broader proposition that "sexual pleasure" is an important end in itself, and frustration of one's preferred sexual outlet, by the state or otherwise, is psychologically harmful to the individual as well as the family.⁸⁵⁴ "[W]hile in the lower animals sexual pleasure is primarily a means to an end, in human beings it is not only a means to an end but also a very important end in itself," and suppressing sexual pleasure through a regimen of continence "is harmful to the personality" and even risks emotional turmoil that give rise to "pathological expression."⁸⁵⁵ Similar but less

849. *Id.* at 44 (quoting *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68 (Ga. 1905)). *Pavesich* was the first important case to adopt Brandeis and Warren's privacy tort. Gormley, *supra* note 841, at 1353-54.

850. See *Sanger*, 251 U.S. 537 (summarily denying Sanger's appeal); *accord* *Buck v. Bell*, 274 U.S. 200 (1927) (upholding state sterilization law).

851. Brief for Appellant at 11-26, *Tileston v. Ullman*, 318 U.S. 44 (1943) (1942 Term, No. 420). Indeed, Ernst argued that "the well recognized indicia of [sexual] immorality, such as abortion, illegitimacy, promiscuity, etc., have tended to be less where no such prohibitions [on contraceptives] are in force." *Id.* at 26.

852. 316 U.S. 535 (1942).

853. *Id.* at 541 (essentially overruling *Buck v. Bell*, 274 U.S. 200 (1927)). On the medical and social developments that made reproductive autonomy both easier and more desired, see, for example, Christopher Tietze, *The Current Status of Fertility Control*, 25 LAW & CONTEMP. PROBS. 426 (1960); Comment, *The History and Future of the Legal Battle Over Birth Control*, 49 CORNELL L.Q. 275 (1964).

854. See Brief for Appellants at 29-31, *Poe v. Ullman*, 367 U.S. 497 (1961) (1960 Term, No. 60) (harm of sexual abstinence to the individual); *id.* at 31-33 (harm to family life).

855. *Id.* at 29-30 (quoting Karl Menninger, *Psychiatric Aspects of Contraception*, 7 BULL. MENNINGER CLINIC 36 (1943)).

far-ranging was the ACLU's amicus brief, written by Melvin Wulf and Ruth Emerson.⁸⁵⁶ Planned Parenthood and a collection of eminent doctors filed amicus briefs in the case, reprising the medical consensus arguments made in *Tileston*. Although the Court dismissed the appeal on odd justiciability grounds, Harper's arguments had a receptive (even if discreet) audience in Justices Douglas and Harlan, both of whom defended a privacy right against state intrusion "into the intimacies of the marriage relationship."⁸⁵⁷

In *Griswold*, Harper's argument was adopted in the briefs for appellants (Thomas Emerson and Catherine Roraback), Planned Parenthood (Morris Ernst and Harriet Pilpel), and the ACLU (Wulf). They emphasized the "basic freedom, namely, the right of married people to have sex relations *and* (not *or*) to decide whether to bring new life into the world." The state's interference with this right "in the light of the facts of human sexuality, the traditional place of marriage in our society and the obvious need, medical and otherwise, for many couples to plan or limit their families, cannot rationally be defended."⁸⁵⁸ Like Harper's brief in *Poe*, the briefs in *Griswold* emphasized that the state ought not be able to require married couples to choose between the health or life of the wife and the sexual abstinence of the couple: given the realities of the human sex drive, abstinence is not possible for most couples or is destructive of their relationship.⁸⁵⁹

The Justices had still not caught up with Fowler Harper. They were receptive to counsel's invitation to recognize some kind of constitutional right of sexual privacy only for *married* couples. Chief Justice Warren at conference was "inclined to reverse," because the statute intruded too broadly into the "most confidential relationship in our

856. Also emphasizing the marital relationship, they maintained that its most "inviolable" incident was "the right to express that love through sexual union, and the right to bear and raise a family. No other rights are entitled to greater privacy than that normally bestowed upon the acts of intercourse and procreation." Brief for the ACLU and the Connecticut Civil Liberties Union as Amici Curiae at 8, *Poe* (1960 Term, Nos. 60-61). For an attempt, after Harper's death, to characterize the ACLU's brief as the only one emphasizing the right of sexual privacy, see Melvin Wulf, *On the Origins of Privacy*, NATION, May 27, 1991, at 700.

857. *Poe*, 367 U.S. at 519 (Douglas, J., dissenting); *see id.* at 552 (Harlan, J., dissenting) (arguing that he cannot imagine anything "more private and more intimate than a husband and wife's marital relations"). Douglas also argued that the law violated the First Amendment rights of doctors to counsel their patients. *Id.* at 512-15.

858. Brief and Appendices as Amicus Curiae for Planned Parenthood Federation of America, Inc. at 8-9, *Griswold v. Connecticut*, 381 U.S. 479 (1965) (1964 Term, No. 496); *see* Brief for Appellants at 30-75, *Griswold* (1964 Term, No. 496) (similar).

859. Brief for Appellants at 62-65, *Griswold* (1964 Term, No. 496); Brief of Amicus Curiae Planned Parenthood at 9-10, *Griswold* (1964 Term, No. 496). At oral argument, Tom Emerson emphasized that the challenge in this case *only* went to married couples. 61 LANDMARK BRIEFS, *supra* note 199, at 407, 414 (oral argument in *Griswold*, Mar. 29, 1965).

society,” marriage.⁸⁶⁰ Other Justices propounded doctrinal theories to support the Chief’s result: a right of association “on the periphery” of the First Amendment’s protection (Douglas, Goldberg); the Due Process Clause’s protection of liberty (Harlan); and a nontextual “right to marry, maintain a home, have a family,” perhaps related to the Fourth Amendment’s “right to be let alone” (Clark).⁸⁶¹ Justice Black was inclined to recognize the First Amendment right of doctors to counsel their patients and was open to a due process argument that the law was vague.⁸⁶² Justice White voted to reverse, apparently under an equal protection reasonableness criterion. Only Justice Stewart seemed unwilling to go along.

The Chief Justice assigned the case to Justice Douglas, who dashed off an opinion linking the intimacies of marriage with various rights implicated in or “peripheral” to the First Amendment, including instruction within the family, association, and expression.⁸⁶³ In a note to Justice Douglas, Justice Brennan suggested “a substantial change in emphasis.” He argued for a “right to privacy created out of the Fourth Amendment and the self-incrimination clause of the Fifth, together with the Third, in much the same way as the right to association has been created out of the First. Taken together, those amendments indicate a fundamental concern with the sanctity of the home and the right of the individual to be let alone.”⁸⁶⁴ Douglas recast his “zones of privacy” as falling within “penumbras” of the particular protections of the Bill of Rights; one such zone was a “right of privacy older than the Bill of Rights,” namely, marriage and (implicitly) its sexual intimacies.⁸⁶⁵ Because the Connecticut law regulated that most private of zones, it required an unusually strong justification, which the state had not provided. Douglas’ broad and odd constitutional basis for the privacy right pushed Justices Harlan and White into opinions concurring

860. Douglas Conference Notes for *Griswold* (Apr. 2, 1965), in Douglas Papers, *supra* note 192, Container 1347. At oral argument, Justice Brennan pressed an equal protection argument, which Professor Emerson rejected. 61 LANDMARK BRIEFS, *supra* note 199, at 407-08, 410-12 (oral argument in *Griswold*, Mar. 29, 1965).

861. See Douglas Conference Notes for *Griswold* (Apr. 2, 1965), in Douglas Papers, *supra* note 192, Container 1347; Brennan Conference Notes for *Griswold*, in Brennan Papers, *supra* note 129, Box I: 114, Folder 1 [hereinafter Brennan Conference Notes for *Griswold*].

862. See Brennan Conference Notes for *Griswold*, *supra* note 861.

863. See Justice Douglas, Draft Opinion (*Griswold*) (Apr. 1965), in Douglas Papers, *supra* note 192, Container 1347.

864. Letter from Justice Brennan to Justice Douglas (Apr. 24, 1965), in Douglas Papers, *supra* note 192, Container 1347.

865. *Griswold v. Connecticut*, 381 U.S. 479, 484-86 (1965).

only in the Court's judgment;⁸⁶⁶ Justice Black fell into dissent with Justice Stewart.⁸⁶⁷ But the opinion commanded a majority of the Court.

Although *Griswold* emphasized the state's intrusion into the marital relationship, the next cases fell outside that arena. In *Stanley v. Georgia*,⁸⁶⁸ the Court ruled that possession of obscene matter in the privacy of one's home was protected by the First Amendment, as informed by *Griswold* and *Olmstead*.⁸⁶⁹ Justice Marshall's opinion interpreted the First Amendment to mean that "a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch," or (apparently) what masturbatory fantasies he could secretly entertain.⁸⁷⁰

Eisenstadt involved a law tailored by the state to avoid *Griswold*'s focus on marriage: Massachusetts allowed married couples to obtain contraceptives with a doctor's prescription but barred them from unmarried persons. The plaintiffs and their amici recast the right of privacy as "the right of personal choice over those events which, by their character and consequences, bear in a fundamental manner on physical and sexual privacy," a right that of course extended to single as well as married persons.⁸⁷¹ At conference, there was no majority for this point of view. Chief Justice Burger and Justice White favored upholding the statute; the other five Justices (with Powell and Rehnquist not participating) were inclined to strike down the law, but for a variety of reasons: Justice Douglas saw a First Amendment right to hand out contraceptives in public; Justice Brennan (joined by Justice Marshall) felt that there was a right to sexual privacy for single people "in [the] *penumbra* of *Griswold*" (hoho); Justice Stewart felt there was no rational basis for the state to discriminate so completely against unmarried persons and also invoked *Griswold*; Justice Blackmun was

866. *Id.* at 499 (Harlan, J., concurring in the judgment) (finding the right of marital privacy necessary to due process ordered liberty); *id.* at 502 (White, J., concurring in the judgment) (anti-contraception law fails rational basis test).

867. *Id.* at 507 (Black, J., dissenting); *id.* at 527 (Stewart, J., dissenting).

868. 394 U.S. 557 (1969).

869. There was no evidence in the record that Mr. Stanley had or intended to display the movie to others. Indeed, the only such evidence was that the police and then the prosecutors displayed the film to groups of people. 67 LANDMARK BRIEFS, *supra* note 199, at 846-47 (*Stanley* oral argument, Jan. 14-15, 1969).

870. *Stanley*, 394 U.S. at 565. Three Justices voted to overturn the conviction on the basis of an unreasonable seizure of the film in Stanley's home by the police. *Id.* at 569 (Stewart, J., joined by Brennan & White, JJ., concurring in the result). Harlan probably captured the mood of the conference when he said the "state can't make a crime out of what an individual draws or paints in the privacy of his own room." Douglas Conference Notes for *Stanley* (Jan. 17, 1969), in Douglas Papers, *supra* note 192, Container 1433.

871. Brief of Amici Curiae ACLU and Civil Liberties Union of Massachusetts at 6, *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (No. 70-17).

bothered by the requirement that contraceptives even for married persons required a doctor's prescription.⁸⁷² From this disarray, Justice Brennan was able to cobble together four votes (Douglas, Stewart, Marshall, himself) for a majority opinion striking down the law because it discriminated between single and married persons.⁸⁷³ Note that, in 1965, it is doubtful a majority of the Court would have invalidated the Connecticut statute if it had applied to unmarried couples only. But once the Court handed down *Griswold*, some of the Justices — including Stewart, who had dissented in *Griswold* — came to understand the Court as committed to the proposition that the right of privacy was a personal right and not just a marital one. That the Court's opinion in *Griswold* was hailed as a wise and useful exercise of judicial review surely encouraged the Justices to read the precedent more broadly than it was written.

Within a month of the *Eisenstadt* conference, the Court heard the first argument in the abortion cases (*Roe v. Wade* and *Doe v. Bolton*), which also involved an unmarried as well as two married plaintiffs. Plaintiffs and their amici articulated their interests as involving the "related rights to personal privacy and physical integrity",⁸⁷⁴ "the fundamental right to choose whether or not to bear a child",⁸⁷⁵ "reproductive autonomy," namely, "[t]he personal, constitutional right of a woman to determine the number and spacing of her children, and thus to determine whether to bear a particular child."⁸⁷⁶ (The briefs also spoke of women's rights to life and health and of doctors' rights to provide advice and treatment to patients.) As they had done in the contraception cases, the Justices in the abortion cases struggled to define the right and its constitutional source. In the first conference, a majority of the Justices seemed inclined to strike down the old Texas law as excessively vague, a resolution that ultimately "did not write,"

872. Douglas Conference Notes for *Eisenstadt* (Nov. 19, 1971), in Douglas Papers, *supra* note 192, Container 1544.

873. *Eisenstadt*, 405 U.S. at 452-55.

874. Brief for Appellants at 103-05, *Roe v. Wade*, 410 U.S. 113 (1973) (No. 70-18). At oral argument, appellants' counsel Sarah Weddington was more expansive, articulating the abortion right as needed to plan and control one's own life. Because "a pregnancy to a woman is perhaps one of the most determinative aspects of her life," it is fundamental that a woman have the freedom to terminate it. 75 LANDMARK BRIEFS, *supra* note 199, at 787 (*Roe* oral argument, Dec. 13, 1971).

875. Brief of Amici Curiae Planned Parenthood Federation of America, Inc. and American Association of Planned Parenthood Physicians at 32-36, *Roe* (No. 70-18); Brief of Amici Curiae Planned Parenthood Federation of America, Inc. and American Association of Planned Parenthood Physicians at 32-36, *Roe* (No. 70-18).

876. Brief of Amici Curiae on Behalf of Organizations and Named Women in Support of Appellants in Each Case at 8, *Roe* (No. 70-18) and *Doe* (No. 70-40); Brief of Amici Curiae Planned Parenthood Federation of America, Inc. and American Association of Planned Parenthood Physicians at 32-36, *Roe* (No. 70-18).

in part because the Court had just upheld the D.C. statute against vagueness attack.⁸⁷⁷ The conference notes and subsequent memoranda also suggest that several of the Justices had, since *Griswold*, changed their minds about the constitutional root of the privacy right, viewing it as within the liberty interest of the Due Process Clause.⁸⁷⁸

At least some of the Justices recognized the normative as well as doctrinal complexity of the privacy right. Justice Brennan gave the matter his most sustained attention and set forth in a letter “three groups of fundamental freedoms that ‘liberty’ encompasses: *first*, freedom from bodily restraint or inspection, freedom to do with one’s body as one likes, and freedom to care for one’s health and person [*Botsford*]; *second*, freedom of choice in the basic decisions of life, such as marriage, divorce, procreation, contraception, and the education and upbringing of children [*Eisenstadt, Griswold, Meyer*]; and, *third*, autonomous control over the development and expression of one’s intellect and personality [*Stanley*].”⁸⁷⁹ This letter synthesized the different formulations of the privacy right offered by various amicus briefs into the different ways of understanding privacy. It was also a dynamic synthesis of the traditional ideas about privacy, confirming privacy as physical integrity, expanding privacy as family governance, and recognizing a new understanding of privacy as life choices. Privacy as life choices was similar to Jonah Goldstein’s argument against “compulsory motherhood” in *Sanger* and Sarah Weddington’s “life disruption” argument in *Roe*. “The decision whether to abort a pregnancy obviously fits directly within each of the categories of fundamental freedoms I’ve identified and, therefore, should be held to involve a *basic individual right*,” concluded Justice Brennan.⁸⁸⁰ It is unlikely that most of his colleagues completely agreed, however.

Reflecting the Court’s (and his own) ambivalence, Justice Blackmun’s opinion in *Roe* merely catalogued the various “activities” the Court had found private — marriage, procreation, contraception, family relationships, childrearing and education — and concluded that

877. See Douglas Conference Notes for the Abortion Cases (Dec. 16, 1971), in Douglas Papers, *supra* note 192, Container 1590 (Douglas, Brennan, Stewart, and Marshall were inclined toward vagueness argument). Compare Justice Blackmun, Draft Opinion 1 (*Roe*) (No. 70-18) (vagueness reason for striking down the Texas statute), with Justice White, Draft Dissent (*Roe*) (relying on *United States v. Vuitch*, 402 U.S. 62 (1971)).

878. See Douglas Conference Notes for the Abortion Cases (Dec. 16, 1971), in Douglas Papers, *supra* note 192, Container 1590 (Marshall); Letter from Justice Brennan to Justice Douglas (Dec. 30, 1971), in Douglas papers, *supra* note 192, Container 1590 (Douglas and Brennan). Counsel for appellants focused on the Due Process Clause as well. See 75 LANDMARK BRIEFS, *supra* note 199, at 788-89 (oral argument in *Roe*, Dec. 13, 1971).

879. Letter from Justice Brennan to Justice Douglas (Dec. 30 1971), at 5-6 in Douglas Papers, *supra* note 192, Container 1590 (file 70-14) (bracketed references added).

880. *Id.* at 8 (emphasis added).

the right was part of the liberty guaranteed by the Due Process Clause and was “broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”⁸⁸¹ Writing only for himself, but also reflecting the views of Justice Brennan, Justice Douglas opined that the Due Process Clause reflected three different kinds of privacy rights: (1) “autonomous control over the development and expression of one’s intellect, interests, tastes, and personality”; (2) “freedom of choice in the basic decisions of one’s life respecting marriage, divorce, procreation, contraception, and the education and upbringing of children”; and (3) “the freedom to care for one’s health and person, freedom from bodily restraint or compulsion, freedom to walk, stroll or loaf.”⁸⁸² Only Justices White and Rehnquist, in dissent, rejected a constitutional basis for this right of decisionmaking privacy.⁸⁸³

The briefs of women and doctors challenging the post-*Roe* abortion statutes increasingly emphasized women’s sexual privacy and autonomy, while the briefs of their opponents emphasized the autonomy of the potential life in the fetus and the privacy values inherent in traditional families. Recall the lawsuits challenging state laws regulating the availability of contraceptives and abortions for minors (Section I.B.3.a). Groups challenging these statutes insisted on the importance to adolescent women of the freedom to make their own choices regarding sexual activity and pregnancy and on the dangers of state-imposed parental involvement to their personal development.⁸⁸⁴ States and their supportive amici emphasized privacy’s double edge in these cases and maintained that the minor’s *sexual privacy* must give way to the older line of cases recognizing the *family governance* side of privacy. In *Danforth*, the state and the Catholic Conference objected to the liberal feminist argument, drawn from *Eisenstadt* and *Roe*, that the right to terminate a pregnancy is an individual right. They cited the *Meyer* line of cases as support for “an organic view of the family and social relationships attendant thereto. These cases accept, as a premise, the view that the family is something more than the sum of its ag-

881. *Roe v. Wade*, 410 U.S. 113, 152-53 (1973).

882. *Doe v. Bolton*, 410 U.S. 179, 211-13 (1973) (Douglas, J., concurring).

883. *Roe*, 410 U.S. at 171 (Rehnquist, J., dissenting); *Doe*, 410 U.S. at 221 (White, J., dissenting).

884. Brief of Amicus Curiae ACLU at 3-15, *Carey v. Population Servs. Int’l*, 431 U.S. 678 (1977) (No. 75-443) (arguing that many horrible things happen to teenage girls who become pregnant because they have no access to contraceptives); Brief of Amicus Curiae Planned Parenthood of America, et al. at 14-20, *Carey* (No. 75-443) (similar); Brief for Appellees at 90-105, *Danforth v. Planned Parenthood of Central Missouri*, 428 U.S. 52 (1976) (No. 74-1151) (similar, but for pregnant minors who cannot obtain abortions).

gregate members.”⁸⁸⁵ If the family is organic and foundational, they maintained that the state must, and certainly may, empower parents to regulate their daughters’ decisions and husbands to participate jointly in their wives’ decisions. As to parental consent, traditionalists also made the liberal argument that minors are not fully capable decision-makers. The state of New York made the liberal argument during the next Term of the Court in *Carey v. Population Services International*,⁸⁸⁶ which involved a law barring the distribution of contraceptives to minors.

By 1976, the Court was committed to a liberal rather than organic view of the family — but a liberal view whereby parents could exercise control over their children’s sexuality. Although the Court in *Danforth* overturned the parental consent rule, at least four Justices (White, Powell, Rehnquist, and Stevens) worried about “parental rights,” as Powell put it.⁸⁸⁷ In *Carey*, the Justices considered themselves bound by *Danforth* to strike down the too-broad state regulation, but most of the Justices also supported Powell’s view that, “[the] state has far greater interest in regulating morals of minors. Don’t see how Constitution gets into that area.”⁸⁸⁸ Although seven Justices applied *Eisenstadt* to strike down the New York law, only four joined that part of Justice Brennan’s opinion concluding that the anti-contraception rule could not be defended as a way to discourage “promiscuous sexual intercourse among the young.”⁸⁸⁹ Justice Powell’s opinion during the same Term in *Bellotti* suggested that there was an audience within the Court for the ideas he and Stevens had expressed in conference, a dictum that the Court fleshed out in subsequent cases and ringingly confirmed in *Casey*: the state has a wide berth in regulating minor women’s access to abortions, and the Court will uphold rules based on the family governance idea of privacy even when the evidence suggests that the rules have devastating consequences for pregnant girls

885. Brief of Amicus Curiae United States Catholic Conference at 26, *Danforth* (No. 74-1151); see *id.* at 26-32 (this view of the family supports the parental consent requirement); *id.* at 32-37 (spousal consent).

886. 431 U.S. 678 (1977).

887. See Brennan Conference Notes for *Danforth*, in Brennan Papers, *supra* note 129, Box I: 368, Folder 6. Recall that White, Rehnquist, and Stevens dissented from the Court’s judgment as to the parental consent requirement.

888. Brennan Conference Notes for *Carey*, in Brennan Papers, *supra* note 129, Box I: 401, Folder 7. As Justice Stevens said, “Don’t have doubt state can prohibit sexual intercourse by minors.” *Id.*

889. *Carey*, 431 U.S. at 691-99 (plurality opinion of Brennan, J.); see *id.* at 702-03 (White, J., concurring in part and in the judgment); *id.* at 707-08 (Powell, J., concurring in part); *id.* at 713-16 (Stevens, J., concurring in part and concurring in the judgment).

and serve no discernible function in facilitating communication within the family.⁸⁹⁰

Even more difficult for the Justices were the sodomy cases. On the one hand, these could be considered analytically similar to *Griswold* and *Roe*, for sodomy (like kissing) is a form of nonprocreative intimacy. The Court directly protected a woman's right to nonprocreative intimacy in *Griswold* and indirectly in *Roe* — and in the face of serious claims that human life was being sacrificed. Why not in the sodomy cases? Especially for lesbian people, the freedom to engage in intimate relations with someone of the same sex implicated all of the deep purposes Justices Brennan and Douglas had identified for the privacy right in *Roe*: freedom to care for and deploy one's body, to make fundamental life decisions, and to develop one's intellect and personality. On the other hand, the sodomy cases presented the sexual privacy right in its most naked form to the Justices. The Court had never directly ruled that a sexual act itself is constitutionally protected,⁸⁹¹ and the earlier sexual privacy cases were all connected to straight people's decisions to procreate (or not). A majority of the Justices in *Griswold* had specifically indicated that there is no constitutional right to engage in “[a]dultery, homosexuality and the like.”⁸⁹² On the other hand, there had been a big change since *Griswold*: the lesbian rights movement had become an insistent normative force for reconsidering sodomy laws. Lambda, the ACLU, and other groups vigorously litigated the issue in both state and federal courts.

For more than a decade, the Supreme Court dodged the issue, and the case that resolved it — *Bowers v. Hardwick*⁸⁹³ — came to the

890. Compare *Planned Parenthood v. Casey*, 505 U.S. 833, 899-900 (1992) (joint opinion) (upholding one-parent consent requirement with judicial bypass), with *Planned Parenthood v. Casey*, 744 F. Supp. 1323, 1356-57 (E.D. Pa. 1990) (findings of fact after trial that parental consent requirement could create “dangerous and prohibitive” delays and be “extremely costly and burdensome” on minors seeking abortions), *rev'd*, 947 F.2d 682 (3d Cir. 1991), *aff'd in relevant part*, 505 U.S. 833 (1992). Compare *Hodgson v. Minnesota*, 497 U.S. 417, 458-61 (1990) (O'Connor, J., concurring in part) (providing fifth vote to uphold two-parent notification law so long as there is a judicial bypass procedure to protect the interests of the minor), with *Hodgson*, 648 F. Supp. 756, 768-69 (D. Minn. 1986) (finding as matter of fact that two-parent notification requirement can be harmful to minors seeking abortion and that judicial bypass is an additional burden), *aff'd*, 853 F.2d 1452 (8th Cir. 1988), *rev'd*, 497 U.S. 417 (1990).

891. *Carey*, 431 U.S. at 688 n.5 & 694 n.17 (plurality opinion of Brennan, J.); *see id.* at 703 (Powell, J., concurring in part and in the judgment) (unwilling to go along with heightened scrutiny for “state regulation affecting adult sexual relations”).

892. *See Griswold v. Connecticut*, 381 U.S. 479, 499 (1965) (Goldberg, J., joined by Warren, C.J., and Brennan, J., concurring) (quoting *Poe v. Ullman*, 367 U.S. 497, 553 (1961) (Harlan, J., dissenting)); *id.* at 507-27 (Black, J., joined by Stewart, J., dissenting from any recognition of a right of sexual privacy).

893. 478 U.S. 186 (1986).

Court through a tragi-comedy of errors.⁸⁹⁴ Representing the challenger, Professor Larry Tribe's strategy was to suppress the *sexual* features of the privacy right he was defending and to emphasize the traditional features: the freedom to be secure in your home (*Olmstead*), to control one's own body (*Roe*), and to make important personal decisions (*Griswold*).⁸⁹⁵ In the tradition of Margaret Sanger and Fowler Harper, amici argued that sexual fulfillment through conduct prohibited by consensual sodomy laws was critically important to the mental health and well-being of lesbian people; their arguments linked sexual privacy to meaningful citizenship for gays.⁸⁹⁶ Four Justices agreed with the amici: the principle underlying *Griswold* and *Roe* is that people's choices in matters of marriage and family planning "form so central a part of an individual's life" that it would be a denial of people's most fundamental liberty for the state to make those decisions for them; that same principle protects the ability of lesbian (and other) people to "define themselves in a significant way through their intimate sexual relationships with others," including consensual sodomy.⁸⁹⁷ No brief could have persuaded the other five Justices to recognize any kind of constitutional right to engage in "homosexual sodomy," but Justice Powell dimly perceived that upholding the law would be inconsistent with his moderately preservationist viewpoint and initially voted to invalidate on poorly reasoned Eighth

894. The Eleventh Circuit interpreted *Griswold* and *Roe* to be inconsistent with Georgia's consensual sodomy law in *Hardwick v. Bowers*, 760 F.2d 1202 (1985), *rev'd* 478 U.S. 186 (1986). Only Justices White and Rehnquist were inclined to grant certiorari in the case — until Justice Brennan joined them, presumably thinking that he could persuade a majority to affirm the lower court. This triggered a vote for certiorari from Justice Marshall. Reconsidering his strategy, Brennan switched his vote, leaving only three for granting review — until Chief Justice Burger switched his vote to grant. *See generally* MURDOCH & PRICE, *supra* note 510, at 656-57.

895. Hobbs, the attorney for Georgia, opened his oral argument with the statement that this case was about whether the state could regulate "homosexual sodomy." 164 LANDMARK BRIEFS, *supra* note 199, at 633 (*Hardwick* oral argument, Mar. 31, 1986). Tribe opened his argument, "This case is about the limits of governmental power." *Id.* at 642. Justice Powell immediately pressed him, What limiting principle would Tribe support? How can you protect "sodomy" without also protecting "bigamy involving private homes or incest or prostitution." *Id.* Tribe's response: The right to privacy "includes all physical, sexual intimacies of a kind that are not demonstrably physically harmful that are consensual and noncommercial in the privacy of the home." *Id.* at 643. Hobbs' rebuttal reposed the issue: Would the Court bar Georgia from preserving "ordered liberty" in the face of "licentiousness." *Id.* at 657. (Wow.)

896. *See, e.g.*, Brief of Amici Curiae American Psychological Association and American Public Health Association in Support of Respondents, *Hardwick* (No. 85-140) (consensual sodomy is just as important to the intimate lives of lesbian people as contraception is to the lives of straights).

897. *Hardwick*, 478 U.S. at 204-05 (Blackmun, J., joined by Brennan, Marshall & Stevens, JJ., dissenting).

Amendment grounds, before he fell back into his accustomed anxiety about issues of (homo)sexuality.⁸⁹⁸

The Court's opinion in *Hardwick* called a halt to the expanding right of sexual privacy and may yet stand for the proposition that the state can make any particular sex act a felony. Justice Blackmun feared that, as the Court was being populated with countermovement appointments, the privacy right itself (including *Roe*) was in peril. His fears seemed justified when President Reagan named Judge Robert Bork to replace retiring Justice Powell in 1987. Bork had been the academy's most vehement critic of the *Griswold-Eisenstadt* right of sexual privacy, and as a judge he denounced *Roe v. Wade* and anticipated *Bowers v. Hardwick*. His vote would surely tip the balance of power on a divided Court toward the Justices opposed to sexual and perhaps other forms of privacy. Progressive groups, including feminist, lesbian, and civil rights organizations, mobilized to oppose the nominee.⁸⁹⁹ Although some of their charges were distortions of Bork's eminent academic and judicial record, verily it was Bork's own testimony that sunk his nomination: the judge not only insisted in his oral testimony that *Griswold* and *Roe* were wrongly decided, but afterward sent the Senate Judiciary Committee a fifteen-page letter attacking the decisions.⁹⁰⁰ A week after Bork's testimony, an opinion poll reported that the American people opposed the Bork nomination by a fifty-seven percent to twenty-nine percent margin; almost all opponents were troubled by his rejection of *Griswold's* right of privacy. On October 23, 1987, the Senate voted 58-42 against the nomination.

"If the Bork hearings accomplished anything . . . it was the enshrinement of *Griswold v. Connecticut* as 'a fixed star in our constitutional firmament.'"⁹⁰¹ The enshrinement of *Griswold*, of course, did not

898. Although the records of the *Hardwick* conference are not now available, we know more about the Justices' deliberations in that case than in almost any other discussed in this Article, because of detailed and reliable insider accounts fueled by dozens of chatty (and cross-checkable) law clerks. See JEFFRIES, JUSTICE POWELL, *supra* note 171, at 511-30 (account from the perspective of Powell's past and contemporary law clerks); MURDOCH & PRICE, *supra* note 510, at 271-345 (account drawn from several dozen law clerks who served before, during, and after the 1985 Term).

899. See MICHAEL PERTSCHUCK & WENDY SCHAETZEL, THE PEOPLE RISING: THE CAMPAIGN AGAINST THE BORK NOMINATION (1989). For a dispassionate view of the campaign, see ETHAN BRONNER, BATTLE FOR JUSTICE (1990).

900. See *Hearings on the Nomination of Robert H. Bork: Hearings Before the Senate Comm. of the Judiciary*, 100th Cong., 1st Sess. 184-85, 3547-49, 3896-3910 (1987). For Bork's unrepentant critique, see ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 120, 250 (1989).

901. Gary McDowell, *Congress and the Courts*, PUB. INT., Summer 1990, at 89, 100 (quoting *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)); accord HARRY H. WELLINGTON, INTERPRETING THE CONSTITUTION: THE SUPREME COURT AND THE PROCESS OF ADJUDICATION 121 (1990); Glenn H. Reynolds, *Sex, Lies, and Jurisprudence:*

mean that women were entitled to abortion on demand or gay people to consensual intimacy, but the public rejection of Robert Bork underlined the less-noted social facts that virtually all respected legal scholars and most Americans were critical of the anti-privacy result in *Hardwick* and were supportive of women's right to choose abortions under some circumstances. Six years after the Bork hearings, five conservative Republican Supreme Court Justices reaffirmed (and reinterpreted) *Roe* in *Casey v. Planned Parenthood*. Seven years after that, in *Carhart*, the Court invalidated a partial-birth abortion law, over passionate objection by four dissenters.

The cutting edge of sexual privacy continues to be the consensual sodomy cases. When the Supreme Court decided *Hardwick*, twenty-five states and the District of Columbia made consensual sodomy a crime. In the sixteen years since *Hardwick* (1986-2002), three states and the District of Columbia have repealed their laws,⁹⁰² and as many as nine states have seen their laws nullified by judicial invalidation as a violation of state constitutional rights of sexual privacy.⁹⁰³ Ironically, the Georgia Supreme Court struck down the consensual sodomy law that the U.S. Supreme Court upheld in *Hardwick*. The court found that "unforced, private adult sexual activity," including sodomy, "is at the heart of the Georgia Constitution's protection of the right of privacy."⁹⁰⁴ In short, *Hardwick* notwithstanding, the emerging constitutional norm of sexual privacy would bar the state from criminalizing sodomy or penile vaginal sex between consenting adults. A decade after *Hardwick* (and exactly 100 years after Justice Harlan's dissent in *Plessy*), six Justices in *Evans v. Romer* rejected Bork's view that "homosexuals" have minimal equal protection rights because they are presumptive criminals (sodomites) and thrust *Hardwick* into a constitutional closet. At the close of the millennium, the right of sexual privacy championed by Emma Goldman, Margaret Sanger, and Fowler

Robert Bork, Griswold, and the Philosophy of Original Understanding, 24 GA. L. REV. 1045, 1105 (1990).

902. The repealing jurisdictions are Arizona (2001), the District of Columbia (1993), Nevada (1993), and Rhode Island (1998).

903. See *Jegley v. Picado*, 80 S.W.3d 332 (Ark. 2002); *Powell v. State*, 510 S.E.2d 18 (Ga. 1998); *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992); *Williams v. State*, 1998 Extra LEXIS 260 (Balt. Cir. Ct. 1999); *Gay & Lesbian Advocates & Defenders v. Att'y Gen.*, 763 N.E.2d 38 (Mass. 2002) (narrowing construction of sodomy law); *Doe v. Ventura*, 2001 WL 543734 (Hennepin Cnty. Dist. Ct. May 15, 2001); *State v. Coghill*, 997 S.W.2d 534 (Mo. App. 1999); *Gryczan v. Montana*, 942 P.2d 112 (Mont. 1997); *Campbell v. Sundquist*, 926 S.W.2d 250 (Tenn. App. 1996) (appeal denied). In a few states, constitutional challenges have been rejected. See *Smith v. State*, 766 So.2d 501 (La. 2000).

904. *Powell*, 510 S.E.2d at 24-25. Also in contrast to *Hardwick*, where the U.S. Supreme Court ruled that anti-homosexual "sentiment" was enough to justify Georgia's consensual sodomy law, the Georgia Supreme Court ruled that "social morality" could not save it under the state constitution.

Harper was a fuzzy but forceful constitutional reality, not just for women desiring to control the conditions of their pregnancies, but also for lesbians, gay men, and bisexuals desiring to form relationships and families with their same-sex partners, and for men and women of all sexualities desiring to have sex (including sodomy) outside of marriage.

C. *Equal Protection's Sliding Scale: Suspect Classifications, Invidious Motives, and Fundamental Interests*

By the beginning of the twentieth century, the Supreme Court had bleached most of the life out of the Equal Protection Clause. Many of the abolitionists who participated in the Reconstruction amendments viewed the Equal Protection Clause as radically transformative, but the Court had construed it with exceeding caution. *Plessy* reflected the classic understanding of the post-Reconstruction Court: a law is consistent with equal protection so long as its distinctions are *reasonable*, a criterion satisfied by a showing that the distinctions reflect the moral or social feelings of the community.⁹⁰⁵ Distinctions that openly excluded a whole class of persons from the benefits and protections of law were vulnerable because they were irrational, but the Court was by 1900 no longer willing to look deeply into the operation of a statutory policy that bore harshly on minorities but did not exclude them on the face of the statute.⁹⁰⁶ And race had been the core concern of the Equal Protection Clause; it had no bite for sex- and sexuality-based exclusions common in American law by the turn of the century.

That equal protection doctrine looked completely different by 2000 is the result of the cases brought and the arguments posed by the civil rights, women's rights, and gay rights movements. The agenda of these social movements was to get the courts involved with equality issues and to persuade judges that they should apply the rationality model with attention to the systematic irrationality of certain *classifications* and to the subordinating effects of those classifications on certain *classes* of Americans. The Court substantially adopted this understanding of the Equal Protection Clause. The effect of this process has been as complex as it has been revolutionary, because the civil rights agenda was always adapted to the Court's own institutional interests and to the concerns of the national political process and because the facts and normative visions of the many IBSMs were often cross-cutting rather than mutually reinforcing. The civil rights movement's

905. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

906. Even in the one area of unquestioned equal protection activism after Reconstruction — the exclusion of blacks from juries — the Court by 1900 was substantially unwilling to monitor local compliance.

understanding of equal protection, which was dominant during the Warren Court, lost steam in the Burger and Rehnquist Courts, which were more responsive to concerns of civil rights traditionalists and, ironically, feminists.

During the twentieth century, there was probably no doctrinal development in the Court's application of the Equal Protection Clause that was not influenced by IBSMs — especially the Court's recognition that the reasonableness scrutiny of *Plessy* must give way to a more searching and suspicious examination when the state deploys certain *suspect classifications*; denies a well-defined group of persons *fundamental rights*; or acts because of prejudice or other *illegitimate motives*. IBSMs pioneered all three of these inquiries, but the Court adapted them to its own institutional and its Justices' ideological ends. The result has been a doctrinal structure whose architecture is clear enough but so manipulable (and manipulated) as to be of declining utility in the new millennium. The most impressive doctrinal synthesis is one developed by Justice Thurgood Marshall, the first IBSM lawyer appointed to the Court. His *sliding scale* theory both captures what the Court has been doing in the cases and provides a normative roadmap for the Court's future in equal protection jurisprudence, a project that will occupy the next two sections (II.D. and II.E.) as well as this one.

1. *Tiers: The Story of Suspect and Other Classifications*

The Equal Protection Clause of the *Plessy* era was one which examined the reasonableness of statutory distinctions, without much attention to their subordinating effects. The goal of civil rights attorneys was to show how race-based policies were founded on prejudice rather than reason and how the subordination of one racial group was both unjust for the people stigmatized and destabilizing for society as a whole.⁹⁰⁷ Doctrinally, they maintained that race-based classifications motivated by prejudice and having subordinating effects on black people should essentially be per se violations of the Equal Protection Clause. In *Guinn*, for example, Moorfield Storey deployed the statute admitting Oklahoma to the union to frame this argument: there should be a flat and broad “prohibition of distinctions on account of race or color * * * as to *all* civil and political rights whatever.” “[N]ow when on every hand race prejudice is exercising a most baleful influence in our affairs,” it was especially important for the Court to deploy the Equal Protection Clause to protect people who had been held down

907. These themes were derived in part from Justice Harlan's classic dissent in *Plessy*, 163 U.S. at 552, which civil rights attorneys often cited and always followed.

but “who ought to be helped up.”⁹⁰⁸ In *Nixon v. Herndon*, Storey and Louis Marshall (Leo Frank’s counsel) argued that the white primary statute was invalid because it was “a flagrant, unjust discrimination against a citizen solely on account of his race and color,” one that would “brand him with a mark of inferiority.”⁹⁰⁹

In all of these appeals, the NAACP’s attorneys maintained that race-based classifications were presumptively unconstitutional because they were inspired by *prejudice*, not rational public policy, and because they had the intended and deleterious effect of *subordinating* minority citizens. The Justices agreed with the challengers in all these cases, but sought to frame their opinions along traditional reasonableness lines. A partial exception was Justice Holmes’ opinion in *Herndon*, which summarily accepted the proposition that “color” cannot be the basis for voting “classification[s].”⁹¹⁰ The Court’s coyness changed after 1938, the year the New Deal Court issued its declaration of revised activism in footnote 4 of *Carolene Products*. Paragraph three of the footnote said:⁹¹¹

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious . . . or national . . . or racial minorities[;] whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry

As David Bixby has shown, Justice Stone (the author of the footnote) and his colleagues on the Court were responding directly to the civil rights movement’s objections to the violence involved in apartheid, which they considered a national embarrassment.⁹¹²

The Japanese curfew and evacuation cases during World War II were the occasion for the Court’s formal rearticulation of equal protection scrutiny. Lawyers for Gordon Hirabayashi maintained that a

908. Brief for the NAACP at 16-17, *Guinn v. United States*, 238 U.S. 347 (1915) (1913 Term, No. 96).

909. Brief for Plaintiff in Error at 31, *Nixon v. Herndon*, 273 U.S. 536 (1927) (1925 Term, No. 117).

910. *Nixon v. Herndon*, 273 U.S. 536, 541 (1927) (Holmes agreed that “it is too clear for extended argument that color cannot be made the basis for a statutory classification affecting the right set up in this case,” namely, voting).

911. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).

912. Bixby, *supra* note 657, at 762-67 (Stone), 767-70 (Frankfurter, former adviser to the NAACP and a proponent of civil rights for African Americans), 770-74 (Murphy, who as Attorney General had established the Civil Rights Section), 774-75 (Black, an anti-racist southerner), 775-77 (Douglas, an avid and long-serving advocate for civil rights), 777-78 (Roberts, Reed, Rutledge); see also Louis Lusky, *Minority Rights and the Public Interest*, 52 *YALE L.J.* 1, 3-6, 20-21 (1942) (arguing that racial minorities must be protected by judicial review). Louis Lusky was the law clerk who drafted the footnote for Justice Stone.

curfew on citizens of Japanese descent violated the Fifth Amendment because “[r]acial discrimination is abhorrent to our institutions.” Not only had Congress *never* attempted “to differentiate between citizens on the ground of their racial or national origins,” but the Court “has condemned discrimination on racial grounds whenever the problem has come before it.”⁹¹³ Amicus briefs traced the history of state anti-Asian laws and policies and argued that, like those older laws, any kind of discrimination among citizens on the basis of race is a dangerous and divisive policy.⁹¹⁴ Although the Supreme Court upheld the wartime curfew in *Hirabayashi*, Chief Justice Stone’s opinion cautioned that “[d]istinctions 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. For that reason, legislative classification or discrimination based upon race alone has often been held to be a denial of equal protection.”⁹¹⁵

In the next case, involving the evacuation of Japanese-American citizens, the ACLU pressed the same point: any “classification of citizens based solely on ancestry . . . is forbidden.”⁹¹⁶ Following *Hirabayashi*, the Court in *Korematsu v. United States*⁹¹⁷ stated that “all legal restrictions which curtail the civil rights of a single racial group are immediately suspect” and must be subjected to the “most rigid scrutiny,” but upheld the restrictions because of the wartime emergency. Justices Murphy, Roberts, and Jackson agreed that race-based classifications should be subjected to strict scrutiny but dissented from the holding that such a test was satisfied.⁹¹⁸ The other Justices were not insensitive to these claims. In *Ex parte Endo*,⁹¹⁹ handed down the same day as *Korematsu*, a unanimous Court found no specific statutory authorization for the indefinite *detention* (following the permitted

913. Brief for Appellant at 14, *Hirabayashi v. United States*, 320 U.S. 81 (1943) (1942 Term, No. 870); *see also* Brief of Amicus Curiae Japanese American Citizens League at 10-12, *Hirabayashi* (1942 Term, No. 870) (curfew orders “affecting only American citizens of a particular race or ancestry violate the minimum requirements of equality inherent in due process of law”); Brief of Amicus Curiae ACLU, *Hirabayashi* (1942 Term, No. 870) (similar). Recall that the Fifth Amendment has no equal protection component, but the participants in the Japanese curfew and detention cases treated that amendment’s Due Process Clause as analogous to the Fourteenth Amendment’s Equal Protection Clause.

914. Brief of Amicus Curiae Northern California Branch of the ACLU at 78-80, *Hirabayashi* (1942 Term, No. 870).

915. *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943).

916. Brief of Amicus Curiae ACLU at 6, *Korematsu* (1943 Term, No. 22).

917. 323 U.S. 214, 216 (1944).

918. *See id.* at 225 (Roberts, J., dissenting); *id.* at 233 (Murphy, J., dissenting) (linking orders to racist sentiment); *id.* at 242 (Jackson, J., dissenting).

919. 323 U.S. 283 (1944).

evacuation) of concededly loyal Japanese Americans.⁹²⁰ For quasi-constitutional reasons, the Justices refused to assume that “Congress and the President intended that this discriminatory action should be taken against these people wholly on account of their ancestry even though the government conceded their loyalty to this country.”⁹²¹

After the war, both litigants and jurists routinely referred to race-based classifications as “not reasonably related to any legitimate legislative objective.”⁹²² The Justices (three of whom were southerners) articulated the emerging doctrine cautiously in the anti-apartheid cases, lest there be a massive southern political reaction. Thus, ironically, the strongest statements continued to come in cases involving discrimination against Asian rather than African Americans. In *Oyama v. California*,⁹²³ for example, the Court declined to rule on the constitutionality of a California law barring property ownership by people who could not become U.S. citizens, namely, Japanese people. But the Court did rule that the son of Japanese parents born here (and therefore a U.S. citizen) could not be denied the right to inherit. The state “discriminated against Fred Oyama; the discrimination is based solely on his parents’ country of origin; and there is absent the compelling justification which would be needed to sustain discrimination of that nature.”⁹²⁴

With authorities like *Hirabayashi*, *Korematsu*, and *Oyama* in place, several amici in *Brown* invoked a two-tier approach to equal protection scrutiny: whereas in cases involving ordinary (economic) legislation the Court presumed reasonableness, the Court’s decisions “reveal a special scrutiny and constant vigilance in those instances where

920. Presuming that the President and Congress “are sensitive to and respectful of the liberties of the citizen,” the Court read the statute to impose “no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used.” *Id.* at 300; see also *id.* at 299 (invoking the *Ashwander* idea favoring a statutory construction that “gives it the greater chance of surviving the test of constitutionality”). Justice Douglas, the author of *Endo*, was originally a dissenter in *Korematsu* on this ground, but Chief Justice Stone persuaded him that the Court was only upholding the *evacuation*, and not any *detention*, in that case. See Douglas Conference Notes for *Korematsu* (Oct. 16, 1944), in Douglas Papers, *supra* note 192, Container 113.

921. *Ex Parte Endo*, 323 U.S. at 303-04; see *id.* at 307-08 (Murphy, J., concurring) (much stronger objection to the Army’s interpretation; criticizing the “racism” at the heart of the executive order).

922. *Ray v. Blair*, 343 U.S. 214, 226 n.14 (1952); *accord Takahashi v. Fish & Game Comm’n*, 334 U.S. 410, 420 (1948); *Shelley v. Kraemer*, 334 U.S. 1, 23 (1948).

923. 332 U.S. 633 (1940).

924. *Id.* at 640. Four concurring Justices were more aggressive. See *id.* at 649 (Black, J., joined by Douglas, J., concurring) (stating that any denial of rights because of “race or color” is presumptively a violation of the equal protection clause); *id.* at 650 (Murphy, J., joined by Rutledge, J., dissenting) (characterizing underlying statute, barring property ownership by “aliens,” per se unconstitutional as an “outright racial discrimination” deserving “constitutional condemnation”).

[state] action was predicated upon alleged racial distinctions or where racial classifications were involved.”⁹²⁵ Although the Supreme Court’s decision in *Brown* emphasized the fundamental right to an education rather than the race-based classification, the lower courts and civil rights attorneys took it for granted that *Brown* rejected apartheid and accepted the long-litigated Inc. Fund view that race-based classifications are per se violations of the Equal Protection Clause. And the Court summarily affirmed lower court decisions striking down race-based classifications in all manner of public regulations.⁹²⁶ In short, the Court as early as 1944 was moving toward a two-tiered approach to equal protection scrutiny: race-based classifications were “immediately suspect” and subject to the “most rigid scrutiny,” in contrast to the reasonableness scrutiny applied to other classifications.⁹²⁷ This was the likely basis for the holdings of the post-*Brown* per curiams. The Court formalized the double standard in the interracial cohabitation and marriage cases, *McLaughlin v. Florida*⁹²⁸ and *Loving v. Virginia*.⁹²⁹

Thus, I disagree, in part, with Michael Klarman’s insistence that the equal protection double standard was not established until *Loving*.⁹³⁰ Chief Justice Warren’s opinion treated the issue as having

925. Brief on Behalf of ACLU et al. at 12, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (1953 Term, No. 1) (citing *Hirabayashi* and *Korematsu*); see Brief of American Veterans Comm., Inc. at 12, *Brown* (1953 Term, No. 1) (contrasting general reasonableness test for ordinary legislation and “the most rigid scrutiny” applied to race-based restrictions, “which are immediately suspect”).

926. See the cases cited *supra* note 108.

927. *Korematsu*, 323 U.S. 214, 216 (1944).

928. 379 U.S. 184 (1964).

929. 388 U.S. 1 (1967); see also Gerald Gunther, *The Supreme Court, 1971 Term — Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972) (noting the Court’s “double standard” and urging the Court to create new categories of intermediate scrutiny).

930. Michael J. Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 227-40 (1991). Klarman is right to say that the Court’s race discrimination opinions in the 1940s and 1950s sometimes used “rationality language,” *id.* at 234, but *Hirabayashi*, *Korematsu*, and *Oyama* explicitly deployed the suspect classification language. So the verbal formulation was in place by the time *Brown* was decided. *E.g.*, *Perez v. Lippold*, 198 P.2d 17, 20 (Cal. 1948) (different-race marriage bar cannot meet Supreme Court’s requirement that racial classifications can only be justified by “a clear and present peril arising out of an emergency”). As a practical matter, the Court was more scrutinizing as to what we today would call “fundamental rights,” Klarman, *supra* at 236, but neither the Justices nor commentators in the 1940s defended stringent scrutiny along these lines. (Klarman, *id.* at 240 & n.118, is wrong to say that *Perez* rested on that distinction; the reasoning of the opinion focused only on the classification; its statement that the state “cannot base a law impairing fundamental rights of individuals on general assumptions as to traits of racial groups” was not “backtracking,” as Klarman claims, but icing on the constitutional cake.) The university and school desegregation cases, from *Gaines* through *Brown*, did not employ the *Hirabayashi/Korematsu* strict scrutiny formulation but were understood by civil rights attorneys and by federal judges as rendering any race-based classification presumptively invalid. There is no theory except mine for the Court’s per curiams affirming lower

been settled by *Hirabayashi* and *Korematsu*, whose language he adopted as the statement of *Loving's* holding.⁹³¹ It is how civil rights lawyers read those precedents in the 1950s.⁹³² The lower courts read the cases the same way. As I shall demonstrate below, so did lawyers for other identity-based social groups, such as women and gay people. Thus, well before 1967, it was clear that the Court would engage in "more searching judicial inquiry" of statutes which deployed racial classifications to deny people of color rights or privileges of all sorts. And it was apparent, from *Brown* and its progeny, that classifications separating the races were suspect for the same reason. What was not clear — and here I agree with Klarman — was how committed the Court was to the verbal formulation and whether it applied across the board. *Loving* brought the Court's approach fully out of the constitutional closet,⁹³³ and was analytically important in its holding that what was objectionable to the Equal Protection Clause was the way that an irrational *classification* contributed to the subordination of a vulnerable *class* by perpetuating an *ideology* grounded upon prejudice and stereotypes. This has become the classic articulation of the Equal Protection Clause. Although it was a codification of half a century's effort on the part of the NAACP and its allies, this formulation was to have a life of its own, as it was appropriated by social movements, countermovements, and Justices — each with different agendas and interpretations.

To begin with, *Loving* accelerated an equal protection classification-fest, for it coincided with the explosion of new social movements representing the political mobilization of women, poor people, the elderly, people with disabilities, and lesbian and gay people. Social movement lawyers vied to replicate the Inc. Fund's success. Each IBSM argued that its members had been subjected to prejudice- or stereotype-based disadvantages legally similar to those suffered by blacks, and that animus against the group's defining trait was just as irrational and counterproductive as racism. After 1968, the Court picked its way through a minefield of equal protection claims. For each claim, the Court con-

court decisions which declared racial segregation of parks, swimming pools, and other facilities invalid. See note 108 *supra*.

931. *Loving*, 388 U.S. at 2. What *Loving* and (more precisely) *McLaughlin* add to the prior cases is the idea that discrimination on the basis of the race of one partner is race discrimination, simpliciter.

932. "The decisions of this Court in [*Hirabayashi et al.*] have declared that racial distinctions are irrelevant, unjustified, inexcusable, odious, and constitutionally suspect, and that a pressing public necessity or exceptional circumstances must be shown to justify them." Brief in Opposition to Appellee's Motion to Dismiss or Affirm at 4, *Naim v. Naim*, 350 U.S. 891 (1955) (1955 Term, No. 366).

933. See, e.g., *Developments in the Law — Equal Protection*, 82 HARV. L. REV. 1065 (1969).

sidered the rationality and anti-subordination arguments pressed by the social movement lawyers, but in light of its own political calculus: Which classifications struck the Justices as most irrational? Which groups were unable to rely on the political process to repeal or nullify discriminations harming them? For example, the Court soon after *Loving* confirmed that state alienage classifications required “close judicial scrutiny,” because they were often deployed to harm a vulnerable minority and with questionable bases in the public good.⁹³⁴ The result of this constitutional litigation process was the creation of a complicated system of “tiers” of equal protection scrutiny. Each new tier, however, has carried with it ambiguities which have exposed fuzziness in the enterprise of categorization.

a. Sex: Intermediate Scrutiny. Before *Loving*, feminist attorneys were arguing that sex-based classifications were invalid or suspect for the same reasons race-based classifications were. Dorothy Kenyon’s brief in *Hoyt*, for example, maintained that sex discriminations are just as unreasonable as race discriminations, and that women’s campaign to serve on juries was a politics of recognition similar to the one blacks had long been fighting.⁹³⁵ After *Loving*, both litigants and lower courts formally rearticulated this as a claim that sex-based *classifications* are suspect because (like race-based classifications) they rely on an immutable trait that typically bears no relationship to rational state policy and that has been the basis for stigmatizing the *class* defined by that trait because it reinforces a subordinating *ideology* grounded on prejudice or stereotypes.⁹³⁶ As in *Loving*, there was an explicit alliance of rationality and subordination in this kind of argument. *Craig v. Boren* was the first case where a majority of the Supreme Court accepted these feminist arguments, halfway. The Court did not rule that

934. *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971) (following *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410, 420 (1948)). As an additional reason undermining state alienage classifications, the Court relied on the federal government’s plenary authority over immigration and naturalization and its frequently announced policy that aliens should be treated fairly while they are in this country. *Graham*, 403 U.S. at 376-80. For this reason, a national law using alienage-based classifications is not suspect in the way a state law is. See generally Gerald Neuman, *Aliens as Outlaws: Government Services, Proposition 187, and the Structure of Equal Protection Doctrine*, 42 UCLA L. REV. 1425 (1995).

935. Brief of Amicus Curiae Florida Civil Liberties Union and the ACLU at 8-19, *Hoyt v. Florida*, 368 U.S. 57 (1961) (1961 Term, No. 31) (women as a class have been subordinated in many of the ways blacks have been, especially in jury service); *id.* at 19-26 (reasons for excluding women for jury service are unreasonable in light of the “revolution [that] has taken place in the lives and status of women”).

936. This was Professor Herma Hill Kay’s line of argument, which the California Supreme Court accepted in *Sail’er Inn, Inc. v. Kirby*, 485 P.2d 529, 540-41 (Cal. 1971), and Professor Ruth Bader Ginsburg’s argument in Brief for Appellant at 14-24, *Reed v. Reed*, 404 U.S. 71 (1971) (No. 70-4), where the Court ducked the issue, and in Brief of Amicus Curiae ACLU at 24-34, *Frontiero v. Laird*, 409 U.S. 1123 (1973) (No. 71-1694) (urging the Court to follow *Sail’er Inn*), where four Justices accepted her argument. *Frontiero v. Richardson*, 411 U.S. 677 (1973) (plurality opinion of Brennan, J.).

sex-based classifications must be subjected to the *strict scrutiny* of race-based classifications, but held instead that such classifications “must serve important governmental objectives and must be substantially related to achievement of those objectives,”⁹³⁷ what has become known as an *intermediate* standard of review.

The subsequent history of *Craig* has raised questions about precisely what standard the Court applies to sex-based classifications. In *Rostker*, for example, the Court seemed to apply a more relaxed standard, due to the deference owing to congressional-presidential decisions regarding military policy. Conversely, the Court applied a tightened standard in *Kirchberg v. Feenstra*.⁹³⁸ Invalidating a law giving the husband, as “head and master” of the household, the right to dispose of community property without the consent of his wife — an easy kill under *Craig* or even *Reed* — Justice Marshall’s opinion reasoned that the state had a burden of demonstrating an “‘*exceedingly persuasive* justification’ for the [sex-based] classification.”⁹³⁹ Justice O’Connor deployed this tougher test in *Hogan* to strike down a bar to men’s admission into a state school of nursing: although the announced state policy of compensating women for past workplace discrimination was a valid policy, the exclusion of men from nursing was not the “‘*exceedingly persuasive*” justification required by the Equal Protection Clause.⁹⁴⁰ Quoting both *Kirchberg* and *Hogan*, Justice Ginsburg’s opinion in the VMI case ruled that a post-hoc rationalization cannot be an “‘*exceedingly persuasive* justification” for a sex-based policy and that such justification must be analyzed in light of (and perhaps supported by) the historical context of the policy.⁹⁴¹ This application was a tougher scrutiny than that followed by the Court in at least some of its prior sex discrimination cases,⁹⁴² a stringency justified by the anti-subordination principle supported by both the civil rights and women’s movements: statutes resting on sexist stereotypes rarely survive when they also tangibly disadvantage women as a class, whereas they often survive when women as a class are not harmed.⁹⁴³

937. *Craig v. Boren*, 429 U.S. 197 (1976).

938. 450 U.S. 455 (1981).

939. *Id.* at 461 (quoting dictum in *Personnel Admin. v. Feeney*, 442 U.S. 256, 273 (1979) (emphasis added)).

940. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 723-31 (1982).

941. *United States v. Virginia*, 518 U.S. 515 (1996).

942. *Id.* at 566 (Scalia, J., dissenting) (claiming that the Court “drastically revises our established standards for reviewing sex-based classifications”). Compare, for example, *Michael M. v. Superior Court*, 450 U.S. 464 (1981), where Justice Rehnquist’s plurality opinion engaged in precisely the kind of post-hoc justification that *Virginia* rejects.

943. See Lawrence G. Sager, *Of Tiers of Scrutiny and Time Travel: A Reply to Dean Sullivan*, 90 CAL. L. REV. 819 (2002).

Contrast *Nguyen v. INS*,⁹⁴⁴ where a narrow majority of the Court upheld a requirement that children born of American fathers and foreign mothers provide affirmative evidence of paternity not required of children with an American mother and foreign father. Applying the *Craig* formulation, the Court found that the national interests in assuring that a parent-child relationship exists and that a personal relationship accompanies it, were reasonably well served by the sex-based discrimination.⁹⁴⁵ Applying the *Kirchberg-Hogan-Virginia* formulation, dissenting Justice O'Connor argued that the Court was being too generous to the government, reading a more benign purpose to the discrimination than was justified by the record and demanding too little of a fit between the asserted purposes and the gendered means.⁹⁴⁶ *Nguyen* involved a discrimination founded on the sex of the parent and not of the more directly injured child,⁹⁴⁷ which helped the majority Justices to see the discrimination as noninvidious. The Court's disposition also reflects the continued difference between race and sex distinctions in equality jurisprudence. Is there much doubt that the Court would have overturned a law making one's citizenship turn in any way on the race of one's American (or non-American) parent?

The sex discrimination cases illustrate several themes of the Court's post-*Loving* classification fest. On the one hand, to make out its case for strict scrutiny, each identity group claimed that its defining trait was like race and its disadvantages were akin to those suffered by African Americans. On the other hand, none of the groups was situated the way African Americans have been in our history, and the other identity traits operate differently from race in many ways.⁹⁴⁸ As a result, it was never easy for the Justices to figure out what to do about new claims for suspect classification status.

b. Illegitimacy: Intermediate Scrutiny. In *Levy v. Louisiana*,⁹⁴⁹ Professor Norman Dorsen (working with the ACLU) argued that illegitimacy should be a suspect classification, like race, because it has no bearing on fair public policy yet has traditionally been a situs for

944. 533 U.S. 53 (2001).

945. *Id.* at 60-71.

946. *Id.* at 74-97 (O'Connor, J., dissenting).

947. Compare *Lehr v. Robertson*, 463 U.S. 248 (1983) (allowing state to discriminate against putative fathers with no custodial, personal, or financial relations with child), with *Caban v. Mohammed*, 441 U.S. 380 (1979) (barring state from discriminating against unwed father who has established a relationship with the child).

948. Some traits (like noncitizenship, poverty, age, sexual orientation) are not considered "immutable" in the way race and sex are. Discrimination against some groups (such as women, the aged, people with disabilities) owes more to cognitive stereotypes than to emotional prejudice. Unlike people of color, women are a majority of the population; aged people are a big minority, and a status to which we all aspire.

949. 391 U.S. 68 (1968).

prejudice-based legislation severely disadvantaging nonmarital children.⁹⁵⁰ Professor Harry Krause (working with the Inc. Fund) developed the further argument that discrimination based on illegitimacy “covertly discriminates on the basis of race,” because “it operates far more severely upon Negroes as a class than it does upon whites.”⁹⁵¹ The facts of the case made *Levy* an easy decision: the state barred nonmarital children from suing in tort for the wrongful deaths of their natural parents. At conference, Chief Justice Warren could not see “any interest” the state would have in such a policy, other than spite or prejudice, and all but Justices Black and Harlan went along with a decision invalidating the discrimination as irrational.⁹⁵²

Levy was not clear as to its level of scrutiny, and for the next twenty years the Court heard one case after another before ruling, in 1988, that illegitimacy-based classifications are subject to an intermediate level of scrutiny.⁹⁵³ Even if it is rational for the state to encourage adults to have children only in a marital relationship, it struck the Justices as unfair to pursue any kind of punitive policy at the expense of children.⁹⁵⁴ Thus, the Court has struck down most laws denying nonmarital children the same basic rights as those accorded marital children,⁹⁵⁵ but has upheld laws requiring such children to establish their biological relationship with their parents through a formal process.⁹⁵⁶ The naturalization discrimination adjudicated in *Nguyen* was a recent, and gendered, example of this kind of allowance.

950. See Brief for Appellant at 6-8, *Levy v. Louisiana*, 341 U.S. 68 (1968) (1967 Term, No. 508); see also Harry D. Krause, *Equal Protection for the Illegitimate*, 65 MICH. L. REV. 477 (1967).

951. Motion for Leave to File Brief Amicus Curiae and Accompanying Brief Amicus Curiae Inc. Fund at 18, *Levy* (1967 Term, No. 508).

952. Brennan Conference Notes for *Levy*, in Brennan Papers, *supra* note 129, Box I: 161, Folder 1. Justice Black agreed that this was “bad state policy” but could not say it was entirely irrational in light of its having been an acceptable classification “for generations.” *Id.*

953. *Clark v. Jeter*, 486 U.S. 456 (1988). *Contrast Mathews v. Lucas*, 427 U.S. 495 (1976) (rejecting strict scrutiny for illegitimacy classifications and upholding federal policy of denying survivorship benefits to many nonmarital children).

954. See *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972). Notice that the Justices viewed this as “unfair” and not wholly “irrational,” for it is plausible that stigmatizing children born outside of marriage would influence some adults to formalize their relationship before the children’s births. Since illegitimacy statutes have fallen out of vogue, much larger numbers of children are in fact born outside of marriage.

955. See *Trimble v. Gordon*, 430 U.S. 762 (1977) (holding that state may not categorically deny inheritance rights to nonmarital children); *Gomez v. Perez*, 409 U.S. 535 (1973) (holding that state may not deny nonmarital children child support rights).

956. *E.g.*, *Lalli v. Lalli*, 439 U.S. 259 (1978) (holding that state may require nonmarital children to be adjudged children of deceased in order to qualify for intestate inheritance rights).

c. *Wealth: Rational Basis?* Like illegitimacy, poverty could be analogized to race in that it strikes many people as an unfair basis for apportioning state benefits and obligations and has been severely stigmatized in our capitalist society. Also, the group afflicted by poverty contains a disproportionate number of racial minorities. The ACLU and many reformist lawyers objected to legal fees that fenced poor people off from government processes. The lawyers had many successes. The Warren Court ruled that poor people did not have to pay state fees required for pursuing felony appeals in *Griffin v. Illinois*⁹⁵⁷ and that poll taxes were invalid (for everyone) in *Harper v. Virginia Board of Elections*.⁹⁵⁸ The Burger Court ruled that the state could not constitutionally deny indigent married couples a free forum for divorce.⁹⁵⁹ In the 1960s, people on welfare and their allies coalesced into a (nascent) social movement, whose attorneys argued from *Griffin* and *Harper* that wealth is a suspect classification.⁹⁶⁰ The California Supreme Court agreed with this interpretation of the Equal Protection Clause in 1971,⁹⁶¹ but the U.S. Supreme Court went another way in three decisions handed down in 1973, the chief of which was *San Antonio Independent School District v. Rodriguez*.⁹⁶²

The plaintiffs, Mexican-American parents challenging the inequality in state-funded public schools, argued that wealth is a suspect classification requiring strict scrutiny, at least where a fundamental right like education is involved.⁹⁶³ Justice Powell's opinion for the Court held that the challenged scheme of public funding did not clearly discriminate against all poor families and, if it did, discriminated only relatively and not absolutely.⁹⁶⁴ This revealed a general problem with viewing wealth as a suspect classification: rather than being formally

957. 351 U.S. 12 (1956); accord *Mayer v. Chicago*, 404 U.S. 189 (1971) (extending the *Griffin* rule to appeals of misdemeanor convictions).

958. 383 U.S. 663 (1966). "Lines drawn on the basis of wealth or property, like those of race, are traditionally disfavored." *Id.* at 668 (internal citations omitted).

959. Justice Harlan's opinion for the Court in *Boddie v. Connecticut*, 401 U.S. 371 (1971), invoked a substantive due process right to marry, in contrast to the equal protection analysis of several concurring Justices. See *id.* at 386 (Brennan, J., concurring in part); *id.* at 383 (Douglas, J., concurring in the judgment); see also *United States v. Kras*, 409 U.S. 434 (1973) (limiting *Boddie* to the fundamental-right-of-marriage context).

960. See ELIZABETH BUSSIERE, (DIS)ENTITLING THE POOR: THE WARREN COURT, WELFARE RIGHTS, AND THE AMERICAN POLITICAL TRADITION (1997); MARTHA F. DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960-1973 (1993); R. SHEP MELNICK, BETWEEN THE LINES: INTERPRETING WELFARE RIGHTS (1994).

961. *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971).

962. 411 U.S. 1 (1973); see also *Kras*, 409 U.S. 434 (upholding bankruptcy law's minimal fee scheme even though the plaintiff was too poor to go bankrupt); *Ortwein v. Schwab*, 410 U.S. 656 (1973) (per curiam) (upholding fees for civil appeals, distinguishing *Griffin*).

963. Brief for Appellees at 38-44, *Rodriguez* (No. 71-1332).

964. *Rodriguez*, 411 U.S. at 18-29.

excluded, as people of color and women have been, from voting and other public activities, poor people have been functionally unable to take advantage of activities that cost money. Powell was suggesting that wealth would be an unwieldy mode of equal protection analysis.⁹⁶⁵ Since 1973, the Supreme Court has been reluctant to invalidate fee schemes on the ground that they deploy a suspect classification. As we shall see below, however, fee schemes remain vulnerable if they deny poor people access to fundamental legal rights and opportunities.

d. Age: Rational Basis. Older Americans engaged in their own social and political activism in the 1960s. The Age Discrimination in Employment Act of 1967, for example, protected people over age forty from workplace discrimination. In the 1970s, gray power activists turned to constitutional litigation. The American Association of Retired Persons and other elder-law groups challenged a mandatory retirement rule for police officers in *Massachusetts Board of Retirement v. Murgia*.⁹⁶⁶ The challengers were able to show that the bright-line rule was substantially overinclusive, dismissing many officers well able to discharge their physical duties, and somewhat underinclusive, allowing many physically less able people to serve. Under any kind of heightened scrutiny, the rule would have been vulnerable, but the Court ruled that ordinary rational basis scrutiny must apply to age-based classifications. The reasoning was, essentially, that age bore none of the distinctive features of race as a classification requiring heightened judicial attention. Thus, age is often relevant to legitimate state policy, and the elderly “have not experienced ‘a history of purposeful unequal treatment’ or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities.”⁹⁶⁷ Also, because old age “marks a stage that each of us will reach if we live out our normal span,” the political process has been attentive to the interests of the elderly.⁹⁶⁸

e. Disability: Rational Basis with Bite? Like the other IBSMs discussed in this paper, the disability rights movement engaged in an intense politics of recognition urging legislatures and courts to revoke disability-based exclusions.⁹⁶⁹ Their politics scored major legislative

965. Much less cogently, Powell added that the classification had “none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.” *Id.* at 28; *cf. id.* at 70 (Marshall, J., dissenting) (sustained critique of Court’s position).

966. 427 U.S. 307 (1976) (per curiam).

967. *Id.* at 313.

968. *Id.* at 313-14.

969. See generally RICHARD K. SCOTCH, FROM GOOD WILL TO CIVIL RIGHTS: TRANSFORMING FEDERAL DISABILITY POLICY (2d ed. 2001) (chronicling passage and implementation of the Rehabilitation Act and mobilization of disability rights movement that

and administrative successes in the 1970s, and lawyers for the disabled (like other social movement attorneys before them) also sought constitutional recognition of their special status. In *Cleburne v. Cleburne Living Center*,⁹⁷⁰ disability rights lawyers challenged a municipal zoning law which discriminated against a group home for disabled people. The lawyers conceded that mental disability is sometimes a legitimate basis for state policy decisions but argued that this trait had traditionally been deployed in a stigmatizing way to exclude disabled people from a wide array of state benefits, on the basis of prejudice and stereotypes.⁹⁷¹ The Reagan Administration intervened to oppose this claim, on the ground that “unlike members of racial minorities, mentally retarded individuals are different from others in respect to their needs and capacities.”⁹⁷² At conference, Justice Brennan laid out a strong case for strict scrutiny: like race, disability is an immutable trait that has frequently been the basis for denying basic civil rights; like people of color in the 1940s and 1950s, disabled people, he maintained were not politically strong enough to overturn all of the unfair legal discriminations.⁹⁷³ Justice White argued against creating another suspect classification for the reasons suggested by the Solicitor General. Chief Justice Burger opined that the “retarded” were “entitled to special attention but not heightened scrutiny.” Justice Stevens felt that there was not even a rational basis for the ordinance. The Court split evenly (4-4) on the merits of the claim and ordered reargument so that ailing Justice Powell could participate. On reargument, Powell was “hesitant” to create a new suspect classification, a process he had “never favored” (*Rodriguez*), but he was willing to find the ordinance invalid on rational basis grounds. And so went the Court.

Justice White’s opinion for the Court in *Cleburne* first held that mental disability was not a suspect classification and so did not trigger strict scrutiny, for three reasons: the “mentally retarded” are “differ-

brought it about); JOSEPH P. SHAPIRO, *NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT* (1993) (providing excellent overview of the “political awakening” and mobilization of people with disabilities in the late twentieth century); JONATHAN M. YOUNG, *NATIONAL COUNCIL ON DISABILITY, EQUAL OPPORTUNITY: THE MAKING OF THE AMERICANS WITH DISABILITIES ACT* (1997) (comprehensive account of the efforts leading to passage of the ADA).

970. 473 U.S. 432 (1985).

971. Brief of Amicus Curiae American Association on Mental Deficiency [and six other disability rights groups], *Cleburne* (No. 84-468); Brief of Amicus Curiae Association for Retarded Citizens/USA [and twelve other disability rights groups] at 21-25 (app. A), *Cleburne* (No. 84-468) (compendium of laws segregating or excluding mentally disabled people in each of the fifty states and the District of Columbia.).

972. Brief of Amicus Curiae United States Supporting Reversal at 8, *Cleburne* (No. 84-468).

973. See Brennan Conference Notes for *Cleburne*, in Brennan Papers, *supra* note 129, Box. I: 662, Folder 3 (notes for both conferences in *Cleburne*).

ent, immutably so, in relevant respects” having to do with their reduced mental capacities;⁹⁷⁴ since 1970, “lawmakers have been addressing their difficulties in a manner that belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary”;⁹⁷⁵ if mental disability were a suspect classification, then it would be hard not to recognize other groups as similarly protected, namely, “the aging, the [physically] disabled, the mentally ill, and the infirm.”⁹⁷⁶ In dissent, Justice Marshall objected to the first two rationales: like alienage (a suspect classification), gender (quasi-suspect), and illegitimacy (on its way to quasi-suspect), mental disability is sometimes relevant to legitimate policymaking, but often it is not, and the very point of heightened scrutiny is to sort out the two; as women had learned, recent legislative solicitude had followed centuries of bad attitudes and has done little to erase vicious prejudices and stereotypes that persist at the local level.⁹⁷⁷ The Court had no cogent response to these concerns — except to apply the rational basis test with the bite of heightened scrutiny (or perhaps “special attention,” as the Chief Justice had suggested in conference). The city’s justification for refusing to allow a group home of mentally disabled persons was the negative attitudes and fears of neighbors. The Court unanimously rejected this as an irrational justification. “ ‘Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.’ ”⁹⁷⁸

The review in *Cleburne* was not nearly as forgiving as standard rational basis review. Had the zoning regulation only involved a business that wanted to open up in the neighborhood, the concerns of fearful neighbors would have been enough to satisfy any judge. Clearly, the Justices were responding to the dreadful history of invidious discrimination and the survival of stereotypes about and prejudice against disabled people in their tougher look at the local decision. On the other

974. *Cleburne*, 473 U.S. at 442.

975. *Id.* at 442-47 (noting the Rehabilitation Act of 1973, Education of the Handicapped Act, and other laws designed to protect the mentally disabled from ongoing discrimination).

976. *Id.* at 446.

977. *Id.* at 468-70 (Marshall, J., concurring in part and in the judgment).

978. *Id.* at 448 (quoting *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)); see also *Cleburne*, 473 U.S. at 451-55 (Stevens, J., concurring) (arguing that rational basis, properly conceived as involving a sliding scale, cannot abide by this justification); *id.* at 455-56 (Marshall, J., dissenting) (contending that heightened scrutiny is a more appropriate standard and that, under it, this justification was insufficient). The Court also rejected the city’s other justifications, based on fears that local teens would harass the group home persons, that the home was on a flood plain, and that too many people would live in the home, essentially as pretexts that would not have been raised had the home been for non-disabled persons. See *id.* at 449-50.

hand, the Court has not applied *Cleburne* to strike down a disability-based classification in any case since 1985.⁹⁷⁹

f. Sexual Orientation: Rational Basis with Bite? In 1960, Frank Kameny's petition for Supreme Court review argued that anti-homosexual policies "constitute a discrimination no less illegal and no less odious than discrimination based upon religious or racial grounds."⁹⁸⁰ The ACLU's Norman Dorsen revived that argument in 1970, urging the Court to recognize that sexual orientation discriminations were problematic because they were based upon irrational prejudices and stereotypes and unfairly harmed many decent people.⁹⁸¹ The Burger Court denied certiorari in Dorsen's cases, and the issue of the proper equal protection standard for scrutiny of sexual orientation discrimination went into constitutional hibernation for more than a decade, as the gay rights movement focused on issues of privacy and free speech.

The heightened scrutiny claim resurfaced in the appeal of Marjorie Rowland, a guidance counselor allegedly discharged because of a confidential conversation she had with her secretary and the assistant principal about her bisexuality. Although her counsel did not clearly argue for strict scrutiny on appeal, Justice Brennan took up the matter as a personal crusade; joined only by Justice Marshall, he wrote an impassioned dissent from the Court's denial of certiorari.⁹⁸² Brennan argued that sexual orientation is a suspect classification, because gay people have been "the object of pernicious and sustained hostility" and state discrimination, based upon prejudice and not rational public policy.⁹⁸³ Brennan's goal was to stimulate judicial attention to this issue, but most of that attention occurred in challenges to the military's exclusion of gay people. Recall the debate between Judges Norris and Reinhardt in *Watkins v. United States Army*.⁹⁸⁴ Ruling that

979. See *Heller v. Doe*, 509 U.S. 312 (1993) (rejecting equal protection attack on law making it easier to commit "mentally retarded" people to hospitals than "mentally ill" persons).

980. Brief for Petitioner at 56, *Kameny v. Brucker*, 365 U.S. 843 (1961) (1960 Term, No. 676).

981. Brief for Petitioner at 6-9, *Schlegel v. United States*, 397 U.S. 1039 (1970) (1969 Term, No. 1257) (appealing 416 F.2d 1372 (Ct. Cl. 1969)); Brief for Petitioner at 5, *Adams v. Laird*, 397 U.S. 1039 (1970) (1969 Term, No. 1258) (appealing 420 F.2d 230 (D.C. Cir. 1969)).

982. *Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009 (1985) (Brennan, J., dissenting from the denial of certiorari). Cf. Petition for Writ of Certiorari at 19-24, *Rowland* (No. 84-532) (arguing that Rowland's discharge was unconstitutional whatever standard was applied).

983. *Rowland*, 470 U.S. at 1014; see also Kenneth Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980). See generally Symposium on Sexual Preference and Gender Identity, 30 HASTINGS L.J. 799-1181 (1979) (especially Rivera, *supra* note 552).

984. 847 F.2d 1329 (9th Cir. 1988), *vacated en banc*, 875 F.2d 699 (9th Cir. 1989) (discussed *supra* Section I.C.3.a).

the army's antigay policy violated the Fifth Amendment, Norris drew from the Court's equal protection precedents three criteria supporting heightened scrutiny in the race and sex cases: (1) a history of purposeful trait-based discrimination by the state; (2) gross unfairness of discrimination because (a) the trait is generally not relevant to a person's ability to contribute to social projects, (b) the discrimination imposes unique disabilities on a class of productive people, or (c) the trait is immutable or very hard to change; and (3) the inability of the stigmatized group to obtain political redress for the discrimination.⁹⁸⁵ The government scarcely disputed that antigay discrimination met most of the criteria, and Norris ruled that sexual orientation was a suspect classification — notwithstanding *Hardwick's* suggestion that lesbian people can be imprisoned for engaging in private, consensual “homosexual sodomy.”⁹⁸⁶

Hardwick, in fact, pushed most gay rights litigation into state courts. A number of state appellate courts have ruled that sexual orientation is a suspect classification under their state constitutions, given the irrelevancy of sexual orientation to legitimate state policy and the tradition of prejudice-driven antigay laws in this country.⁹⁸⁷ The U.S. Supreme Court has remained silent as to the level of scrutiny to be applied to sexuality traits. In contrast to *Cleburne*, where the Court explicitly rejected heightened scrutiny for disability classifications before striking down a local zoning decision, *Romer v. Evans* left open the level-of-scrutiny question when it struck down the state antigay constitutional amendment. *Evans* offers an opportunity for reflection on the Court's experience with its classification-based tiers of judicial review.

The briefs in *Evans* reflected three kinds of factors the Court has considered in determining level of scrutiny: (1) the extent to which the discriminatory classification is relevant to rational public policy; (2) the history of prejudice and disadvantage of the class stigmatized by

985. *Id.* at 1345-48 (developing criteria in text and applying them to conclude that sexual orientation ought to be a suspect classification). The Canadian Supreme Court has reached a similar conclusion under its Charter. See *Vriend v. Alberta*, [1998] 156 D.L.R.4th 385, 387.

986. That the legitimacy of sodomy laws validated antigay discrimination was not only the conclusion reached by Judge Reinhardt in *Watkins*, but also by the large majority of appellate judges in the military exclusion cases. *E.g.*, *Steffan v. Perry*, 41 F.3d 677 (D.C. Cir. 1994) (deferring to Navy's presumption that a gay cadet will have a propensity to engage in forbidden sodomy); *Dronenberg v. Zech*, 741 F.2d 1388 (D.C. Cir. 1984) (Bork, J.) (anticipating *Hardwick's* holding, its precise rationale, and [eerily] some of the majority's language).

987. For state court decisions announcing strict scrutiny for sexual orientation classifications, see *Baehr v. Miike*, 994 P.2d 566 (Haw. 1999) (summary disposition); *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992); *Tanner v. Oregon Health Scis. Univ.*, 971 P.2d 435 (Or. App. 1998); see also *Baker v. State*, 744 A.2d 864 (Vt. 1999) (applying rational basis with a lot of bite to sexual orientation discrimination).

the trait in suit; and (3) the extent to which the current political process can be expected to avoid or even rectify the first two problems. These three considerations map onto three theories about what the Equal Protection Clause is supposed to be enforcing: (1) the *rationality* principle, whereby laws are supposed to be public-regarding rather than private rent-seeking; (2) the *anti-subordination* policy, whereby the state ought not contribute to the social oppression of a worthy class of people; and/or (3) the *representation-reinforcement* idea, whereby the Court makes a judgment as to whether the disadvantaged class can rely on the political process to correct irrational laws that hurt them. The Court's implicit assumption has been that the Equal Protection Clause ought to be applied with attention to each of these principles or policies. The first principle has been instinct in the Court's equal protection jurisprudence since the beginning, through the *Plessy* and then *Brown* periods. The second principle was important in the framing of the Equal Protection Clause, but was ignored during the *Plessy* period; civil rights lawyers kept it alive, and lawyers for other IBSMs have given it expanded meaning. The third principle has been a product of the twentieth century, with civil rights lawyers, political theorists, and the Justices themselves giving it shape.

The third principle is complicated by the *paradox of the tiers*: During the period when a minority is truly marginalized politically because society accepts its defining trait as a malignant variation, its members would most benefit from a judicial corrective pluralism — but this is the period when the Court is least likely to respond to their political need.⁹⁸⁸ The Court is the most vulnerable branch and has for institutional reasons almost always been unwilling to extend extraordinary constitutional protections to invalidate laws designed to marginalize the most despised minorities. Once the minority has organized itself as a recognition-seeking IBSM and made some headway persuading popular culture that its defining trait is a tolerable variation (at least), then the Court will be responsive to the group's demands for constitutional equality. But at that point, the IBSM will have gained political clout, a development that might render judicial protection less important for the group, and less compelling from the perspective of a well-functioning political process. The paradox of the tiers explains why the Supreme Court failed to recognize heightened scrutiny for race and sex classifications until the civil rights and women's movements had gained national power, but not so much power that they could eliminate hundreds of blatant and no longer acceptable discriminations. The disability rights movement, in contrast, has been successful in repealing outmoded discriminations and in obtaining

988. See William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term — Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26 (1994) (developing this idea).

legislation protecting its members against many forms of private discrimination — a political success that undermined the movement's petition for heightened scrutiny.⁹⁸⁹

Now that the lesbian rights movement has matured as a national phenomenon, the Court cannot indefinitely avoid the issue of what scrutiny is appropriate for sexual orientation classifications. Recall *Evans's* context: responding to open appeals to antigay stereotypes and prejudice, Colorado voters revoked local ordinances protecting lesbian people against discrimination. If this scenario persists, the Court will be under pressure to follow the state courts in applying heightened scrutiny, because lesbian people have mobilized as a minority no longer willing to accept second-class citizenship, while at the same time antigay prejudice remains politically powerful enough to invite periodic bouts of new antigay lawmaking and to thwart legislative efforts to repeal obsolescent antigay laws and policies.⁹⁹⁰

Evans and the lesbian rights cases also suggest this lesson of *Cleburne*: the usefulness of the tiers has eroded. It is easy to establish a prima facie case for making one's trait a suspect classification in a culture like ours which is cynical about the "rationality" of the legislative process, has generated an ever-increasing array of disadvantaged minority groups, and accepts prejudice as multivocal and proliferate rather than univocal and exceptional. In a judicial culture concerned with efficient management of caseloads, the prospect of recognizing new suspect classifications — and thereby triggering a new generation of cases — is daunting; the burden has always been on the minority group, but *Cleburne* suggests that the burden is a higher one than it was in 1971-76, when the Court recognized alienage, sex, and (informally) illegitimacy as suspect or quasi-suspect. On the other hand, *Cleburne* and *Evans* demonstrate that rational basis scrutiny sometimes has bite; the contrast between *Rostker* and *Hogan* demonstrate that intermediate scrutiny depends on institutional context, among other things; *Fullilove* and *Bakke* demonstrate that even race-based classifications can pass strict scrutiny. This suggests that the Court has

989. Indeed, judges have given the disability community's greatest political success, the ADA, a chilly reception, in part because the law went through too easily, without the kind of well-publicized normative struggle that surrounded the Civil Rights Act, the Voting Rights Act, the Pregnancy Discrimination Act, and other landmark IBSM legislation. Cf. Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 BERKELEY J. EMP. & LAB. L. 19 (2000) (discussing the judicial backlash against the ADA).

990. Under my theory, the old people's movement (and its powerful arm, the AARP) has been too successful to tempt the Court to protect its members against discrimination. The political process is quite generous to the elderly, as *Murgia* noted. The welfare rights movement had the opposite problem: it was never enough of a political success to motivate much constitutional protection. All the current Justices were appointed by presidents who vowed "welfare reform" (that is, reduction in benefits), and the nation's political balance has shifted far away from the agenda of welfare rights activists of the late 1960s and early 1970s.

informally moved away from giving such critical importance to the level of scrutiny and has moved toward a sliding scale approach.⁹⁹¹ Five Justices in *Cleburne* rejected the now-traditional tiers analysis in favor of such an approach.⁹⁹² Before developing the sliding scale idea further, I should like to examine other doctrinal contributions IBSMs have made to equal protection doctrine.

2. *Legislative Motivation and Fundamental Interests: The Equal Protection Sliding Scale*

The Warren Court explicitly recognized a second occasion for equal protection strict scrutiny implicit in earlier precedents: state discrimination in the allocation of “fundamental” rights, primarily voting. IBSMs played a key role in this development because many voting restrictions were legacies of apartheid. In *Harper*, for example, the Court agreed with the ACLU’s challenge to Virginia’s poll tax, which had originally been adopted as part of that state’s program to disenfranchise people of color and poor whites.⁹⁹³ Justice Douglas’s opinion for the Court did not address the ACLU’s argument that the poll tax violated the Fifteenth Amendment because of its racially discriminatory origins and impact but instead treated the “wealth” classification as reason enough for suspicion. Douglas further ruled that “where fundamental rights and liberties are asserted under the Equal Protection Clause,” including the right to vote, “classifications which might invade or restrain them,” perhaps including non-suspect ones, “must be closely scrutinized and carefully confined.”⁹⁹⁴ In the wake of *Harper* and *Loving*, there were two officially accepted routes to heightened scrutiny that guaranteed success for equal protection plaintiffs: the statutory classification is “suspect” or the interest as to which there is claimed discrimination is “fundamental.”⁹⁹⁵ Unad-

991. See Leslie Friedman Goldstein, *Between the Tiers: The New[est] Equal Protection and Bush v. Gore*, 4 U. PA. J. CONST. L. 372, 382 (2002); Peter S. Smith, Note, *The Demise of Three-Tier Review: Has the United States Supreme Court Adopted a “Sliding Scale” Approach Toward Equal Protection Jurisprudence?*, J. CONTEMP. L. 475 (1997). See generally Toni M. Massaro, *Gay Rights, Thick and Thin*, 49 STAN. L. REV. 45 (1996) (arguing the advantages of a genuine rational basis review for IBSMs generally and lesbian and gay people specifically).

992. Specifically, concurring Justice Stevens and Chief Justice Burger as well as dissenting Justices Marshall, Brennan, and Blackmun.

993. Brief for Appellants at 19-22, *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966) (1965 Term, No. 48).

994. *Harper*, 383 U.S. at 670. Contrast *Lassiter v. Northhampton County Bd. of Elections*, 360 U.S. 45 (1960) (in absence of ACLU or NAACP involvement in the case, Court unanimously upheld literacy requirement for voting).

995. See *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 625-30 (1969). The Burger Court applied *Loving* along these lines. Although *Loving*’s equal protection holding rested

dressed but clearly open after *Harper* was a third route being pressed by the ACLU and the NAACP: heightened scrutiny is also appropriate for state policies having a strongly negative and disparate impact on a traditionally subordinated class, especially racial minorities.

Just as this potentially expansive structure emerged, the Court was reconstituted by Richard Nixon. The Nixon Justices sounded cautionary themes of separation of powers, federalism, and institutional competence. Expansive application of equality jurisprudence would turn the Court into a “super-legislature,” trumping legitimate state policy choices and embroiling the judiciary in polycentric issues it could not adequately handle. Accepting the nation’s political consensus against apartheid and any form of race discrimination, the new Justices recognized *Loving* as a polestar, but one beyond which they were reluctant to venture — except in deference to their own (and their class’s) opposition to state-imposed duties of motherhood and traditional gender roles (*Roe* and *Craig*). Authored by the Court’s most rigorous lawyer, *Rodriguez* (the school financing case) epitomized the new majority view.

Justice Powell’s opinion opened with an essay on the inappropriateness of judicial intervention into the complicated budgetary politics of education finance.⁹⁹⁶ As Justice Blackmun said in conference, “if we affirm, federal courts will destroy the state systems; we cannot legislate equality in education.”⁹⁹⁷ For the Nixon Justices, the many difficulties in implementing *Brown* by federal injunctions suggested that this was an exercise the Court cannot often initiate. If the Court were to intervene, it should do so only when the disadvantaged class has been “subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.”⁹⁹⁸

only on the suspect classification (race), Chief Justice Warren’s opinion also recognized a fundamental right to marry. *Loving v. Virginia*, 388 U.S. 1, 12 (1967). The Burger Court in *Zablocki v. Redhail*, 434 U.S. 374 (1978), applied strict scrutiny to strike down a law barring remarriage by deadbeat spouses, not because the law deployed a suspect classification (being in arrears in one’s obligations owed after termination of prior marriages), but only because the law touched upon people’s fundamental right to marry. See also *Turner v. Safely*, 482 U.S. 78 (1987) (overturning bar to marriage by prisoners).

996. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 56-59 (1973).

997. Douglas Conference Notes for *Rodriguez* (Oct. 17, 1972), in Douglas Papers, *supra* note 192, Container 1575. Justice Powell, who had chaired the school board in Richmond, expounded at length in support of Justice Blackmun; the Chief Justice briefly made a similar point. Justice Rehnquist (alone) argued that the framers of the Fourteenth Amendment would have been comfortable with Texas’s school financing plan. Justice Stewart — the only non-Nixon Justice ultimately in the majority — was an uncertain vote and is not on record as having been concerned about the factors that troubled the Nixon Justices. Accord Brennan Conference Notes for *Rodriguez* (No. 71-1332), in Brennan Papers, *supra* note 129, Box I: 281, Folder 1.

This was the normative background for the entire opinion: the baseline for state allocative decisions is either the market or democratic politics (the legislature), and it requires “extraordinary” justification for the Court to intervene.

Justice Powell applied a careful lawyer’s examination to the state statutory scheme and found no explicitly wealth-based classification in it, a contrast to *Loving*, where the suspect (race-based) classification was on the face of the statute. This part of the opinion expressed the reason Justice Stewart joined the new Brethren.⁹⁹⁹ Even if the plaintiffs could show a wealth-based effect of the system in *Rodriguez*, Powell’s opinion suggested that they would then have to show how “the financing system is *designed* to operate to the peculiar disadvantage of the comparatively poor.”¹⁰⁰⁰ This statement takes on added significance in light of the fact that the plaintiffs and their amici were arguing that the Texas system was subject to heightened scrutiny because it had strong race-based effects; the education deficit assured by the financing inequities fell mostly on latino and black schoolchildren.¹⁰⁰¹ Powell was suggesting that *Loving* was the limit of the Court’s activism: statutes bearing a suspect classification would generally be invalidated, while those only having a big impact on disadvantaged groups would be invalid only if “designed” to hurt minorities.

In greater detail but less cogency, Powell took a restrictive view of fundamental-interest strict scrutiny. Conceding that *Brown* had recognized the foundational importance of public education for both citizens and our democracy, Powell observed that “ ‘virtually every state statute affects important rights.’ ”¹⁰⁰² To protect all these important rights would render the Court a “super-legislature,” making or re-

998. *Rodriguez*, 411 U.S. at 28. Of course, that claim has been forcefully made for poor people, but it was not developed in the *Rodriguez* record, at least as read by Justice Powell. *But see Rodriguez*, 411 U.S. at 121-24 (Marshall, J., dissenting).

999. Ironically, Stewart was open to finding wealth to be a suspect classification, see Memorandum from Justice Stewart to Justice Powell (Feb. 8, 1973), in Brennan Papers, *supra* note 129, Box I: 296, Folder 9, but believed there was no “discrete class of people invidiously discriminated against.” For him, “ ‘the poor,’ ‘pauper’ are too general” to capture the classificatory scheme challenged in the case. *Id.* Box I: 281, Folder 1.

1000. *Rodriguez*, 411 U.S. at 26. Powell cited authorities suggesting that facially neutral laws could not be challenged under the suspect classification wing unless the challengers could show that the laws were motivated by animus against vulnerable classes of citizens. *See id.* at 27 n.62 (citing *Jefferson v. Hackney*, 406 U.S. 535, 547-49 (1972); John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1258-59 (1970)). I discuss *Hackney*, which is probably the leading case, in Section I.A.3.b.

1001. This was an ancillary point in the Brief for Appellees at 16-17, *Rodriguez* (No. 71-1332), but was the lead argument in Brief of Amici Curiae ACLU et al. at 14-23, *Rodriguez* (No. 71-1332), and Brief of Amicus Curiae NAACP Legal Defense Fund and Educational Fund, Inc. at 3-9, *Rodriguez* (No. 71-1332).

1002. *Rodriguez*, 411 U.S. at 30-31 (quoting *Shapiro v. Thompson*, 394 U.S. 618, 661 (1969) (Harlan, J., dissenting)).

viewing countless political decisions; to protect only some of them required a neutral principle rather than a utilitarian (and subjective) assessment of “how important” each right was. Powell’s neutral principle was “whether there is a right to education explicitly or implicitly guaranteed by the Constitution.”¹⁰⁰³ Whereas the rights to vote and privacy are implicitly guaranteed by the Constitution, the right to an education is not, he claimed. But, as Justice Marshall argued in dissent, the reason voting and privacy have been viewed as implicit in the Constitution is that they are foundations for the exercise of other rights, such as speech and participation — which is how *Brown* characterized education.¹⁰⁰⁴ Implicit in his dissent was the proposition that education, voting, and privacy constitute a trilogy of rights strongly affecting women and minorities, which (along with jury service) have been the central policy foci for liberationist movements of the twentieth century.

Rodriguez was a doctrinal harbinger in many respects. Consistent with Powell’s opinion, the Court after 1973 promoted only two classifications (sex and illegitimacy, in both cases following implications of pre-1973 cases) to those formally entitled to heightened scrutiny; applied rational basis scrutiny to laws with disparate effects on racial minorities or women, except on the rare occasion that challengers could show that the laws were inspired by animus;¹⁰⁰⁵ and refused to create new fundamental interests whose discriminatory allocation would justify strict scrutiny. The actual operation of this doctrinal consensus, however, defies simple characterization. Ironically, its main effect is that the Court committed itself to considering evidence that social movement litigators had long been exploring in their briefs to the Court: What ideology motivated policymakers when they adopted a challenged discrimination?¹⁰⁰⁶ Before 1971, the rule was that such ar-

1003. *Rodriguez*, 411 U.S. at 33.

1004. *Id.* at 110-17, (Marshall, J., dissenting) (quoting, *inter alia*, *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)). *Rodriguez* has hardly ended school finance litigation, which has for the past 30 years been extensively litigated in state courts pursuant to state constitutional guarantees of a right to an efficient education. See James Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249 (1999).

1005. See *Washington v. Davis*, 426 U.S. 229 (1976), and its progeny, analyzed in Section I.A.3.b.

1006. Thus, civil rights attorneys had long maintained that race-based classifications were “drawn with great ingenuity with a view to placing the negro citizens . . . in as inferior a position as possible” and thereby seeking to establish “a permanent superiority for the white race.” Brief for the Plaintiff in Error at 31-33, *Buchanan v. Warley*, 245 U.S. 60 (1917) (1915 Term, No. 33). Feminist counsel maintained that most sex-based rules were grounded upon a desire to reinforce “archaic stereotypes” about men and women. Gay rights litigators argued that sexuality-based rules, such as employment exclusions, were based on the same “odious” prejudice as race-based exclusions. See Brief for Petitioner, *Kameny v. Brucker*, 365 U.S. 843 (1961) (1960 Term, No. 676).

guments were not strictly admissible as a basis for challenging legislation.¹⁰⁰⁷ After *Rodriguez* and its progeny, such arguments were not only required in disparate impact cases, a requirement confirmed in *Washington v. Davis*, but encouraged in disparate treatment cases, an encouragement taken up in the affirmative action cases that were then reaching the Court (discussed below).

Rodriguez was the Magna Carta of a conservative pragmatic jurisprudence in race cases, for it reformulated anti-discrimination law in a way that would minimize its costs to (white) Middle America. By drawing the line with *Loving*, the Court was reaffirming the nation's symbolic distance from formal apartheid even as the Court strongly discouraged constitutional litigation that could challenge racial discrimination that was more indirect. So long as racial segregation or exclusion was ostensibly the product of private choices and of state policies deploying non-race criteria, it was immune from constitutional challenge because of the *Hackney-Rodriguez-Davis* rule that plaintiffs had to show "discriminatory intent."¹⁰⁰⁸ Nor was the Court prepared to add new classifications (like poverty or wealth) to those requiring heightened scrutiny. Finally, although the importance of the deprivation could also trigger heightened scrutiny, the Court was closing off any expansion of that avenue toward strict scrutiny as well. The effect of the *Rodriguez* package of doctrines was that state allocative and developmental policies were protected from constitutional challenge, no matter how badly they bore on people of color.

Another way of understanding *Rodriguez* and its companion cases is through the lens of principle: the moderate politics of preservation privileged rationality as the core principle of the Equal Protection Clause and deemphasized anti-subordination and representation-reinforcement except as weakly understood from a majoritarian per-

1007. See *Palmer v. Thompson*, 403 U.S. 217, 224-26 (1971) (municipal action closing public swimming pool cannot be held to violate equal protection "because of the motivations of the men who voted for it") (following *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810)). Justice Black's opinion conceded that the Court had referred to racist motives in *Griffin v. County School Board*, 377 U.S. 218 (1964), and *Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960), but distinguished those cases (rather unpersuasively, according to Justice White, dissenting in *Palmer*, 403 U.S. at 263-67).

1008. There is an impressive literature attacking the problems with the intent requirement for disparate impact cases. E.g., Theodore Eisenberg & Sheri Lynn Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?*, 76 CORNELL L. REV. 1151, 1153 (1991) (demonstrating empirically that the Court's intent test has discouraged constitutional challenges to facially neutral policies); Barbara J. Flagg, "Was Blind, But Now I See": *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 958 (1993) (arguing that intent requirement is "transparently white," which reflects a failure by whites "to scrutinize the whiteness of facially neutral norms"); Lawrence, *supra* note 185 (criticizing the Court's approach for its inability to deal constructively with "unconscious racism"); Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279 (1997) (similar).

spective. Against Justice Powell's classic synthesis of the moderate politics of preservation, Justice Marshall's dissenting opinion stood as the classic synthesis of a pragmatic politics of minority recognition. At the level of principle, Marshall reminded the Court that the greatness of *Brown* did not rest on the rationality principle, but rather on its embodiment of the anti-subordination and representation-reinforcement goals of equal protection. At the level of doctrine, the dissenting opinion objected to the majority's "rigidified approach to equal protection analysis." Indeed, Marshall maintained, the two-tier structure of equal protection law did not really describe what the Court had been doing in the 1960s and early 1970s. The cases suggested a "spectrum of standards," whereby "the degree of care with which the Court will scrutinize particular classifications [depends] on the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn."¹⁰⁰⁹ Although not drawn from briefs filed by the parties, as most doctrinal innovations discussed in this Article have been, Marshall's synthesis drew from his decades-long work as a litigator for the civil rights movement. In my view, it is one of the greatest contributions of IBSMs to constitutional doctrine in the twentieth century. Marshall's theory brings a great measure of coherence to equal protection law, not only as it had evolved before 1973, but also as it has unfolded since then.

In the spirit of Dan Ortiz's recharacterization of the role of intent in equal protection law,¹⁰¹⁰ I should like to frame Marshall's approach in the following way. Almost all laws have arguable purposes that can be expressed in terms of the public interest and rationality, but the statutory criteria are usually both overinclusive (regulating activities not needed to meet the statute's rational goals) and underinclusive (failing to regulate some activities inconsistent with the goals). Where the state is regulating the market and the classification is a purely economic one, courts will not be interested in the actual, typically messy, motivations of the legislature and will simply attribute plausible public interests to such laws; additionally, they will tolerate a great deal of over- and underinclusion in the choice of statutory criteria.¹⁰¹¹ In con-

1009. *Rodriguez*, 411 U.S. at 99 (Marshall, J., dissenting); see also *Dandridge v. Williams*, 397 U.S. 471, 520-21 (1970) (Marshall, J., dissenting) (similar sliding-scale approach, quoted in the *Rodriguez* dissent).

1010. Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105 (1989); see also Julie A. Nice, *The Emerging Third Strand in Equal Protection Jurisprudence: Recognizing the Co-Constitutive Nature of Rights and Classes*, 99 U. ILL. L. REV. 1209 (1999).

1011. Thus, the Court has not been inclined to invalidate economic legislation that is clearly the product of special interest rent-seeking at the public's expense. *E.g.*, *United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166 (1980).

trast, where important constitutional rights are involved and the classification one that has been found consistently invidious, courts will presume irrational motives (prejudice and stereotypes) to the legislature and may strike down the law on that ground alone. This was the holding of race cases such as *Guinn* (voting) and *Loving* (marriage) and gender cases such as *Taylor* (jury service). A more recent example is *Palmore v. Sidoti*,¹⁰¹² where the Court ruled it per se inadmissible for state courts to consider race as a basis for making decisions regarding child custody. Even if the state were able to show that rational motives inspired a rule like that in *Palmore*, the Court would not tolerate the least amount of over- or underinclusion when such a suspicious criterion acts to deprive people of fundamental rights.

The foregoing cases, including the use of suspect classifications to allocate fundamental rights, are so easy that they have dried up; legislatures themselves have repealed virtually all such statutes. Only a little harder are cases in which a suspicious classification deprives people of important but not constitutionally fundamental interests such as education. After *Brown*, these cases have also dried up — except for affirmative action cases such as *Bakke*. In such cases, the burden is on the state to prove that its motivation is not grounded on prejudice or stereotypes; even if the state carries that burden, the Court will not tolerate much over- or underinclusion, which doomed the program in *Bakke*. This is a problem with state justifications grounded on diversity or remediation: the state must show that the goals or quotas are not only sufficient to solve the problem but also necessary. Marshall's model would suggest that the Court would be more forgiving in cases (like *Bakke*) involving graduate schools, which hardly bear the fundamental features that *Brown* extolled for primary and secondary schools. And when only economic rights are involved, as in *Fullilove*, *Metro Broadcasting*, and *Adarand*, it ought to be possible for benignly motivated affirmative action programs to survive, as they did in the first two cases and may yet in the third.

Hard cases are those where the state has apportioned rights using criteria that have a disparate racial impact. The doctrine is that challengers have to show race-based motivations, and the leading cases seem to require but-for causation: but for racial prejudice, the policy would not have been adopted or perpetuated.¹⁰¹³ The Court's practice has been more nuanced, however. Where the rights are constitution-

1012. 466 U.S. 429 (1984).

1013. See *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256 (1979); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 269, 270 n.21 (1977) (following Paul Brest, Palmer v. Thompson: *An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95); see also Paul Brest, *Reflections on Motive Review*, 15 SAN DIEGO L. REV. 1141 (1978). But see Foster, *supra* note 378, for a more complex view of the "doctrine."

ally fundamental, such as voting and jury service, the Court has actually engaged in a serious investigation into motivation. Thus, *Batson* and *J.E.B.* require prosecutors (and now other counsel as well) to provide a neutral reason for a pattern of discriminatory peremptory challenges.¹⁰¹⁴ The voting cases are even more dramatic. *Rogers v. Lodge*¹⁰¹⁵ affirmed a lower court finding of discriminatory intent in maintaining an electoral system that produced no black officeholders. In contrast to the Court's stingy inquiry into legislative motivations in employment and housing cases, the Court in the voting case demanded no direct evidence of racially biased decisionmaking and rested its judgment on indirect evidence stemming from the historical operation of the system. In the racial gerrymandering cases seeking to increase minority representation, the Court inferred discriminatory intent from the "bizarre" shape of majority-minority districts in *Shaw v. Reno*.¹⁰¹⁶ The Court cited any other kind of "persuasive circumstantial evidence" that race was the dominant consideration as its basis for finding discriminatory intent in *Miller v. Johnson*.¹⁰¹⁷

The hardest cases are those where the state has apportioned important but not "fundamental" rights using criteria that are fishy but not among the classifications the Court has recognized as "suspect." A classic case was *Plyler v. Doe*.¹⁰¹⁸ Texas denied public education to children who were not legally admitted into the United States. Chief Justice Burger scrupulously applied existing doctrine to the matter: illegal alienage was surely not a suspect classification, as it served many legitimate state functions; *Rodriguez* had held that education is not a fundamental right; Q.E.D., Texas's exclusionary law was only subject to rational basis analysis, which it passed. But only four Justices joined this logic.¹⁰¹⁹ Five joined Justice Brennan's opinion for the Court, which conceded the doctrinal points but maintained that denying children minimal education because of the actions of their parents (illegal entry) raised red flags under the Equal Protection Clause.¹⁰²⁰ Viewed skeptically, the Texas statute was way over- and underinclusive of its stated objective, discouraging illegal immigration: the penalty would fall on children who had nothing to do with their parents' illegal immi-

1014. See *Ortiz*, *supra* note 1010, at 1119-26; *supra* Section II.A.2.

1015. 458 U.S. 613 (1982); see also *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (essentially inferring discriminatory intent from the obvious race-based effects of redistricting).

1016. 509 U.S. 630 (1993); see Richard Pildes, *Principled Limitations on Racial and Partisan Redistricting*, 106 YALE L.J. 2505 (1997).

1017. 515 U.S. 900, 913 (1995).

1018. 457 U.S. 202 (1982).

1019. *Id.* at 242-54 (Burger, C.J., dissenting).

1020. See *id.* at 218-20 (harm in penalizing children); *id.* at 221-23 (importance of education).

gration, while at the same time doing little to discourage most illegal immigration.¹⁰²¹ *Plyler* reveals the continuing relevance of the anti-subordination and representation-reinforcement goals of the Equal Protection Clause. Even conservative Justices were concerned with penalizing “innocent children,” which seemed vicious,¹⁰²² and with creating a “permanent underclass,” which seemed like a recipe for social disorder and political strife.¹⁰²³ At conference, Justices White and Rehnquist saw the fairness and underclass problems as ones that should be addressed by Congress, but the other Justices — including Chief Justice Burger and Justice O’Connor — were not moved by this concern because of the political powerlessness of such aliens (“wetbacks,” as Rehnquist reportedly termed them in conference).¹⁰²⁴

Until the Supreme Court decides that sexual orientation is a (quasi-)suspect classification, *Romer v. Evans* can be read as analogous to *Plyler v. Doe*. In both cases, the severe consequences for the affected persons (alien children and lesbian people) and the fact of traditional prejudice against such persons raised the stakes of judicial scrutiny. In both cases, the state was asserting legitimate public goals, but the statutory means were disproportionate to the harm and were unlikely to solve the problem.¹⁰²⁵ The big mismatch between ends and means and the severe consequences for the affected persons raised an

1021. That is, the Texas policy would have no effect on aliens who come here without their children or whose children are born here (and hence are American citizens). Its effect on parents with children was speculative at best. Justice Stevens forcefully pressed this argument in conference, as well as the related cost-benefit argument: while Texas would save a little money in the short term, the “countervailing cost to society in not educating children” more than offset it. See Brennan Conference Notes for *Plyler*, in Brennan Papers, *supra* note 129, Box I: 554, Folder 2.

1022. The challengers’ brief centrally argued: “Legislation that visits the ‘wrongs’ of parents on their innocent children in such a drastic manner is deserving of heightened scrutiny.” Appellees’ Brief on the Merits at 24-26, *Plyler* (No. 80-1538). This argument resonated with several Justices, especially Marshall, Blackmun, and Powell. Marshall put it this way: “Kids are not involved in anything illegal — victims of being born. It’s the kids we must focus on and I can’t treat them as ‘illegals.’” Brennan Conference Notes for *Plyler*, in Brennan Papers, *supra* note 129, Box I: 554, Folder 2. Powell: “Hard to think of [a] category more helpless than children of illegal aliens.” *Id.*

1023. See *Plyler*, 457 U.S. at 231 (Blackmun, J., concurring); *id.* at 236 (Powell, J., concurring).

1024. See Brennan Conference Notes for *Plyler*, in Brennan Papers, *supra* note 129, Box I: 554, Folder 2. The Chief Justice observed that Congress was responsive to Texas employers, allowing illegal aliens to work in this country for low wages. *Id.* This feature of the case also troubled Justice O’Connor. *Id.* Justice Rehnquist conceded that this was “an intractable problem in the southwest. Wetbacks or not, question is validity of Texas’ policy choice.” *Id.*

1025. The state interest in *Plyler* was discouraging illegal immigration by adult aliens, but the means focused on innocent children and was probably ineffective. See *supra* note 1015 and accompanying text. The state interest in *Evans* was conservation of scarce enforcement resources for antidiscrimination laws, but the Justices viewed the measure as threatening a range of other government services that gay Coloradans needed and were probably persuaded that the measure solved the scarcity of resources problem.

inference that the democratic process was motivated by animus rather than by rational problem-solving. In neither case was the state able to refute that inference. Indeed, *Evans* is a particularly compelling case, because there was direct evidence of animus. The official ballot materials prepared by the sponsors of the antigay initiative argued that gay people should be denied the "special" protections of antidiscrimination law because they were assertedly "diseased," predatory, selfish, and privileged.¹⁰²⁶ All of these arguments are factually false or too vacuous to be falsified, and hence reflect inaccurate stereotypes about gay people. All of these arguments also fit snugly into classical categories of prejudice-based thinking about gay people and other scapegoated minorities.¹⁰²⁷

A very different kind of equal protection decision, *M.L.B. v. S.L.J.*,¹⁰²⁸ is both explicable and subject to critique according to my understanding of Justice Marshall's sliding scale. The issue was whether the state could insist that M.L.B. pay over \$2000 in fees to prepare a record before she could appeal a judgment stripping her of her parental rights. Three Justices sought to overrule *Griffin v. Illinois*, which required the state to waive fees for poor people appealing their criminal convictions, but a majority reaffirmed that precedent and extended it to include appeals of family relations matters.¹⁰²⁹ As the dissenters pointed out, wealth is not a suspect classification, and there is no constitutional right to appeal civil judgments, but that ought not always be the end of equal protection analysis. What makes *M.L.B.* different from *Plyler* and *Evans*, however, is that there was no inference of animus or suggestion that the legislature was ill-motivated. Instead, the Court simply found the legitimate state interest in saving money outweighed by the mother's fundamental interest in seeking a forum to protect her family relationship. This strikes me as unlike the other equal protection cases, and I would understand the decision the way concurring Justice Kennedy did, as a due process decision ensuring the mother the fairest possible process when her parental rights were at stake.¹⁰³⁰

1026. See Nagel, *supra* note 637, at App. A (reproducing ballot materials prepared by Colorado for Family Values, which sponsored Amendment 2).

1027. Thus, *hysterical prejudice* attributes disease and uncleanness to hated minorities; *obsessional prejudice* views the minorities as threats to one's self and family; *narcissistic prejudice* insists on differentiating the minority from the majority. See ESKRIDGE, GAYLAW, *supra* note 14, at 211 (drawing from ELIZABETH YOUNG-BRUEHL, *THE ANATOMY OF PREJUDICES* (1996)).

1028. 519 U.S. 102 (1996).

1029. Compare *id.* at 129 (Thomas, J., dissenting), with *id.* at 106 (Ginsburg, J., for the Court).

1030. *Id.* at 128 (Kennedy, J., concurring in the judgment) (following *Boddie v. Connecticut*, 401 U.S. 371 (1971) (Harlan, J.) (state cannot prevent indigent couple from divorc-

Table 3 below summarizes the doctrinal features of the sliding scale approach to equal protection law that is suggested (to me) by the Court's experience with IBSM claims in the twentieth century.

TABLE 3
THE SLIDING SCALE: THE COURT'S CONSTRUCTION OF LEGISLATIVE
MOTIVES IN EQUAL PROTECTION CASES

Classification	Ordinary (Allocative) Economic Interests	Important State Benefits and Rights	Fundamental Constitutional Rights
<i>(Quasi-) Suspect Classifications</i>	Presumption of bad legislative motives (<i>Fullilove; Adarand</i>)	Strong presumption of bad legislative motives (<i>Brown</i>)	Conclusive presumption of bad legislative motives (<i>Loving</i>)
<i>Neutral Classifications with Disparate Race/Sex Effects</i>	Presumption against bad legislative motives (<i>Washington v. Davis; Feeney</i>)	Weak presumption against bad legislative motives (<i>Rodriguez</i>)	Open to evidence of bad legislative motives (<i>Rogers v. Lodge</i>)
<i>Fishy but Nonsuspect Classifications</i>	Presumption against bad legislative motives (<i>Kras</i>)	Open to evidence of bad legislative motives (<i>Plyler; Evans</i>)	Presumption of bad legislative motives (<i>Harper</i>)

3. *The Disaggregation of Suspect Classifications and Subordinated Classes*

The interplay among IBSMs, countermovements, and the Justices after *Loving* has at least one final dimension. *Loving* was open to a reading of the Equal Protection Clause that demanded heightened scrutiny solely because the state deployed a suspect classification, even when the deployment did not directly harm a traditionally subordinate minority. The civil rights movement and most feminists in the 1960s resisted such a reading of *Loving*, for it gave short shrift to their anti-subordination understanding of the Fourteenth Amendment.¹⁰³¹ (In-

ing because they cannot afford filing fees; state monopoly on the important rights of civil marriage and divorce requires a particularly open and fair process)).

1031. Thus, civil rights attorneys such as Thurgood Marshall and feminist attorneys such as Dorothy Kenyon and Pauli Murray believed race and sex could not be the basis for state

deed, civil rights and women's movement attorneys followed the anti-subordination principle to disaggregate classification and class in the reverse way: even when the state does not announce a suspect classification, its policy should be subjected to heightened scrutiny if it strongly disadvantages traditionally stigmatized classes.) But the rationality principle seemed to support an approach focusing on unreliable classifications. Moreover, as liberal feminists, critics of affirmative action, and supporters of gay marriage argued in the 1970s, the disaggregation of suspect classifications and stigmatized classes was justified in cases where sex classifications harmed men, race classifications harmed whites, and sex classifications harmed gay people. Consistent with *Loving*, if you viewed the operation of the classifications through the lens of their ideology (racism and sexism) sex-based classifications harming men and gay people reinforce the rigid gender roles that hurt women, and race-based classifications harming whites reinforce stereotypes that hurt people of color. The Court's reception of these various disaggregation arguments teaches us much about the politicization and complexity of current equal protection doctrine.

The classic articulation of this particular synthesis of rationality and anti-subordination jurisprudence, along the lines suggested by *Loving*, has been by liberal feminists. Ruth Bader Ginsburg's briefs maintained that most if not all sex-based *classifications* were unconstitutional, even those discriminating against men, to the extent they reflected an *ideology* of sexism, which has been the deep cause of women's subordination as a *class*. For an example, in *Kahn v. Shevin*,¹⁰³² Ginsburg and the ACLU challenged a state law allowing widows, but not widowers, a small property tax exemption. The allowance was an "invidious discrimination," they argued, because it was based on stereotypes of "a woman left alone by the death of her husband," who is assumed to be destitute, in contrast with the widower, who "is believed to suffer scant financial loss upon the death of his wife."¹⁰³³ Following *Loving*, Ginsburg was very careful to tie this classification-based argument to a class-based one: laws perpetuating outmoded stereotypes of women as dependent on men contribute to women's ongoing inequality, because they encourage Americans to think about women as second-class citizens or as confined to the do-

exclusions, but could be the basis for programs of integration and remediation for past exclusions.

1032. 416 U.S. 351 (1974).

1033. Brief for Appellants at 5, *Kahn v. Shevin*, 416 U.S. 351 (1974) (No. 73-78); *see id.* at 6-8 (showing that many married women work outside the home, and some of them make more than their husbands).

mestic sphere.¹⁰³⁴ The Supreme Court disagreed with Ginsburg's analysis in *Kahn* — upholding the tax law as a permissible even if imperfect remedy for social and state obstacles to women's advancement in the marketplace. But the Court accepted her argument in *Craig v. Boren*, which deployed heightened scrutiny to invalidate a law barring only eighteen to twenty-one-year-old males from buying two percent beer.¹⁰³⁵ Ginsburg continued to press the Court to invalidate sex-based classifications that directly injured men, and the Court usually went along — except in cases where there was evidence that the intended effect of a gendered social security calculation was remedial.¹⁰³⁶

A similar kind of argument was emerging in the race cases, but pressed by the new politics of preservation: when the state engages in “reverse discrimination” in favor of racial minorities, it is deploying a race-based *classification* that perpetuates racist *ideology* that ultimately harms people of color as a *class*. This argument was first made to the Court in *DeFunis*, involving affirmative action in university admissions (Section I.A.3.c). The NAACP responded that “benign” classifications were not like the one in *Loving*, because they sought to remedy past discriminations and were not motivated by the ideology of racism. The challengers, in turn, rearticulated the questionable ideology as “race-consciousness,” rather than just racism: blacks as well as whites suffer when the state acts, even remedially, on the basis of citizens' race.¹⁰³⁷ There was surprisingly little enthusiasm for the challengers' position within the conservative Court. At the *DeFunis* conference, only the Chief Justice spoke in their favor.¹⁰³⁸ Justices Brennan and Powell accepted the institutional deference argument, “that courts have no business limiting in any significant way admissions policies of graduate schools,” and at least two other Justices (White and Marshall) were with them.¹⁰³⁹ Justice Douglas, who passed at conference, ultimately agreed with the challengers on the merits.

1034. *See id.* at 12. The proposition was asserted with no support, either from empirical or sociological surveys or even from feminist theory.

1035. In *Craig*, the bar to beer purchase by 18-21 year-old boys but not girls was objectionable because it reflected stereotypes of boys as wild and crazy and girls as civilizing; hence, the discrimination against men rested upon “archaic and overbroad” generalizations that have traditionally segregated women in their “separate sphere” of the household.

1036. *E.g.*, *Califano v. Webster*, 430 U.S. 313 (1977).

1037. This argument pervaded the briefs in *DeFunis* but was most forcefully and eloquently pressed in Alexander Bickel and Philip Kurland's Brief of Amicus Curiae B'nai Brith, *DeFunis v. Odegaard*, 416 U.S. 312 (1974) (No. 73-235). *See supra* notes 207-214 and accompanying text.

1038. *See* Douglas Conference Notes for *DeFunis* (Mar. 1, 1974), in *Douglas Papers*, *supra* note 192, Container 1655; Brennan Conference Notes for *DeFunis*, in *Brennan Papers*, *supra* note 129, Box 1: 311

1039. Douglas Conference Notes for *DeFunis*, (Mar. 1, 1974), in *Douglas Papers*, *supra* note 192, Container 1655. Brennan's docket book reflects four Justices inclined to affirm,

Whatever tentativeness judges may have felt in the early and even mid-1970s,¹⁰⁴⁰ had dissipated by 1978. The reason was that the politics of preservation had made the issue of affirmative action a centerpiece of its anti-civil rights agenda; correlatively liberals supporting the civil rights agenda fell in behind affirmative action, whatever their misgivings. This polarization was apparent in the amicus briefs for *Bakke*: there were more of them (sixty-two all told) than ever before, and their arguments were completely predictable from the ideology of the supporting organization.¹⁰⁴¹ The polarization had infected the Court. As Bernard Schwartz has documented, the Court's three egalitarian Democrats (Brennan, White, and Marshall) lined up in favor of affirmative action, ultimately joined by Blackmun, whom Brennan had been wooing all decade; the four libertarian Republicans (Burger, Stewart, Rehnquist, and Stevens) lined up against affirmative action, albeit on statutory grounds to satisfy Stevens; the Nixonian Democrat occupied the middle (Powell).¹⁰⁴² Moreover, the arguments bruited about by the Justices had almost nothing to do with the original intent of the Fourteenth Amendment, its history, or the Court's precedents; they were straight out of the newspapers. Justices opposing "reverse discrimination" argued that it violated the rights and liberties of white people and discouraged people of color from assimilating into the American melting pot the way previous minorities had done.¹⁰⁴³ Justices supporting "affirmative action" argued that it was consistent with the purposes of the Equal Protection Clause and necessary to effectuate its anti-subordination goal.¹⁰⁴⁴ Justice Powell, writing only for himself but delivering the judgment of the Court in *Bakke*, accepted the preservationist argument in part: "benign" racial preferences might reinforce "common stereotypes holding that certain groups are

four believing the case moot (including the Chief Justice), and one (Douglas) passing. Brennan Conference Notes for *DeFunis*, in Brennan Papers, *supra* note 129, Box 1: 311.

1040. Thus, liberal Justice Douglas voted for strict and fatal scrutiny for "benign" racial quotas in *DeFunis*, and liberal Justice Stanley Mosk wrote the California Supreme Court's opinion doing the same in *Bakke v. Regents of Univ. of Cal.*, 553 P.2d 1152 (Cal. 1976), *aff'd in part and rev'd in part*, *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

1041. With this exception: the Carter Administration's Department of Justice. Frank Easterbrook, a strongly conservative lawyer in the Solicitor General's Office, wrote an anti-affirmative action brief which the pro-affirmative action Solicitor General Wade McCree rewrote under the direction of the pro-affirmative action Carter White House. The result was an incoherent jumble. See JEFFRIES, JUSTICE POWELL, *supra* note 171, at 462-63.

1042. See SCHWARTZ, BEHIND *BAKKE*, *supra* note 217, at 56-141.

1043. See William H. Rehnquist, Memorandum of Nov. 10-11, 1977, reprinted in SCHWARTZ, BEHIND *BAKKE*, *supra* note 217, at 173-94 app. B; *id.* at 38-39 (Burger).

1044. See William J. Brennan, Jr., Memorandum of Nov. 23, 1977, reprinted in SCHWARTZ, BEHIND *BAKKE*, *supra* note 217, at 225-44 app. D; Thurgood Marshall, Memorandum to the Conference for *Bakke* (Apr. 13, 1978), discussed in SCHWARTZ, BEHIND *BAKKE*, *supra* note 217, at 127-29.

unable to achieve success without special protection based on a factor having no relationship to individual worth,” but (as in *DeFunis*) he was willing to accept graduate school admissions criteria that included race as one among several “pluses.”

As detailed in Section I.A.3.c of this Article, the Court continued to debate the constitutionality of affirmative action for a quarter century after *Bakke*, and another major case awaits the Justices in the 2002 Term.¹⁰⁴⁵ Although there are no reliable records of the Court’s internal deliberations available after 1986,¹⁰⁴⁶ the Justices’ votes closely followed their ideological predispositions: the most conservative Republican Justices (Rehnquist, Scalia, Kennedy, Thomas) have followed the Reagan Administration’s stance that all or virtually all affirmative action plans are unconstitutional; the moderate Republicans (Stevens, Souter) and Clinton Democrats (Ginsburg, Breyer) would allow many such plans. Justice O’Connor has succeeded to the Powell position (swing vote) and so authored the Court’s opinions in *Croson* and *Adarand*. Her opinions reached back to *Hirabayashi* and *Korematsu* to insist that any kind of racial classification must be subjected to “the most searching judicial inquiry,” but also that such inquiry might permit some such classifications, as in instances where they are truly needed to remedy past racial discrimination. So one effect of the affirmative action cases has been to convert strict scrutiny from an examination which once was automatically fatal to an examination that some statutory schemes would pass.

Dissenting Justices in *Croson* and *Adarand* maintained that remedial race-based classifications should only be subjected to the kind of intermediate scrutiny followed in the sex-discrimination cases, where the Court had generally upheld them. There are some interesting lessons to be drawn from this contrast. Doctrinally, the contrast between race-based classifications (strict scrutiny) and sex-based ones (intermediate scrutiny) operates to prefer remedial preferences for women over remedial preferences for racial minorities; easiest to defend would be preferences based upon income, geography, or another factor that would produce diversity along several dimensions without deploying a suspect identity trait. Recall that this is consistent with Justice Marshall’s sliding scale approach, which further suggests that the benefit being apportioned is also a relevant variable. Here, I should think that race- or sex-based preferences would be more defensible in government spending programs (*Fullilove*, *Croson*, *Adarand*)

1045. See *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002) (en banc), cert. granted, 2002 U.S. LEXIS 8677 (Dec. 2, 2002) (No. 02-241).

1046. The Brennan Papers, *supra* note 129, do not allow access after the 1985 Term. The Blackmun Papers, which appear to have conference notes, have been catalogued by the Library of Congress but will not be available to scholars until 2004 at the earliest.

than in university admissions (*DeFunis, Bakke*), because the latter involve a more important symbolic interest in education. In employment cases, preferences that require the discharge of white or male employees are harder to defend than those expanding promotion opportunities for women or minorities.¹⁰⁴⁷

Compare the reasoning in equal protection sex cases involving male challengers, such as *Kahn* and *Hogan*, and in equal protection race cases involving white challengers, such as *DeFunis* and *Bakke*. Whereas Justice Douglas thought the quota program in *DeFunis* insisted on a factor long associated with “invidious discrimination,” he wrote the opinion for the Court in *Kahn* which refused even to label the tax exemption for widows a discrimination.¹⁰⁴⁸ Justice Rehnquist’s internal memorandum in *Bakke* labeled the affirmative action program “Orwellian” because it discriminated against whites, while in *Hogan* he voted to uphold the state nursing school’s exclusion because it was “[d]iscrimination vs. men [and] they weren’t victims in past.”¹⁰⁴⁹ Justice Powell’s opinion treated Allan Bakke’s claim as one of race discrimination, triggering the highest scrutiny, but he did not agree that Joe Hogan, excluded because he was a male, was a “victim of sex discrimination” and so looked only for a rational basis in that case.¹⁰⁵⁰ As Earl Warren suggested in *Loving* and Thurgood Marshall in *Rodriguez*, you cannot intelligently decide these cases without a theory that considers the classification, the class affected, and the legislative motivation. Before affirmative action became such a polarizing issue, most of us did not even tend to use the term “discriminate” unless the decisionmaker was maliciously invoking a classification with a shady past to disadvantage a member of the stigmatized group. Consider another equal protection argument that disaggregates classification and class and dramatically illustrates my point that the way the interpreter (unconsciously) frames the relationship among classification, class, and motive essentially predetermines the interpretive answer.

1047. Compare *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (striking down collective bargaining agreement setting racial quotas for minority layoffs), with *United States v. Paradise*, 480 U.S. 149 (1987) (upholding court order setting racial quotas for future promotions), and *Local 28 Sheet Metal Workers Int’l Assoc. v. EEOC*, 478 U.S. 421 (1986) (upholding race-conscious membership remedy against union).

1048. Compare *DeFunis*, 416 U.S. at 333 (Douglas, J., dissenting), with *Kahn*, 416 U.S. at 352-56 (Douglas, J., for the Court) (refusing to characterize the statute as discriminating against men).

1049. Compare Rehnquist *Bakke* Memo, reprinted in SCHWARTZ, BEHIND BAKKE, *supra* note 217, at 176-94, with Brennan Conference Notes for *Hogan* (Aug. 27, 1981), in Brennan Papers, *supra* note 129, Box I: 555, Folder 2 (reporting Rehnquist’s reasons for upholding the exclusion).

1050. Compare *Bakke*, 438 U.S. at 294-95 (Powell, J.), with Brennan Conference Notes for *Hogan* (Aug. 27, 1981), in Brennan Papers, *supra* note 129, Box I: 555, Folder 2.

At the same time Professors Ginsburg and Bickel were deploying the *Loving* structure to urge heightened scrutiny for all sex- and race-based classifications, Professor Paul Freund was deploying it as an argument for rejecting the ERA. In 1972, Freund told Congress that if the ERA were added to the Constitution, the courts would compel states to recognize same-sex (homosexual!) marriages.¹⁰⁵¹ His logic was the logic of *Loving*: just as bars to different-race marriage are race discrimination because they differentiate based on the race of one partner, so bars to same-sex marriage are sex discrimination because they differentiate based on the sex of one partner. No one except the most fervent ERA opponents quite believed Freund's logic, and the Supreme Court had summarily and unanimously rejected the argument in *Baker v. Nelson*.¹⁰⁵² The analytical problem was the same one that confronted liberal feminists and reverse discrimination preservationists: the classification (sex) did not directly harm the traditionally disadvantaged group (women). As Andy Koppelman has demonstrated in great detail, the miscegenation analogy for same-sex marriage can be supported against this charge. In *Loving*, people of color as a class were harmed by miscegenation laws only because of the laws' underlying ideological motivations, namely, racist desires to preserve the purity of the "white" race. Likewise, women as a class are harmed by same-sex marriage bars because of their ideological motivations, namely, sexist desires to preserve traditional sex roles for women and men.¹⁰⁵³

The sex discrimination argument for gay rights is analytically hard to distinguish from arguments the Court accepted in *Hogan* and *Adarand*. In the latter cases, the Court gave heightened scrutiny to, and struck down, sex and race classifications (respectively) whose immediate disadvantage was felt by men and whites (respectively). Under a rationality theory of equal protection, heightened scrutiny was defensible because race and sex are unreliable criteria for state policy — but in that event state marriage bars grounded on the *sex* of one partner ought to be scrutinized carefully, just as the Court did to bars grounded on the *race* of one partner in *Loving*. Under an anti-

1051. See 118 CONG. REC. 9096-97 (1972) (reproducing testimony of Prof. Freund); *id.* at 9315 (Sen. Ervin, relying on Freund testimony to oppose ERA). *But see id.* at 9320-21 (Sen. Bayh, ERA sponsor, denying that ERA would require same-sex marriage). See generally Note, *The Legality of Homosexual Marriage*, 82 YALE L.J. 573 (1973).

1052. 409 U.S. 810 (1972) (mem.) (dismissing appeal because state bar to same-sex marriage raised no substantial federal question, even though challenger had presented *Loving* and *Reed* arguments).

1053. Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994); see also ESKRIDGE, GAYLAW, *supra* note 14, at 218-28. For a response which starts with my own framing of the issue and turns it against Koppelman, see Edward Stein, *Evaluating the Sex Discrimination Argument for Lesbian and Gay Rights*, 49 UCLA L. REV. 471 (2001).

subordination or representation-reinforcing theory of equal protection, heightened scrutiny was defensible in *Hogan* because the state was completely excluding men from an occupation traditionally filled by women and so was directly reinforcing traditional sex stereotypes and gender roles. The state bar was perpetuating old patterns of sex segregation and marginalization which have been harmful to women. It is for this very reason, however, that anti-subordination theory does not support strict scrutiny in *Adarand*: the race-based classification was not perpetuating old patterns of segregation and was, to the contrary, eroding them. To the extent that the Court is now operating primarily under a rationality approach (as *Adarand* suggests), the Court is obliged to accord heightened scrutiny to state same-sex marriage bars unless it retreats either from *Craig/Hogan* or from *Loving*. To the extent the Court returns to an approach considering anti-subordination values, it should also accord heightened scrutiny, for the reasons Koppelman has advanced.

The cultural and political answer to the sex discrimination argument for same-sex marriage is that it cannot be accepted until there is more support in society for the norm of benign sexual variation as the basis for state policy. So long as most people, and judges, continue to believe unfounded stereotypes about lesbian and gay people and close their eyes to the existence of committed lesbian and gay families, any argument for same-sex marriage looks bizarre or brave. (It looks dangerous to people, and judges, who are prejudiced against and hate lesbians and gays.) Conversely, in polities whose judges and culture have been able to accept a fact-based rather than stereotype-dominated view of lesbians and gay people and their families, the sex discrimination argument for same-sex marriage has either been accepted or treated with respect.¹⁰⁵⁴ Just as unprejudiced observers felt that *Brown* was the death knell for state bars to different-race marriages, so they feel that *Hogan* and *Craig* should speed the demise of same-sex marriage bars. But it took half a generation, and a sea change in our culture, for the Court to get from *Brown* to *Loving*, and it will probably take longer for our culture to get to same-sex marriage. Note a final contrast. Canada's political culture has moved toward viewing sexual variation as benign, and this has facilitated its willingness to recognize lesbian and gay unions.¹⁰⁵⁵

1054. See *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (plurality opinion accepts sex discrimination argument requiring prohibition on same-sex marriage to be subjected to heightened scrutiny), *remanded sub nom.* *Baehr v. Miike*, 1996 WL 694235, at *21-22 (Haw. Cir. Ct. Dec. 3, 1996) (finding after evidentiary hearing that state cannot meet its burden under strict scrutiny), *rev'd*, 994 P.2d 566 (Haw. 1999) (mem.); *Baker v. State*, 744 A.2d 864, 905-12 (Vt. 1999) (Johnson, J., concurring) (adding sex discrimination argument as alternative ground to majority invalidation of same-sex marriage bar on rationality grounds).

1055. See *M. v. H.*, [1999] 171 D.L.R. (4th) 577 (Can.) (invalidating state discrimination against lesbian and gay couples); ESKRIDGE, *EQUALITY PRACTICE*, *supra* note 626, at ch. 3 (surveying recent developments in Canada).

D. *The Death Penalty Cases: Equal Protection and the Eighth Amendment*

The Supreme Court in *Weems v. United States*¹⁰⁵⁶ ruled that the Eighth Amendment's bar to "cruel and unusual punishments" is not limited to measures that would have been unacceptable in 1791. Application of the amendment has been dynamic, requiring attentiveness to current mores and circumstances. Although no one in 1910 would have thought the Eighth Amendment regulated the ability of states to impose the death penalty, by the close of the century some of the most conservative Justices were voting to strike down the death penalty on those grounds. Rape can no longer be punishable by death, and the imposition of the death penalty along racial lines is subject to never-ending constitutional challenges. The transformation of the Eighth Amendment could not have occurred without the civil rights movement.

The story begins with the "Martinsville Seven," black youths convicted in 1949 of raping a white woman in Martinsville, Virginia.¹⁰⁵⁷ Their trials were not afflicted with the dozens of glaring irregularities of the trials in the Phillips County and Scottsboro cases, and it appears that most and perhaps all the men were culpable of sexual assault or assisting in it. All seven men, including the aiders and abettors, were sentenced to death. That was hardly unheard-of in the South. During the slavery period, rape of a white woman by a black man was typically a capital offense (sometimes even when it was not a capital offense for a white defendant), and the end of the formal distinction after the Civil War had virtually no effect on the operation of the death penalty for that crime. Between 1930 and 1967, 455 men were executed for rape in the United States, almost all in the South; 405 of them were black men, almost all accused of raping a white woman.

For reasons developed earlier in this Article, the foregoing history was ripe for challenge after World War II. The death sentences for the Martinsville Seven caught the attention of civil rights journalists, political groups, and lawyers.¹⁰⁵⁸ In response to thousands of letters requesting mercy, the governor stayed the men's executions pending the Inc. Fund's appeal, which raised serious challenges to the conduct of the trials: the judge should have granted a change in venue because of

1056. 217 U.S. 349 (1910).

1057. An excellent descriptive and analytical account of the Martinsville Seven case is ERIC W. RISE, *THE MARTINSVILLE SEVEN: RACE, RAPE, AND CAPITAL PUNISHMENT* (1995).

1058. The Civil Rights Congress ("CRC"), a merger of various progressive groups in 1946, publicized the case as an example of how the system brutalized African Americans; the CRC was an important player in the case but often at odds with the more moderate NAACP. *See id.* at 55-69.

the publicity given the case, defendants' confessions were tainted, and the judge's close questioning of jurors as to their stance toward the death penalty focused their attention unduly on that as the proper penalty.¹⁰⁵⁹ These arguments were unsuccessful in the Virginia Supreme Court of Appeals, and the U.S. Supreme Court declined to review their decision.¹⁰⁶⁰ Various civil rights groups renewed appeals to the governor for clemency. Echoing a theme in many of the letters, Martin Martin, counsel for defendants, argued that "[t]he prime reason [they] were sentenced to the electric chair was because all of them are colored and that the prosecutrix was a white woman and the juries were composed of all white men."¹⁰⁶¹ After the governor denied the pleas, Martin and the Inc. Fund petitioned in state court for a writ of habeas corpus, based upon the argument that death sentences in rape cases were meted out by race: since 1908, Virginia had sentenced fifty-three blacks and one white to death for rape and had executed forty-five blacks and no whites.¹⁰⁶² This radical argument failed to persuade either the habeas judge or the Virginia appeals judges. Martin's last chance was Supreme Court review of the habeas appeal. The Court denied certiorari on January 2, 1951.¹⁰⁶³ One month later, the Commonwealth electrocuted the seven men.

The Martinsville Seven case was the first time anyone had challenged a capital sentence because of racial disparity, but the Supreme Court's silence was hardly encouraging. An equal protection challenge to death sentences in rape cases posed questions the Justices were not prepared to answer affirmatively in 1950:¹⁰⁶⁴ Could you be sure the

1059. For an account of the Inc. Fund's arguments, see *id.* at 70-94.

1060. *Hampton v. Commonwealth*, 58 S.E.2d 288 (Va. 1950), *cert. denied*, 339 U.S. 989 (1950). The Inc. Fund argued that the "undue attention from the public press" created an "atmosphere of prejudice and hostility" to the defendants, especially given the interracial nature of the crime. A law clerk's memorandum to Justice Frankfurter suggested that, even if "popular sentiment . . . was crystallizing" against defendants, it was not legally prejudicial, because "it seems clear that any jury would have found petitioners guilty." RISE, *supra* note 1057, at 92 (quoting Cert. Memorandum, in *Papers of Felix Frankfurter* (microfilm), pt. 1, reel 45, frames 6268-69).

1061. RISE, *supra* note 1057, at 103 (quoting Martin's letter); see *id.* at 103-12 (summarizing other letters and the clemency review process).

1062. See *id.* at 112-25 (detailing arguments and decisions in the Virginia habeas proceedings); see also Donald H. Partington, *The Incidence of the Death Penalty for Rape in Virginia*, 22 WASH. & LEE L. REV. 43 (1965) (updating the data: all 56 men executed for rape since 1908 were African American). On the eve of *Brown v. Allen*, the Inc. Fund did not file their habeas petition with the federal court but instead followed the route of state habeas.

1063. *Hampton v. Smyth*, 340 U.S. 914 (1951).

1064. See Brief for Respondent in Opposition to the Petition for Writ of Certiorari at 8-10, *Hampton v. Smyth*, 340 U.S. 914 (1951) (1950 Term, No. 245, Misc.); RISE, *supra* note 1057, at 129-30 (relying on a memorandum to Justice Burton, suggesting that certiorari be denied in the Martinsville Seven case).

race differential was not caused by some other factor? So long as there was no outside racist pressure from a mob or the judge, could the race-based differential be properly attributed to the state? Was it justifiable to prevent all applications of the death penalty because of the race differential? For these reasons, state judges rejected these arguments in the 1950s.¹⁰⁶⁵ The issue lay dormant at the Supreme Court level — until Justices Goldberg, Douglas, and Brennan renewed it in a dissent from the denial of certiorari in 1963. Their dissent asked that the Court consider whether the Eighth Amendment (freshly applicable to the states) should be construed to permit state execution of rapists who have neither taken nor endangered human life.¹⁰⁶⁶ Although the Justices did not tie their published dissent to the race differential, it was clearly a concern of theirs.¹⁰⁶⁷ This episode, moreover, directly stimulated interest within the Inc. Fund to develop their Martinsville Seven arguments in the context of the Eighth Amendment as well as the Equal Protection Clause.¹⁰⁶⁸

The Inc. Fund's campaign against the death penalty commenced in earnest at a point when most states outside the South had repealed the penalty for rape cases and executions everywhere were steeply in decline. And, as the Fund's lawyers soon learned, a huge number of capital cases were infected with serious procedural errors that could support a variety of challenges. In the wake of the Supreme Court's liberalization of habeas corpus rules in *Fay v. Noia*, such challenges could generate federal hearings on issues not raised in state court. In the wake of new criminal law precedents such as *Mapp*, *Malloy*, *Gideon*, *Escobedo*, and *Miranda*, such challenges could raise issues that would not have been legally cognizable during the earlier state proceedings. For each state where it picked up a test case, the Inc.

1065. *E.g.*, *Williams v. State*, 110 So.2d 654 (Fla. 1959) (rejecting relevance of evidence that 33 blacks and 1 white executed for rape, 1925-59); *Brickhouse v. Commonwealth*, 159 S.E.2d 611 (Va. 1968) (rejecting relevance of evidence that fifty-six blacks and zero whites were executed for rape, 1908-65).

1066. *Rudolph v. Alabama*, 375 U.S. 889 (1963) (Goldberg, J., dissenting from the denial of certiorari). The matter was also being debated among lawyers and academics. See Gerald Gottlieb, *Testing the Death Penalty*, 34 S. CAL. L. REV. 268 (1961) (arguing that the death penalty violates the Eighth Amendment).

1067. In an earlier draft, Justice Goldberg suggested that barring capital punishment in rape cases "would also eliminate the well-recognized disparity in the imposition of the death penalty for sexual crimes committed by whites and nonwhites." This evidence was uncovered by Dennis D. Dorin, *Two Different Worlds: Criminologists, Justice and Racial Discrimination in the Imposition of Criminal Punishment in Rape Cases*, 72 J. CRIM. L. & CRIMINOLOGY 1667, 1694 (1981).

1068. MICHAEL MELTSNER, CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT 28-59 (1973); see also Jack Greenberg & Jack Himmelstein, *Varieties of Attack on the Death Penalty*, 15 CRIME & DELINQUENCY 112 (Jan. 1969); Eric Muller, *The Legal Defense Fund's Capital Punishment Campaign: The Distorting Influence of Death*, 4 YALE LAW & POL'Y REV. 158 (1985).

Fund developed sophisticated empirical surveys showing not only that race was the probable variable determining death sentences for rapes and other capital crimes, but also that other observable factors were not statistically significant contributing factors.¹⁰⁶⁹

The first major challenge to reach the Supreme Court was *Maxwell v. Bishop*.¹⁰⁷⁰ Representing the defendant, the Inc. Fund demonstrated that Arkansas' imposition of the death penalty was almost exclusively against black men, like William Maxwell, who had been convicted of raping white women.¹⁰⁷¹ There were two interconnected constitutional infirmities generating these statistics: the state gave racially biased jurors no standards to follow in deciding between life in prison and death for a defendant, and the defendant was not practically able to plead for his life for fear that his testimony seeking leniency could help convict him of the crime in a single-verdict (on guilt and sentence) trial.¹⁰⁷² The Court was, on the whole, sympathetic to the NAACP's concerns. As Chief Justice Warren put it in conference, "Death [is] known to be reserved for [the] poor and underprivileged — rarely does one who can afford a good lawyer suffer the death penalty."¹⁰⁷³ Six Justices (Warren, Douglas, Harlan, Brennan, Fortas, and Marshall) were prepared to strike down Arkansas' death penalty and to require states to conduct a separate hearing (after the trial convicting the defendant) before such a penalty could be imposed, but only three (Warren, Douglas, and Brennan) agreed with the NAACP on the issue of standards.¹⁰⁷⁴

Douglas circulated an opinion in April 1969 that followed the NAACP on both issues but was unable to attract a majority to join the opinion.¹⁰⁷⁵ Justice Harlan, in particular, was not at rest as to his position and ultimately agreed to write for the Court in *McGautha v.*

1069. See Marvin Wolfgang & Marc Reidel, *Race, Judicial Discretion, and the Death Penalty*, 407 ANNALS AM. ACAD. POL. & SOC. SCI. 119 (1973) (study of death sentences in eleven southern states over twenty-year period, finding seven times as many blacks sentenced to death as whites; a black defendant harming a white victim was eighteen times more likely to be sentenced to death than any other combination of defendant/victim).

1070. 398 U.S. 262 (1970).

1071. Brief for Petitioner at 11-24, *Maxwell* (1968 Term, No. 13); see *id.* at 1a-23a (Appendix A, statistical evidence compiled by Professor Wolfgang).

1072. *Id.* at 24-66 (no standards); *id.* at 66-79 (single-verdict trial).

1073. Brennan Conference Notes for *Maxwell*, in Brennan Papers, *supra* note 129, Box I: 201, Folder 2.

1074. Douglas Conference Notes for *Maxwell* (Mar. 6, 1969), in Douglas Papers, *supra* note 192, Container 1470; Docket Sheet for *Maxwell*, in Brennan Papers, *supra* note 129; Box I: 201, Folder 2 (initial votes on the merits in *Maxwell*).

1075. See Justice Douglas, Memorandum to Conference, Re: No. 622 — *Maxwell v. Bishop* (Apr. 4, 1969) (draft opinion attached), in Douglas Papers, *supra* note 192, Container 1470.

California,¹⁰⁷⁶ which declined to find unitary trials unconstitutional. As the term ran out, the Court ordered reargument in *Maxwell* for spring 1970. By then, the retirements of Warren and Fortas meant that Douglas had permanently lost his majority. After reargument, there were only four votes for requiring bifurcation (Douglas, Harlan, Brennan, and Marshall) and three for requiring standards (Douglas, Brennan, and Marshall).¹⁰⁷⁷ But there were six Justices (all but Burger and Black) willing to overturn Maxwell's death sentence on a narrow procedural ground, and so the Court ruled. The case which death penalty abolitionists felt would end this form of punishment had fizzled — at the very point when the Court was veering sharply to the right.

There could not have been much cause for optimism on the part of abolitionists when the Court announced in 1971 that it was taking two rape and two murder cases as vehicles to consider the constitutionality of the death penalty. (Any optimism would have faded when two more Warren Court Justices were then replaced with Nixon appointees Rehnquist and Powell.) Nonetheless, briefs filed by the Inc. Fund (counsel of record in two of the cases) and the NAACP pressed upon the Court historical and social science accounts showing that the death penalty in the South (where it was, by 1971, increasingly concentrated) had traditionally been reserved for defendants of color, especially in rape cases, and that the continuing race differential could be directly traced to laws of the slavery period and practices of the Jim Crow era.¹⁰⁷⁸ The fact that the death penalty was rarely imposed but, when imposed, was typically reserved for black defendants gave rise to the conclusion that it was applied “freakishly,” an arbitrariness that, movement lawyers maintained, violated the Eighth Amendment in its cruelty and unusualness.¹⁰⁷⁹ One problem with this position was that the vagueness of the Eighth Amendment standard seemed to leave too much discretion with judges to strike down laws simply because

1076. 402 U.S. 183 (1971).

1077. See Douglas Conference Notes for *Maxwell* (May 6, 1970), in Douglas Papers, *supra* note 192, Container 1470; Brennan Conference Notes for *Maxwell* (reargument), in Brennan Papers, *supra* note 129, Box I: 201, Folder 2.

1078. Brief for Petitioner at 50-54, *Aikens v. California*, 406 U.S. 813 (1971) (1968 Term, No. 5027) (adopted in Brief for Petitioner at 11-12, *Furman v. Georgia*, 408 U.S. 238 (1972) (1969 Term, No. 5003)); Brief of Amici Curiae NAACP et al. at 7-19, *Aikens* (1968 Term, No. 5027). *But see* Brief for Respondents at 103-09, *Aikens* (1968 Term, No. 5027) (demonstrating that, for California, there was no appreciable race differential).

1079. *E.g.*, Brief for Petitioner at 36-39, 50-61, *Aikens* (1968 Term, No. 5027); *see also* Brief of Amicus Curiae The Synagogue Council of America and the American Jewish Congress at 29-35, *Branch* (1969 Term, No. 5031) (death penalty imposed overwhelmingly in former apartheid states and against blacks; such “unequal punishment” is both “unjust” and “cruel”). *Furman*, which became the lead case, presented a different complexity: the defendant was mentally disabled, and so there was an added Eighth Amendment concern. Brief for Petitioner at 8-11, *Furman* (1969 Term, No. 5003).

they felt the laws unfair as a policy matter. At oral argument, Anthony Amsterdam, the counsel in two of the appeals, responded to this concern with an “objective” standard that fit well with the sociological argument in the briefs: the Eighth Amendment does not allow legislatures to leave capital punishment in place for crimes for which society would recoil if death were meted out evenhandedly; if the only reason legislatures leave rape and even murder as capital crimes is that they know those penalties will be rarely applied, and then “only” to poor men of color, that is unconstitutional.¹⁰⁸⁰

As unlikely as the odds of success might have seemed, Amsterdam’s arguments moved the Justices. Even Chief Justice Burger and Justice Blackmun expressed hesitancy about the death penalty in the rape cases, but they and the other Nixon appointees voted to affirm in all the cases.¹⁰⁸¹ Justice Douglas voted to reverse in all the cases: the “lack of standards makes [the] system discriminatory,” which renders it “unusual” under the Eighth Amendment, he argued in conference. Justice Brennan expressed concern that the dynamic application of the Eighth Amendment be guided by “objective” criteria, which he found satisfied in the demonstrated “selectivity” of its imposition; because that selectivity was racial, equal protection concerns were also mobilized. Justice Marshall voiced similar views, surely based on his own first-hand experience with the racially discriminatory deployment of the penalty in the South. Justices Stewart and White, both of whom had rejected the Inc. Fund’s position in the *Maxwell* conferences, were won over by the Amsterdam argument: they had ultimately been persuaded that the death penalty was not “meted out fairly.” White was bothered that death came too infrequently, Stewart that it came arbitrarily, like a “bolt of lightning.” Unless death were a mandatory or better structured penalty, it served neither deterrent nor retributive goals of the criminal justice system. The opinion for the Court in *Furman v. Georgia*¹⁰⁸² was short per curiam announcing that all four of the challenged statutes violated the Eighth Amendment. It was accompanied by five lengthy concurring opinions by the majority Justices, three of whom explicitly relied on

1080. 73 LANDMARK BRIEFS, *supra* note 199, at 835, 838 (Amsterdam’s oral argument in *Aikens*); *id.* at 861-62 (presenting an even blunter argument in *Furman*: because “Georgia executes black people,” there was “no pressure on the legislature” to reform the death penalty).

1081. The Justices’ views in this paragraph are taken from Douglas Conference Notes on the Death Penalty Cases (January 21, 1972), in Douglas Papers, *supra* note 192, Container 1542. See also BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS: INSIDE THE SUPREME COURT* 242-53 (1979) (journalistic account, based on interviews with law clerks and possibly a Justice or two: Marshall, Douglas, White, and Stewart were all troubled by the racially discriminatory application of the death penalty).

1082. 408 U.S. 238 (1972) (per curiam).

the race differential as the main reason they were finding an Eighth Amendment violation.¹⁰⁸³

Furman was not the death knell of capital punishment in the United States, as the abolition movement had hoped. Indeed, as *Brown* and *Roe* had done with civil rights and abortion, *Furman* contributed to a powerful death penalty countermovement that drew its strength from a mix of popular fears, including safety concerns, resentment that the Court had intervened, and racist associations between crime and color.¹⁰⁸⁴ Between 1972 and 1976, states responded with new death penalty statutes, each seeking to solve the problem of excessive discretion: seventeen states adopted laws making death the mandatory punishment for a limited and well-defined number of crimes; six states and the federal government enacted laws requiring the death penalty when statutory defined aggravating (and no mitigating) circumstances are found by the jury; seven states enacted laws requiring the sentencer to find one or more statutorily defined aggravating circumstances but also to consider particular mitigating circumstances before imposing death; five states enacted laws requiring the sentencer to impose the death penalty if it finds one statutory defined aggravating circumstance.¹⁰⁸⁵ Consistent with my hypothesis that death penalty litigation was driven by civil rights concerns, every single petition for Supreme Court review came from the South, which also had the harshest death penalty statutes.¹⁰⁸⁶ The Court selected cases representing five different kinds of statutes. In each appeal, the Inc. Fund and other civil rights attorneys argued that the new statutes did not solve the problem of excessive discretion and would predictably generate the same kind of racially disparate sentencing the Court had seen in *Furman*.¹⁰⁸⁷ The state briefs had no intelligent response to this

1083. See *id.* at 248-56 (Douglas, J., concurring); *id.* at 309-10 (Stewart, J., concurring); *id.* at 364-66 (Marshall, J., concurring).

1084. See STUART BANNER, *THE DEATH PENALTY* 267-71 (2002); JAN GORECKI, *CAPITAL PUNISHMENT: CRIMINAL LAW AND SOCIAL EVOLUTION* 97-113 (1983); RAYMOND PATERNOSTER, *CAPITAL PUNISHMENT IN AMERICA* 127-28; FRANKLIN E. ZIMRING & GORDON HAWKINS, *CAPITAL PUNISHMENT AND THE AMERICAN AGENDA* 38-45 (1986); Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 410-12 (1995).

1085. See Memorandum from James B. Ginty to the Conference, Re: Capital Cases, at 1-4 (Jan. 15, 1976), in Brennan Papers, *supra* note 129, Box I: 366, Folder 3.

1086. For example, only three southern states made rape a capital crime. The most draconian mandatory death statutes were in the South; North Carolina's was easily the most severe.

1087. See Brief for Petitioner at 28-64, *Jurek v. Texas*, 428 U.S. 262 (1976) (No. 75-5394) (excessive discretion), *id.* at 81-84 & nn.146-147 (racially discriminatory applications) incorporating by reference arguments made and data assembled in Brief for Petitioner, *Fowler v. North Carolina*, 428 U.S. 904 (1976) (No. 73-7031) (earlier appeal)). The petitioners in *Woodson v. North Carolina*, 428 U.S. 280 (1976) (No. 75-5491) (also represented by the Inc.

concern, but Solicitor General Robert Bork's comprehensive amicus brief supporting the states claimed that the NAACP's empirical studies only established patterns of race discrimination in rape cases, not the murder cases that the Court had selected here.¹⁰⁸⁸

At conference, Justices Brennan and Marshall reiterated the fundamental opposition to the death penalty they had expressed in their *Furman* concurring opinions; Chief Justice Burger and Justices Blackmun and Rehnquist stuck with their deferential *Furman* dissents.¹⁰⁸⁹ Justice White was satisfied that all five statutes met his *Furman* concerns that the states were not serious about enforcing outdated statutes. Focusing on "evolving standards of decency," Justice Stewart was impressed that thirty-five state legislatures had re-established the death penalty for murder, but remained concerned that jury imposition of that penalty be guided by rational standards. Although a *Furman* dissenter, Justice Powell concluded that the earlier decision had played a "salutary role" in requiring states to rethink their capital statutes and, in reenacting them, to provide new procedural safeguards to ensure against its arbitrary imposition. Justice Stevens agreed with both Stewart (standards) and Powell (procedural safeguards) but was appalled at the "monster" North Carolina statute, which imposed mandatory death sentences on a wide range of crimes.

As the center on this issue, Justices Stewart, Powell, and Stevens essentially took the cases away from Justice White, to whom the Chief Justice had assigned the opinions. The three centrists delivered a joint opinion announcing the judgment of the Court in each of the five cases, upholding three statutes and striking down two. In the lead case, *Gregg v. Georgia*,¹⁰⁹⁰ the joint opinion interpreted *Furman* as requiring that "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or

Fund), *Roberts v. Louisiana*, 428 U.S. 325 (1976) (No. 75-5844) (same), and *Gregg v. Georgia*, 428 U.S. 153 (1976) (No. 74-6257), followed the *Jurek* excessive-discretion argument and adopted the race discrimination argument by explicit reference.

1088. Compare Brief of Amicus Curiae the United States at 65-69 & la-9a (app. A), *Gregg et al.* (No. 74-6257) (detailed analysis of empirical studies), with Consolidated Reply Brief for Petitioners at 15-19 n.26, *Jurek et al.* (No. 75-5394) (refuting Bork's analysis). The Inc. Fund's reply brief also brought the Court's attention to a new empirical study showing that the percentage of people of color on death row had increased under the post-*Furman* regime. See Marc Riedel, *Discrimination in the Imposition of the Death Penalty: A Comparison of the Characteristics of Offenders Sentenced Pre-Furman and Post-Furman*, 49 TEMPLE L.Q. 261 (1976).

1089. My discussion of the conference in this paragraph is taken from Brennan Conference Notes for *Jurek et al.*, in Brennan Papers, *supra* note 129, Box I: 371, Folder 2.

1090. 428 U.S. 153 (1976) (upholding Georgia law where the jury considered statutorily defined aggravating and mitigating circumstances before it could enter a death sentence). The Court also upheld the laws in *Jurek*, 428 U.S. 262 (similar), and *Proffitt*, 428 U.S. 242 (similar, where the judge was required to consider aggravating and mitigating circumstances).

spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.”¹⁰⁹¹ The new Georgia statute had ample safeguards to protect against arbitrariness: the trial was bifurcated, so that the defendant could abstain from testifying at the guilt phase without losing the opportunity to plea for his life in the sentencing phase; the jury was instructed as to the particular aggravating and mitigating factors they must consider; and substantive searching review of every death sentence was assured by the state’s supreme court.¹⁰⁹² The joint opinion did not specifically respond to the Inc. Fund’s concern, documented for the post-*Furman* cases, that the new statute would continue to be applied in a racially discriminatory manner, apparently because these Justices were confident that the procedural protections would ensure substantive fairness. In *Woodson v. North Carolina*,¹⁰⁹³ the joint opinion ruled that mandatory death sentences for a specified range of cases violated the Eighth Amendment, in part because such laws were substantively unfair in light of the nation’s evolving standards of decency and in part because they did not provide standards to constrain juries, which would engage in an unguided process of frequent nullification of the substantive offense under such statutes.¹⁰⁹⁴

Three states adopted post-*Furman* statutes imposing the death penalty in cases of rape. This was a significant consequence of *Furman*, as it required states to drop capital punishment from offenses for which there was insufficient popular support. The Inc. Fund challenged those statutes in *Coker v. Georgia*.¹⁰⁹⁵ Its brief laid out the familiar history of Georgia’s highly raced application of the death penalty for rape and argued that this penalty was guaranteed to be both racially disproportionate and freakishly applied.¹⁰⁹⁶ Joining the Inc. Fund in attacking the law was a brief filed by Ruth Bader Ginsburg for the ACLU’s Women’s Rights Project and other feminist groups. Capi-

1091. *Gregg*, 428 U.S. at 159 (joint opinion); *see also Furman*, 408 U.S. at 309-10 (Stewart, J., concurring); *id.* at 255-57 (Douglas, J., concurring); *id.* at 291-95 (Brennan, J., concurring).

1092. *Gregg*, 428 U.S. at 188-205 (joint opinion). The concurring Justices would not have required as much of the state. *Id.* at 220-26 (White, J., concurring in the judgment); *id.* at 226 (statement of Burger, C.J. and Rehnquist, J.); *id.* at 227 (Blackmun, J., concurring in the judgment).

1093. 428 U.S. 280 (1976).

1094. *Id.* at 285-305 (joint opinion); *see id.* at 305 (Brennan, J., concurring in the judgment for his *Furman* reasons); *id.* (Marshall, J., concurring in the judgment for his *Furman* reasons). *But see id.* at 303-24 (Rehnquist, J., dissenting) (detailed critique of joint opinion’s reasoning). *See also Roberts v. Louisiana*, 428 U.S. 325 (1976) (also striking down a mandatory death penalty law for particular kinds of murders).

1095. 433 U.S. 584 (1977).

1096. Brief for Petitioner at 48-59, *Coker v. Georgia*, 433 U.S. 584 (1977) (No. 75-5444); *see id.* at app. A (detailing the raced history of punishment for rape in Georgia).

tal rape statutes enjoyed a history that was patriarchal as well as racist: this extreme penalty for sexual assault was a vestige of an era when women's value rested mainly on their presentability for marriage (virginity) but men distrusted (seductive) women to be sufficient guarantors of their own chastity and were hysterical at the possibility that women would fall prey to men of color.¹⁰⁹⁷ Georgia's law therefore failed the Court's requirement that capital punishment satisfy "contemporary standards regarding the infliction of punishment." Unlike *Gregg* and *Woodson*, this was an easy case for the Justices. At the *Gregg* conference, Justice Stevens had opined that "death is impermissible for rape — only five or six states have it and they are deep South with potential for racial bias behind it."¹⁰⁹⁸ The combination of the racist history of capital punishment for rape and the plummeting popular support for such statutes (except in the "deep South"!) were lethal for all the Justices except Burger and Rehnquist, who dissented half-heartedly.

Gregg and *Coker* by no means ended the NAACP's campaign against the death penalty. The Inc. Fund returned to the equal protection argument it had initiated in the Martinsville Seven case, but with more sophisticated statistical techniques than ever before. Again, the situs of the challenge was Georgia. David Baldus and his colleagues demonstrated that the post-*Gregg* application of the death penalty in that state was most decisively influenced by the race of the victim.¹⁰⁹⁹ Even after considering hundreds of other variables, the researchers found that defendants accused of killing whites were four times more likely to receive capital sentences than those accused of killing nonwhites. The raw statistics were damning enough, even without fancy numerology.¹¹⁰⁰ Most victims of homicide in Georgia were black people. But since *Gregg*, Georgia had executed seven men, all of whom had killed white people; six of the seven executed men were

1097. This background of patriarchal racism generated a "schizophrenic law of rape, characterized on the one hand by unenforceably severe penalties, and on the other, by special rules requiring corroboration of the victim's testimony" and so forth (except in interracial rape cases). Brief of Amici Curiae ACLU et al. at 19, *Coker* (No. 75-5444); see also BARBARA BABCOCK ET AL., *SEX DISCRIMINATION AND THE LAW: CAUSES AND REMEDIES* 868 (1975).

1098. Brennan Conference Notes for *Jurek v. Texas*, 428 U.S. 262 (1976), in Brennan Papers, *supra* note 129, Container I: 371, Folder 2. There were three such laws in 1976, two of which were mandatory death penalty laws that were disapproved in *Woodson*. Three other states had laws making rape of children a capital offense, and three of the Justices, White, Stewart, and Powell, commented that it might be allowable.

1099. See DAVID C. BALDUS ET AL., *EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS* (1990).

1100. See Brief of Amici Curiae the Congressional Black Caucus, the Lawyers' Committee for Civil Rights Under Law, and the NAACP at 5-6, *McCleskey v. Kemp*, 481 U.S. 279 (1987) (No. 84-6811).

black men convicted of killing white people. Of the fifteen men Georgia was holding on death row before Warren McCleskey arrived, thirteen were black men, nine of whom killed white people (the two white men on death row also killed white people). These raw numbers suggested that the death process in Georgia was not only as raced as it had been before *Furman* (even with the rape cases excluded), but in ways that were symbolically squalid under *Brown's* normative regime: a life for a life was the punishment only when white people died; white lives were worth more than black lives. Seventeen men had been convicted in Georgia for killing police officers; Warren McCleskey, a black man convicted of killing a white officer, was the only man to receive a death sentence. The Inc. Fund strenuously argued that this violated both the Eighth Amendment (*Furman*) and the Equal Protection Clause (*Norris*).

Justice Powell was not persuaded. In a memorandum urging his colleagues not to take review in *McCleskey v. Kemp*,¹¹⁰¹ he questioned whether discrimination as to the *victim's* race made out an equal protection claim by the *defendant* and opined that the Baldus study revealed a reasonably well-operating system of criminal justice.¹¹⁰² Powell believed that the procedural checks approved in *Gregg*, together with *Batson's* requirement that judges monitor prosecutors' peremptory strikes of black jurors, were a sufficient regime to regulate racism in the system. In his opinion for the Court, Powell emphasized the same simple point that the Commonwealth of Virginia had emphasized half a century before in the Martinsville Seven case: there was no evidence of juror discrimination in the particular case before the Court.¹¹⁰³ Like the NAACP, Justices Brennan, Marshall, Blackmun, and Stevens believed the system of criminal justice itself was on trial — and the evidence against it was damning. The majority of the Court — the four Reagan Justices and Powell — refused to see the case as anything but an individual appeal for which they could not grant relief.¹¹⁰⁴ After a second unsuccessful trip to the Court on habeas

1101. 481 U.S. 279 (1987).

1102. Memorandum from Lewis F. Powell to the Conference (June 27, 1986), discussed in JEFFRIES, JUSTICE POWELL, *supra* note 171, at 439. The Baldus study had found the racial differential unimpressive for low-aggravation crimes (almost no one was sentenced to death) or for the high-aggravation crimes (most were sentenced to death). The race differential was most pronounced for those in McCleskey's category of medium-aggravation: juries overwhelmingly favored defendants who killed black people over defendants who killed white people.

1103. Compare *McCleskey*, 481 U.S. at 297, 309-12 (finding Baldus study insufficient to demonstrate that *this defendant's* sentence was tainted by discrimination), with Brief for Respondent in Opposition to the Petition for Writ of Certiorari at 8, *Hampton v. Smyth*, 340 U.S. 914 (1951) (1950 Term, Misc. No. 245) ("Did the juries in the instant cases discriminate against the petitioner? There is no such evidence.").

review,¹¹⁰⁵ Warren McCleskey was executed on September 25, 1991, thirteen years after he had killed the police officer.

Does *McCleskey*, decided at the tail end of the century, mean the end of the constitutional discourse against the death penalty? Probably not. The Powell opinion itself left open the possibility that particularized evidence of the operation of racial prejudice in a specific case would justify overturning a death sentence. Indeed, the debate within the Court revealed that most of the Justices were actually persuaded that juries acted upon the basis of conscious or unconscious racism. The four dissenters openly made that charge — and they found an unlikely echo in Justice Antonin Scalia. In a remarkable memo to his colleagues, Scalia objected to Powell's suggestion that racist motivations by jurors would justify reversing a sentence. Because "the unconscious operation of irrational sympathies . . . including racial, upon jury decisions and (hence) prosecutorial [decisions], is real, acknowledged by the [decisions] of this court, and ineradicable, I cannot honestly say that all I need is more proof."¹¹⁰⁶ More firmly than Powell, however, Scalia was unwilling to act upon this knowledge to overturn capital punishment statutes. An open acknowledgment of this position in a judicial opinion would be almost unthinkable. Not only is the ongoing racism of the criminal justice system being pushed into a constitutional closet, but so is the acknowledgment that it does not matter.

Nonetheless, the core lesson of the Martinsville Seven case resonates still: the administration of capital punishment in this country must be understood against the backdrop of the persistence of racial distinctions and fears; ignoring or denying the effect of race — documented in every respectable study that I have seen¹¹⁰⁷ — does not solve the problem and leaves the criminal justice system vulnerable to questions about its legitimacy. One does not have to be a radical to be troubled by this. Justice Blackmun, a consistent ally in Chief Justice Burger's campaign to uphold the death penalty in the 1970s, dissented passionately in *McCleskey*. At the end of his tenure, he announced his belief that the death penalty was per se unconstitutional.¹¹⁰⁸ After he

1104. Like Virginia in 1950, Powell in 1987 could not envision a remedy for the bad numbers that a restrained court could implement. Stevens' suggestion that the Court rule against the death penalty for all but the most egregious circumstances smacked too much of judicial legislation for the majority. For a nuanced critique of the Powell decision, see KENNEDY, RACE, CRIME, *supra* note 202, at 326-50.

1105. *McCleskey v. Zant*, 499 U.S. 467 (1991).

1106. Justice Scalia's internal memo was uncovered and analyzed in Dennis D. Dorin, *Far Right of the Mainstream: Racism, Rights, and Remedies from the Perspective of Justice Antonin Scalia's McCleskey Memorandum*, 45 MERCER L. REV. 1035 (1994).

1107. See the list of sources in KENNEDY, RACE, CRIME, *supra* note 202, at 450-51 n.51.

1108. *Callins v. Collins*, 510 U.S. 1141, 1157 (1994) (Blackmun, J., dissenting from denial of certiorari).

left the Court, Justice Powell told his biographer that he regretted his vote in *McCleskey* and had concluded that the death penalty could not be properly administered in this country.¹¹⁰⁹

E. *Equal Protection and the Shifting Fortunes of the Political Question, Federalism, and State Action Doctrines*

The newly vital Equal Protection Clause engineered by the civil rights politics of recognition had ancillary but ambiguous consequences for a whole range of other constitutional doctrines: the political question doctrine, federalism limits on congressional regulatory authority, and the state action doctrine. The Supreme Court's long campaign to support the civil rights movement's politics of recognition motivated the Justices to relax each of these limitations on judicial and legislative authority. Specifically, the voting and desegregation cases drew the Court irrevocably into the political thicket and contributed directly to the Court's great activism in legislative apportionment cases; the Court's desire to approve new federal statutes protecting people of color against various forms of state and private discrimination represented an extension of both Commerce Clause and Fourteenth and Fifteenth Amendment authorizations for Congress to regulate local affairs; the complicated interrelationships between public and private oppression of minorities triggered loopholes and exceptions to the state action requirement for constitutional intervention by the courts and, in some cases, the Congress. The Court's equal protection activism in all these venues went against the grain of traditional doctrine — which made a comeback in the last quarter of the century. Separation of powers, federalism, and libertarian values were constitutional tropes to which the anti-civil rights, anti-ERA and pro-life, and TFV countermovements could successfully appeal.

But the revival of these constitutional values did not, and could not, turn back the clock to 1950, and so these areas of law well illustrate how the interaction between IBSMs and their countermovements create doctrinal webs and spirals. The webs, moreover, were woven in unpredictable patterns. The most unexpected beneficiary of those patterns was George W. Bush, whose selection as President owed more than a little to the legacy of the civil rights movement in voting cases.

1109. See JEFFRIES, JUSTICE POWELL, *supra* note 171, at 451-52.

1. *Voting Cases and the Displacement of the Political Question Doctrine*

American courts long refrained from deciding “political” questions. The classical doctrine rests upon the constitutional notion that the role of the Court is to enforce legal *rights*, and not to decide matters of *policy* the Constitution has allocated to the discretion of officials in the other branches of government.¹¹¹⁰ But most of the great political question decisions have emphasized pragmatic considerations as well. For example, in *Luther v. Borden*,¹¹¹¹ the Court refused to adjudicate a controversy over which competing faction represented the legitimate government of Rhode Island, in part because the Guarantee Clause seemed to vest Congress with primary responsibility for determining whether a state government was properly “republican,” but also because a judgment would have presented problems of interpretation and enforcement beyond the Court’s institutional competence.¹¹¹² Some of the political question cases have emphasized a court’s “equitable discretion” not to issue injunctive relief in cases presenting political or other problems with enforcement. Accordingly, I would separate three different strands of what might be collectively deemed a political question doctrine: (1) *constitutional*, arising out of the Constitution’s allocation of authority to other branches of government; and (2) *pragmatic*, relating to the competence of the judiciary to *discern* rules and principles of law to the matter and (3) to *administer* a remedy.¹¹¹³

A classic statement of the pragmatic rule-discernment and administrability features of the political question doctrine was *Giles v.*

1110. *E.g.*, *Marbury v. Madison*, 5 U.S. 137 (1803) (dictum). One feature that has made *Marbury* a great case is that the Court distanced itself from “political” issues while at the same time framing its legal opinion so as to minimize “political” risks to the Court. See William Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1. Academic articulations of the rule of law basis for the doctrine include Oliver P. Field, *The Doctrine of Political Questions in the Federal Courts*, 8 MINN. L. REV. 485 (1924).

1111. 48 U.S. (7 How.) 1, 47 (1849).

1112. *Id.* at 39-40; see also *Coleman v. Miller*, 307 U.S. 433, 454-55 (1939) (plurality opinion of Hughes, C.J.) (citing lack of judicially manageable standards as reason for refusing to determine an expiration date for ratifying a proposed constitutional amendment); *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 141-42 (1912) (another Guarantee Clause case, but with much greater emphasis on pragmatic reasons for abstaining).

1113. For a more elaborate typology, see Louis Henkin, *Is There a Political Question Doctrine?*, 85 YALE L.J. 597 (1976) (political question doctrine is a collection of various doctrines of abstention). For a simpler typology, see Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237 (2002) (emphasizing the “prudential” features of the political question doctrine). One might also usefully distinguish among political question justifications for federal courts to (a) refuse jurisdiction over a matter, (b) determine there is no constitutional cause of action, or (c) withhold relief in the court’s discretion.

Harris.¹¹¹⁴ The case involved a claim that Montgomery County, Alabama unlawfully refused to register more than 5000 qualified African-American voters. Such a claim, routinely justiciable today, was not in 1903. Although “traditional limits of proceedings in equity have not embraced a remedy for political wrongs,” Justice Holmes’ opinion for the Court assumed that the circuit court had jurisdiction, and the complaint made out a constitutional claim, but ruled that the court properly declined to issue an injunction to remedy the wrongs. The main reasons were that popular opinion would defeat the injunction, rendering it pointless, and that only the national political process could truly assure that voting rights could be enforced under these circumstances, making the injunction unnecessary.¹¹¹⁵ The latter point was fanciful, as the federal government had abandoned those “sullen peoples” to the operation of local politics.¹¹¹⁶ If *Giles* were read broadly, it would have rendered southern voting practices immune from constitutional challenge — not because the Constitution denied federal courts authority to adjudicate such cases, but because the courts saw themselves as incompetent to do so or impotent to administer a remedy. Under the theoretical framework in this Article, *Giles* would be read broadly only so long as its victims were completely marginalized — which of course was the object of the Alabama voting practices.

Giles was not read broadly, in part because of the political and legal efforts of the NAACP and its allies. In *Guinn*, none of the parties cited *Giles*, presumably because the state grandfather clause was transparently unconstitutional, the remedy straightforward (simple invalidation of the statute), and its enforcement highly likely. The last point owed much to the fact that the United States itself was prosecuting the case, a stance that civil rights activists had orchestrated. When the NAACP later challenged Texas’s white primary law in *Nixon v. Herndon*,¹¹¹⁷ without the support of the Solicitor General, the pragmatic-administrability considerations of *Giles* were more relevant.

1114. 189 U.S. 475 (1903). For an excellent exegesis, see Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 CONST’L COMM. 295 (2000).

1115. *Giles*, 189 U.S. at 487. Holmes made two other arguments against relief: the plaintiffs’ cause of action was founded on the very statutory scheme they were challenging, and plaintiffs were unable to sue the state because of *Hans v. Louisiana*, 134 U.S. 1 (1890), and so would not be able to obtain a genuine remedy. This latter difficulty would be cured by *Ex parte Young*, 209 U.S. 123 (1908), which allowed civil rights plaintiffs to sue state officials for injunctive relief.

1116. Pildes, *supra* note 1114, at 307 (quoting William A. Dunning, *The Undoing of Reconstruction*, 88 ATLANTIC MONTHLY 437, 449 (Oct. 1901)); *see id.* at 309-10 (Congress in 1904 abandoned any effort to enforce the Fifteenth Amendment even as to the legitimacy of its own members’ elections, leaving the matter to the courts).

1117. 273 U.S. 536 (1927), discussed *supra* Section I.A.1.

The plaintiffs sought to get around that equitable precedent by bringing an action at law for damages resulting from the denial of their right to vote.¹¹¹⁸ More broadly, the NAACP argued that the political question doctrine was inapplicable to cases where citizens were asserting individual rights guaranteed by the Constitution, specifically the rights to vote and to the equal protection of the laws.¹¹¹⁹

Justice Holmes again wrote for the Court. He followed the NAACP in distinguishing *Giles* on the ground that it was a decision in equity not applicable to actions at law and then ruling that the classification of voting rights as “political” and therefore unreviewable is “little more than a play upon words.”¹¹²⁰ *Herndon* effectively disposed of *Giles* as a barrier to future challenges to southern denial of the franchise to people of color, because such suits could usually be brought as damage actions and could always be understood as individual rights cases.¹¹²¹ But *Herndon* was more than a technical departure from *Giles*. The earlier decision was written with a spirit of resignation and brusque dismissal of the individual rights claim: So long as the South was dedicated to suppressing black votes, wasn’t it futile for courts to intervene? The later decision just as brusquely dismissed the state’s political question argument. It reflected the Justices’ awareness that people of color were fighting for their rights and that the federal courts were their only effective avenue for relief, which the Taft Court Justices, conservative in other arenas, were willing to grant.¹¹²²

The Court revisited these issues in *Colegrove v. Green*,¹¹²³ where some Illinois voters objected to the dilution of their vote because of the state’s obsolescent law setting congressional districts. The state’s lead argument was that *Giles* precluded equitable relief in this “political” matter.¹¹²⁴ Writing for three Justices and invoking *Giles*, Justice

1118. See Reply Brief for Plaintiff-in-Error at 22-23, *Nixon v. Herndon*, 273 U.S. 536 (1927) (1926 Term, No. 117).

1119. See *id.* at 20. Most ambitiously, the NAACP confronted the Court with the South’s defiance of the Constitution. “We are not here concerned with a political question. It is one that transcends all politics. It is one which involves the supremacy of the Constitution both in its letter and in its spirit.” *Id.* at 33.

1120. *Herndon*, 273 U.S. at 540.

1121. See *Lane v. Wilson*, 307 U.S. 268, 272-73 (1939) (distinguishing *Giles* from civil rights actions brought in law); Petitioner’s Points at 16-17, *Nixon v. Condon*, 286 U.S. 73 (1932) (1931 Term, No. 265) (next lawsuit also brought in law rather than equity to fall under *Herndon* rather than *Giles*).

1122. Recall that the *Giles* Court had earlier decided *Plessy*, while the *Herndon* Court had already handed down *Moore v. Dempsey*, and its most articulate conservative (Sutherland) would soon author *Powell v. Alabama*.

1123. 328 U.S. 549 (1946).

1124. Brief and Argument for Appellees at 8-9, *Colegrove* (1945 Term, No. 804). But see Brief and Argument for Appellants at 80-88, *Colegrove* (1945 Term, No. 804) (relying on the race cases, *Classic* and *Allwright*, to refute the *Giles* argument).

Frankfurter reasoned from the constitutional structure and the greater institutional competence of the political branches that “[c]ourts ought not to enter this political thicket.”¹¹²⁵ Although not cited, *Giles* was even more central to Justice Rutledge’s concurring opinion, which argued that voting matters were not political questions in the constitutional sense, but posed “delicate” issues of remedy and enforcement that judges should exercise their equitable discretion to refrain from issuing relief.¹¹²⁶ With the race cases in mind, Justices Black, Douglas, and Murphy — the three most pro-civil rights jurists on the Court — dissented. “It is true that voting is part of elections and that elections are ‘political,’ ” but it does not follow that “courts are impotent in connection with evasions of all ‘political’ rights.”¹¹²⁷

After *Colegrove* and *Herndon*, *Giles* could not be cited for the proposition that voting rights were per se nonjusticiable (the core constitutional feature of the political question doctrine). But *Giles* could be the basis for two other kinds of claims: enforceability difficulties should inform a court’s decision whether to issue an injunction (the pragmatic-administrability idea, followed by Rutledge in *Colegrove*); or vote dilution or manipulation, as opposed to vote denial, presented issues not susceptible of a principled judicial, as opposed to legislative, determination because of its polycentric nature (the pragmatic-rule-discernment idea, followed by Frankfurter in *Colegrove*). How the Court viewed these claims was influenced by its experience with the school desegregation cases, which I think strengthened the Black-Douglas position. In the briefing for *Brown II*, southern states argued that local mores and resistance should be considered in judicial decisions crafting injunctions to remedy de jure segregation. The Court unanimously rejected their arguments, in part because the Eisenhower Administration supported a tougher approach to enforcement.¹¹²⁸ The arguments returned in sharper form in *Cooper v. Aaron*. Counsel for the Little Rock School Board relied on *Giles* to support his assertion that desegregation orders could not be issued by federal judges when

1125. *Colegrove*, 328 U.S. at 556 (plurality opinion of Frankfurter, J., joined by Reed & Burton, JJ.). “This is not an action to recover for damage because of the discriminatory exclusion of a plaintiff from rights enjoyed by other citizens,” like *Herndon* was. “The basis for the suit is not a private wrong, but a wrong suffered by Illinois as a polity,” making the case closer to *Giles. Id.* at 552.

1126. *Id.* at 564-65 (Rutledge, J., concurring); see also Alexander M. Bickel, *The Durability of Colegrove v. Green*, 72 YALE L.J. 39 (1962) (defending abstention in reapportionment cases as necessary for the Court to avoid adjudicating politically delicate issues; urging that the Court avoid the error of *Plessy*, which rashly reaffirmed a squalid practice).

1127. *Colegrove*, 328 U.S. at 572-73 (Black, J., dissenting).

1128. The state briefs and the Solicitor General’s stance are discussed *supra* Section I.A.2.

the people of the state were massively unwilling to go along.¹¹²⁹ Given the Court's commitment to *Brown* and the district's underlying (but never directly asserted) challenge to its duty to follow that precedent, this was an argument that even Justice Frankfurter summarily dismissed.¹¹³⁰ The Court did not even mention the *Giles* issue in its landmark opinion, which held that local opposition was no justification for a federal judge to delay entry of an injunction enforcing constitutional rights.¹¹³¹

The second kind of claim, administrability, presumably survived the early school desegregation cases but was weakened in the Court's first important case involving racial vote dilution, *Gomillion v. Lightfoot*.¹¹³² The NAACP challenged an Alabama statute altering the city limits of Tuskegee, to the effect that virtually all the black voters were moved outside the new limits. The challengers recognized that *Colegrove* was a problem for their lawsuit. The ACLU distinguished between what I am calling the constitutional dimension of the political question doctrine and the pragmatic-administrability dimension.¹¹³³ The Court's prior cases, starting with *Herndon*, made clear that the first was no barrier. Nor was the second, because Congress in 1957 had explicitly authorized federal courts to exercise jurisdiction in voting rights cases. Unspoken but also relevant was the Solicitor General's participation in the case, suggesting that the Eisenhower Administration would back the Court up (as it had reluctantly done in *Cooper*). At conference, the Chief Justice and Justice Frankfurter (ferverently) distinguished *Colegrove* from the new case, but Justice Black insisted that any "distinction between this and *Colgrove* is not sound [O]ur opinion will be received with as much hostility as *Brown v. Board of Education* — if political considerations are to keep us from adjudicating a case, this should be the one — all cities in the south do this."¹¹³⁴ Distinguishing *Colgrove*, Justice Frankfurter's

1129. See Brief for Petitioners at 13, 19, 27-29, 33, *Cooper v. Aaron*, 358 U.S. 1 (1958) (Aug. 1958 Special Term, No. 1).

1130. At oral argument in *Cooper*, counsel analogized this situation to one in which a drayman is ordered by a court to go from A to B. To do so he must cross a bridge. If the bridge is down, the drayman ought not be required to follow the original order. 54 LANDMARK BRIEFS, *supra* note 199, at 673-74. Justice Frankfurter objected to the analogy and then added, "a court of equity would not be beyond its powers to require that the bridge be restored." *Id.* at 674.

1131. *Cooper v. Aaron*, 358 U.S. 1, 15-17 (1958).

1132. 364 U.S. 339 (1960).

1133. Motion for Leave to File Brief for the ACLU as Amicus Curiae and Brief Amicus Curiae at 6-10, *Gomillion* (1960 Term, No. 32); see also Brief for the United States as Amicus Curiae at 6-14, *Gomillion* (1960 Term, No. 32).

1134. Douglas Conference Notes for *Gomillion* (Oct. 21, 1960), in *Douglas Papers*, *supra* note 192, Container 1234. Speaking right after Black. Frankfurter responded that *Colgrove* was different because Article I, Section 4 vested Congress (not the Court) with redis-

opinion for the Court saw the challenged law as just the same as *Guinn* and *Lane*: a subterfuge to deny people of color their rights to vote and therefore no different from any other individual rights case.¹¹³⁵

Notwithstanding Frankfurter's cautious opinion, *Gomillion* was a doctrinal fulcrum for the Court to reconsider *Colegrove*.¹¹³⁶ The same Term, the Court took review in *Baker v. Carr*,¹¹³⁷ where urban and suburban voters in Tennessee challenged the state's rural-biased apportionment law, which had not been revised since 1901. The lower court dismissed the complaint on grounds that it had no subject matter jurisdiction over this "political question" and that the complaint failed to state a valid claim. The challengers, including the Solicitor General, argued that the political question doctrine did not preclude the court from taking jurisdiction. They relied on *Gomillion* to support their principle that voting rights cases did not involve any of the three features of what I am calling the political question doctrine.¹¹³⁸ The conference discussion in *Baker* was among the most heated I read. Justices Frankfurter and Harlan were infuriated by the Solicitor General's "reckless" invitation for federal courts to enter the political thicket, thereby imperiling the Court's legitimacy.¹¹³⁹ Viewing the case as on a par with *Brown* in its potential importance, Justice Stewart was "not at rest" on the matter, and an evenly (4-4) split Court ordered reargument.

The more the Justices deliberated in the matter, the more relevant the Tuskegee and other race cases became.¹¹⁴⁰ Frankfurter circulated a

tricting authority. No other Justice is recorded as responding to either point, but all agreed to overturn the racial gerrymander. *Id.*

1135. *Gomillion*, 364 U.S. at 346.

1136. Indeed, the Solicitor General's Brief for the United States as Amicus Curiae suggested that the Department of Justice was open to a rethinking of *Colegrove*. Brief for the United States as Amicus Curiae at 11, *Gomillion* (1960 Term, No. 32).

1137. 369 U.S. 186 (1962).

1138. See Brief for the United States as Amicus Curiae at 29-41, 44-46, *Baker v. Carr*, 369 U.S. 186 (1962) (1961 Term, No. 6) (relying on 1957 CRA and *Gomillion*); Brief for Appellants at 31-34, *Baker* (1961 Term, No. 6) (*Herndon* as well as *Gomillion*). I am citing here to the briefs on reargument, which mainly reiterated points made in earlier briefs and at oral argument on April 19-20, 1961. 56 LANDMARK BRIEFS, *supra* note 199, at 568-69 (Solicitor General generalizing from the Texas white primary cases).

1139. Douglas Conference Notes for *Baker* (Apr. 20, 1961), in *Douglas Papers*, *supra* note 192, Container 1267.

1140. The reargument in *Baker v. Carr* on October 9, 1961, saw counsel for appellants, return repeatedly to the Texas white primary cases, *Gomillion*, and the 1957 and 1960 civil rights laws to distinguish or overrule *Colegrove*. See 56 LANDMARK BRIEFS, *supra* note 199, at 629-35. Solicitor General Cox insisted that the race discrimination cases could not be distinguished from the case at hand, which presented an equally "arbitrary" discrimination. *Id.* at 642-43.

lengthy memo distinguishing *Gomillion*, and it was the focus of a long speech by Harlan at the second conference. As Harlan expounded on the Court's wise avoidance of "political contests" throughout its history, Douglas jotted down, "My God — what does he think the Segregation Cases were — or the Youngstown Case — or the Tuskegee Case?"¹¹⁴¹ Invoking *Shelley v. Kraemer* for the idea that the state ought to play no part in denying people their rights, Justice Stewart finally took a firm position against viewing the case as raising a political question. It is clear from both the conference evidence and the context of *Baker v. Carr* that the voting rights cases provided not only the precedential basis for overruling *Colegrove* and ignoring *Giles*, but also the motivation for the Justices. Except for Frankfurter and Harlan, the Justices viewed the dangers of injecting the Court into the political thicket of electoral line-drawing as both manageable and justified by the benefits. The NAACP's cases, especially *Gomillion*, had already involved the Court, and any impact on the Court's legitimacy had been to enhance it.

Justice Brennan was ultimately able to persuade six Justices to join his opinion overruling *Colegrove*. His important synthesis of political question history and doctrine posited the relevance of six factors:¹¹⁴²

[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Thus, *Baker* emphasized the pragmatic (factors [2]-[6]) rather than constitutional (factor [1]) dimensions of the political question doctrine and, within the pragmatic dimension, emphasized competence to discern rules of law rather than the administrability concerns. Indeed, *Baker* can be read as narrowing the kinds of administrability concerns courts ought to consider and as decisively rejecting *Giles*'s holding that problems with enforcement are a reason for refusing to exercise jurisdiction. Since *Baker*, of course, the Court has reached the merits of a host of constitutional voting cases — most notably the decisions requiring one-person, one-vote in state legislatures and the U.S. House

1141. Douglas Second Conference Notes for *Baker* (Oct. 13, 1961), in Douglas Papers, *supra* note 192, Container 1267.

1142. *Baker*, 369 U.S. at 217 (bracketed numbers added).

of Representatives,¹¹⁴³ extending that principle to local governments,¹¹⁴⁴ and evaluating discriminatory intent in cases raising vote dilution claims on the part of people of color,¹¹⁴⁵ political parties,¹¹⁴⁶ and white people.¹¹⁴⁷ Although the Court usually does not grant relief in its voting cases, there is a general consensus that they present justiciable issues.

Without expounding more than preliminarily, I should say that *Brown* and *Baker* have contributed to the Court's increasing disinclination to invoke the political question doctrine in many kinds of cases, apart from voting. The Court's encouragement of aggressive school desegregation decrees in *Green* and *Swann* reflected the Justices' diminished concern for embroiling federal courts in local politics (Section I.A). Patterned on the *Brown II* lawsuits, institutional reform class actions ask federal courts to declare conditions in state institutions (prisons, hospitals) unconstitutional and then to retain jurisdiction over a period of time to assure that the state restructures the flawed institutions. As Malcom Feeley and Ed Rubin have argued, this kind of litigation necessarily involves courts in allocational and managerial decisions.¹¹⁴⁸ For another example, the Court adjudicated and endorsed Representative Adam Clayton Powell's claim that he was improperly excluded from the Ninetieth Congress.¹¹⁴⁹ This was remarkable even under the *Baker* test, as the Constitution vests broad authority in the House to judge the qualifications of its members, and

1143. *Reynolds v. Sims*, 377 U.S. 533 (1964) (equal protection clause requires one person, one vote). For examples of applications, see *Karcher v. Daggett*, 462 U.S. 725 (1983), and *Wesberry v. Sanders*, 376 U.S. 1 (1964) (one-person, one-vote required for House districts by U.S. CONST. art. I, § 2). See also *United States Dep't of Commerce v. Montana*, 503 U.S. 442 (1992) (Department of Commerce correct to allocate Montana only one House member). This line of cases contributed to a political revolution in this country and is one of the biggest constitutional legacies of the twentieth century Court.

1144. *Avery v. Midland County*, 390 U.S. 474 (1968); *Hadley v. Junior College Dist.*, 397 U.S. 50 (1970).

1145. *City of Mobile v. Bolden*, 446 U.S. 55 (1980); *Rogers v. Lodge*, 458 U.S. 613 (1982).

1146. *Davis v. Bandemer*, 478 U.S. 109, 118-27 (1986) (rejecting on the authority of *Baker* and the race cases the argument that political gerrymandering cases were nonjusticiable political questions, an argument pressed in *id.* at 144-45 (O'Connor, J., concurring with judgment)).

1147. *Shaw v. Reno*, 509 U.S. 630 (1993).

1148. MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS* (1998); see also ROBERT COVER ET AL., *PROCEDURE* ch. 2' (1988); OWEN FISS, *THE CIVIL RIGHTS INJUNCTION* (1978); Susan Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L.J. 1355 (1991).

1149. *Powell v. McCormack*, 395 U.S. 486 (1969). Justice Douglas' concurring opinion in *Powell* suggested that the underlying concern for some of the Justices was that this representative was singled out because of his race. *Id.* at 553 (Douglas, J., concurring).

a judgment of wrongful exclusion by the Court would normally be embarrassing to a coordinate branch of government. The decline of the political question doctrine is hardly limited to civil rights cases. It has been pervasive in all kinds of cases.¹¹⁵⁰ One major reason for this phenomenon was suggested by Professor Charles Black, who helped draft the briefs in *Brown*: the civil rights era has confirmed that judicial review to protect individual rights is the norm and not the exception.¹¹⁵¹ Scholars have overwhelmingly endorsed the Court's disinclination to apply the political question doctrine expansively, and some have called for abolishing the doctrine: in a constitutional world where *Brown* is the triumph and *Plessy* the disaster, courts should presumptively decide and protect the scrupulous operation of the electoral process especially.¹¹⁵²

Although no constitutional scholar has any but nasty words nowadays for the kind of abstention involved in *Giles v. Harris*, the Supreme Court's recent willingness to engage in aggressive equal protection review of the Florida Supreme Court's decision in *Palm Beach County Canvassing Board v. Harris*¹¹⁵³ (which had required manual recounts in the famously close 2000 presidential election) has stimulated some academic nostalgia for the old political question doctrine. Rachel Barkow maintains that the Supreme Court should not have adjudicated the first appeal of the (recent) *Harris* case, because the issues surrounding the choice of presidential electors were nonjusticiable for constitutional as well as pragmatic reasons.¹¹⁵⁴ There are many ironies in the second *Harris* litigation, almost 100 years after the first. From my perspective the main irony is that the utter demise of *Giles v. Harris* by the Texas white primary cases and subsequent

1150. A Court majority has invoked the political question doctrine in only two cases since *Baker*: *Nixon v. United States*, 506 U.S. 224 (1993) (Senate's delegation of factfinding in impeachment matters to a committee is nonjusticiable); *Gilligan v. Morgan*, 413 U.S. 1, 10-12 (1973) (challenges to national guard training nonjusticiable because Article I, § 8, cl. 16 vests Congress rather than the Court with supervision). On the Court's disinclination to invoke the doctrine in cases raising plausible concerns under the *Baker* factors, see David J. Bederman, *Deference or Deception: Treaty Rights as Political Questions*, 70 U. COLO. L. REV. 1439 (1999), and R. Brooke Jackson, *The Political Question Doctrine: Where Does It Stand After Powell v. McCormack, O'Brien v. Brown and Gilligan v. Morgan?*, 44 U. COLO. L. REV. 477 (1973).

1151. Charles L. Black, *Inequities in Districting for Congress: Baker v. Carr and Colgrove v. Green*, 72 YALE L.J. 13 (1962).

1152. See, e.g., ERWIN CHEREMINSKY, *INTERPRETING THE CONSTITUTION* 99-100 (1987); THOMAS FRANCK, *POLITICAL QUESTIONS/JUDICIAL ANSWERS* (1992); Martin H. Redish, *Judicial Review and the "Political Question,"* 79 NW. U. L. REV. 1031 (1985).

1153. 772 So.2d 1220 (Fla. 2000), *rev'd and remanded sub nom. Bush v. Palm Beach Canvassing Bd.*, 531 U.S. 70 (2000), *on remand*, 772 So.2d 1273 (Fla. 2000), *rev'd*, 531 U.S. 78 (2000). This is the infamous *Bush v. Gore* litigation.

1154. See Barkow, *supra* note 1113, at 277-95 (constitutional form of the doctrine required abstention); *id.* at 295-300 (prudential considerations support abstention as well).

precedents rendered the various dimensions of the political question doctrine virtually invisible in *Canvassing Board v. Harris*. After 100 years of adjudicating voting rights irregularities under the Equal Protection Clause, neither the litigating parties nor any Justice even mentioned abstention in a case which seemingly presented political questions that Article II of the Constitution has vested in Congress and the states to resolve and whose resolution was hard to justify along traditional rule of law grounds. The new judicial supremacy reflected in the later case — widely condemned by legal scholars — has been in some measure made possible by the civil rights revolution that legal scholars just as overwhelmingly endorse.¹¹⁵⁵

So *Giles v. Harris* is a doctrinal dinosaur, whose demise has unleashed nine Justices to intervene in the political process at will. But, in a final irony, *Giles*' pragmatic spirit has returned to haunt modern civil rights cases. While it would be unthinkable for a modern Holmes to refuse jurisdiction altogether in a race discrimination case, he or she might still refuse or tailor relief because of the underlying constitutional and pragmatic concerns that once animated the political question doctrine. Specifically, the constitutional and pragmatic underpinnings of the political question doctrine have, to some extent, migrated to doctrines of standing, deference to legislative judgments, and other passive virtues. In cases like *Allen v. Wright*,¹¹⁵⁶ the Court for reasons of separation of powers and the constitutionally limited role of courts has held that civil rights plaintiffs have no standing under Article III to raise claims best left to the political branches.¹¹⁵⁷ In cases like *Hunt v. Cromartie*,¹¹⁵⁸ the Court, for reasons of separation of powers and federalism, has ruled that even when enforcing voting rights the judiciary needs to tread cautiously.¹¹⁵⁹ In cases like *Milliken v. Bradley*,¹¹⁶⁰ the

1155. And so there is now a cottage industry seeking to show how the current activism is “new.” See, e.g., Larry D. Kramer, *The Supreme Court, 2000 Term — Foreword: We the Court*, 115 HARV. L. REV. 4 (2001) [hereinafter Kramer, *We the Court*].

1156. 468 U.S. 737 (1984) (black parents have no standing to sue Treasury Department to revoke tax exemption of private academies violating tax law by their race discrimination).

1157. See also *Raines v. Byrd*, 521 U.S. 811 (1997), where the Court refused standing to members of Congress complaining of the line item veto; *id.* at 833-34 (Souter, J., concurring) (justifying the Court's result explicitly along political question lines); *Baker v. Carr*, 369 U.S. 186, 286-87 (1962) (Frankfurter, J., dissenting) (constitutional standing doctrine implements same values as political question doctrine) (citing *Fairchild v. Hughes*, 258 U.S. 126 (1922)).

1158. 121 S. Ct. 1452, 1466 (2001) (lower court acted improperly in overturning North Carolina redistricting decision, given the “extraordinary caution” that courts must show before treading on legislative prerogatives) (quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995) (O'Connor, J., concurring)).

1159. See also *Rizzo v. Goode*, 423 U.S. 362, 378 (1976) (local government needs wide latitude in running its police department, thereby supporting abstention from adjudicating allegation of system-wide misconduct).

1160. 418 U.S. 717, 744-45 (1974) (lower courts in *Brown II* cases do not have authority to issue interdistrict remedies), *followed in Missouri v. Jenkins* (III), 515 U.S. 70 (1995).

Court for reasons of practicality and competence laid down restrictions of lower court relief in *Brown II* cases. In *Naim v. Naim*, even the Warren Court ducked the politically charged miscegenation issue in the 1950s, not by ruling it a political question or by denying equitable relief, but instead by a fabricated technical ruling.¹¹⁶¹

Although technically no longer good law, *Giles v. Harris* might retain some vitality as a cautionary limit to a court's discretionary exercise of remedies in equity. The difference today is that federal courts will often demand the "best plaintiffs" before they will adjudicate a civil rights case or will apply the *Giles* concerns in thinking about how broad the injunction should be. An updated reading of *Giles* points the way toward a smarter role for the Supreme Court in lesbigay rights cases, for example. The Court has decided too many important cases beclouded by procedural defects. *Bowers v. Hardwick* should have been booted for lack of standing (there was no prosecution nor any danger thereof by the time the case reached the Supreme Court) or on grounds of mootness, the wise move by which the Court avoided an early decision on the issue of affirmative action (*DeFunis*). *Boy Scouts of America v. Dale* should have been dismissed as improvidently granted because the association's actual stance toward lesbigay people seemed more a lawyer's post-hoc justification than one that saturated its members' goals and identities. On the other hand, the Vermont Supreme Court's savvy decision in *Baker v. State* was a good example of the possible utility of an updated *Giles*: the court recognized lesbigay people's rights claim and insisted on efficacious relief, but delayed issuing an injunction so that the political process could respond first.¹¹⁶²

2. *Federalism and Expanded National Authority to Protect Civil Rights*

The autonomy of the states to govern themselves and make local policy decisions is enshrined in the U.S. Constitution and protects desirable values of liberty, efficiency, civic engagement, and accountability in governance.¹¹⁶³ So constitutional federalism is valuable, but if

1161. See BICKEL, *supra* note 140, at 174 (classic defense of the Court's decision in *Naim*: by striking down the miscegenation law (the only proper ruling after *Brown*), the Court would have undermined the political conditions needed for enforcing *Brown* itself).

1162. See ESKRIDGE, EQUALITY PRACTICE, *supra* note 626, at chs. 2, 4-5 (explication and defense of the court's pragmatic approach to relief).

1163. See U.S. CONST. amend. X; Gregory v. Ashcroft, 501 U.S. 452 (1991) (federalism justifications for super-strong clear statement rule protecting against national regulation of core state activities); PETERSON, *supra* note 485; Jenna Bednar & William N. Eskridge, Jr., *Steadying the Court's "Unsteady Path": A Theory of Judicial Enforcement of Federalism*, 68 S. CAL. L. REV. 1447 (1995); Steven G. Calabresi, "A Government of Powers": In Defense of U.S. v. Lopez, 94 MICH. L. REV. 752 (1995); Deborah Jones Merritt, *The Guarantee Clause*

carried too far would impose significant costs. As the Constitution of 1789 recognized, the nation needs to speak with one voice as to certain matters, especially foreign policy, immigration, military affairs, and commerce. Both the original Constitution and the Reconstruction amendments also spoke to the danger that local majorities would be especially prone to oppress minorities.¹¹⁶⁴ The remedy was to nationalize individual rights: the Reconstruction amendments, in particular, offered federal courts as a neutral forum where victims of local discrimination could find protection against oppressive local measures, and empowered the national Congress to pass legislation effectuating those rights. Congress enacted various civil rights laws between 1866 and 1875 that established federal causes of action for discrimination on the basis of race in matters of contracts and property (1866), voting (1870), jury service (1875), and public accommodations (1875).¹¹⁶⁵

The Supreme Court's decision in the *Civil Rights Cases*¹¹⁶⁶ invalidated the public accommodations provisions of the 1875 law and generally constricted the equality-enforcing potential of the Reconstruction amendments. First, the Court ruled that the Equal Protection Clause regulates only the actions of states and not private parties, and that the authorization of congressional "enforcement" in section 5 of the Fourteenth Amendment is similarly limited.¹¹⁶⁷ Second, the Court understood "state action" narrowly, to mean affirmative state conduct and not mere acquiescence in private conduct. Third, while conceding that the Thirteenth Amendment applies directly to private "badges and incidents" of slavery, the Court limited Congress's power to those regulations that had historically buttressed the institution of slavery.¹¹⁶⁸ This conservative interpretation of federal

and State Autonomy: *Federalism for a Third Century*, 88 COLUM. L. REV. 1 (1988). But see Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903 (1994).

1164. A more modern point, recognized during Reconstruction, was that *redistributive* policies (including redistribution of legal entitlements as well as wealth) would not readily occur at the local level; the comparative advantage of local governments is ordinary *police power* functions (roads, trash, schools). See PETERSON, *supra* note 485 (public choice theory along these lines). The Reconstruction amendments represented a massive redistribution of rights and duties in the South, and reconstructors would rationally have expected that this redistribution could not be left to local organs. Hence the delegation of enforcement authority both to the Supreme Court (§ 1 of each amendment) and to Congress (the enforcement clauses of each amendment).

1165. See Civil Rights Act of 1866, 42 U.S.C. §§ 1981-1982 (2000); Voting Rights Act of 1870, 16 Stat. 140 (1870); Civil Rights Act of 1875, 18 Stat. 336 (1875).

1166. 109 U.S. 3 (1883) (invalidating federal statute prohibiting race discrimination by public accommodations).

1167. *Id.* at 10-14.

1168. *Id.* at 22: "Compulsory service of the slave for the benefit of the master, restraint of his movements except by the master's will, disability to hold property, to make contracts,

power to legislate for the protection of people of color was significant, for local politics in the South not only punished people of color with apartheid laws but effectively excluded them from participation in the process by which laws were made (through voting exclusions) and enforced (through jury exclusions). The NAACP recognized that federalism was a shield for the local operation of racist sentiments, and that the only feasible route for redistribution of rights and entitlements was at the national level. Women's and gay rights groups have assimilated the same lesson: activists have won equal rights in states located on the east and west coasts, but states of the South in particular have required national pressure or compulsion before they will provide any measure of equality to women working outside the home and to lesbian-gay people. For each IBSM, a central goal of its politics of remediation has been the adoption of a broad antidiscrimination law by Congress.

But until the 1950s, it was only the Supreme Court and sometimes the Department of Justice that intervened (episodically) to interrupt the cycle of subordination. So the *Civil Rights Cases* were not in play for most of the twentieth century. But once the civil rights movement became a mass mobilization in 1962-63, Congress acted in a big way with the Civil Rights Act of 1964 ("CRA") and the Voting Rights Act of 1965 ("VRA"), as well as other important statutes.¹¹⁶⁹ These were super-statutes that transformed constitutional law. Their opponents' main constitutional as well as policy argument was that the laws invaded "states' rights" by imposing unauthorized national rules onto traditionalist locales. Supporters responded that these laws were modest efforts to deliver on the original promises of Reconstruction and of *Brown*. There was no doubt that the Warren Court was friendly to the latter arguments; between 1965 and 1969, the Court transformed federalism jurisprudence in response to states rights challenges to the new laws.

The CRA provisions barring racial discrimination by public accommodations such as private hotels and restaurants were immediately challenged as beyond Congress's authority in *Heart of Atlanta Motel v. United States*¹¹⁷⁰ and *Katzenbach v. McClung*.¹¹⁷¹ The challengers basically relied on the *Civil Rights Cases*, which they read to bar Congress from regulating discrimination by private parties, either directly under the section 5 of the Fourteenth Amendment or indi-

to have a standing in court, to be a witness against a white person, and such like burdens and incapacities, were the inseparable incidents of the institution."

1169. See text accompanying notes 133-154.

1170. 379 U.S. 241 (1964).

1171. 379 U.S. 294 (1964). An excellent account of the litigation is RICHARD C. CORTNER, CIVIL RIGHTS AND PUBLIC ACCOMMODATIONS: THE HEART OF ATLANTA MOTEL AND MCCLUNG CASES (2001) [hereinafter CORTNER, PUBLIC ACCOMMODATIONS].

rectly under the Commerce Clause.¹¹⁷² Over the objections of many in the Justice Department, Solicitor General Archibald Cox defended the law only as a regulation of interstate commerce and did not ask the Court to reconsider the *Civil Rights Cases*.¹¹⁷³ At conference, three Justices (Black, Douglas, Goldberg) were prepared to overrule the *Civil Rights Cases*' holding that Congress could not regulate private actors under section 5.¹¹⁷⁴ Two Justices (Clark and Harlan) were opposed to any such overruling, and Harlan would have invalidated the law had it rested only on section 5.¹¹⁷⁵ The remainder of the Court (Warren, Brennan, Stewart, White) found the Commerce Clause basis for the law so clear that discussion of a section 5 ground was pointless, and unanimous Courts ruled in both cases that Congress could legislate antidiscrimination rules upon its finding "overwhelming evidence that discrimination by [public accommodations] impedes interstate travel."¹¹⁷⁶ The conference in the CRA cases, however, set the stage for the Court to consider the issue squarely in the VRA cases that immediately followed.

In *South Carolina v. Katzenbach*¹¹⁷⁷ and *Katzenbach v. Morgan*,¹¹⁷⁸ the Court upheld the VRA's suspension of literacy tests. This was significant because the Court had earlier refused to hold that literacy tests were per se violations of the Fourteenth Amendment.¹¹⁷⁹ Chief

1172. Moreston Rolleston, Jr.'s Jurisdictional Statement and Brief for the Appellants in *Heart of Atlanta* (1964 Term, No. 515) was presumably the last brief filed with the Court whose rhetoric was unashamedly that of the natural law defense of segregation. Rolleston argued, inter alia, that because many of the framers were slaveholders, their Constitution would not countenance racial integration. "George Washington did not intend that the new Constitution would provide any rights of personal freedom for his Negro slaves and certainly not the right to use the taverns and inns in which George Washington slept." *Id.* at 28.

1173. See 60 LANDMARK BRIEFS, *supra* note 199, at 560-84 (Cox's oral argument); CORTNER, PUBLIC ACCOMMODATIONS, *supra* note 1171, at 5-7.

1174. Douglas Conference Notes for *Heart of Atlanta* and *McClung* (Oct. 5, 1964), in Douglas Papers, *supra* note 192, Container 1348 (O.T. 1964, Nos. 515 & 543). Douglas and Goldberg expressed their views in concurring opinions; see *Heart of Atlanta*, 379 U.S. at 279 (Douglas, J., concurring); *id.* at 291 (Goldberg, J., concurring).

1175. In the late Warren Court, only Justice Harlan unwaveringly followed the *Civil Rights Cases* — ironic because his grandfather had dissented in that case. *Civil Rights Cases*, 109 U.S. at 26-62 (Harlan, J., dissenting).

1176. *Heart of Atlanta*, 379 U.S. at 253; see *McClung*, 379 U.S. at 304-05.

1177. 383 U.S. 301 (1966) (rejecting facial challenge to VRA).

1178. 384 U.S. 641 (1966) (rejecting challenge to VRA preemption of New York's requirement that voters be able to read and write English). See generally Alexander M. Bickel, *The Voting Rights Cases*, 1966 SUP. CT. REV. 79.

1179. *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45 (1959). In *South Carolina v. Katzenbach*, intervening plaintiff Virginia argued that the Congress drafting the Fifteenth Amendment was aware of literacy tests and consciously rejected language that would have barred them. See Brief on Behalf of the Commonwealth of Virginia, Amicus Curiae app., *South Carolina* (1965 Term, Orig. No. 22).

Justice Warren's opinion for a unanimous Court in *South Carolina* ruled that Congress has broader authority under section 2 of the Fifteenth Amendment than the Court has under section 1 to recognize and remedy voting rights problems. Rather than determine how the Court would have ruled (or did rule), the Chief Justice's test was whether Congress's remedy was reasonable under the circumstances.¹¹⁸⁰ Given the Court's and Congress's long experience with trying to enforce equality of voting in the South — starting with *Guinn* and proceeding through the CRA of 1957 and 1960 — and the persistence of racial exclusions, Congress's judgment that strong prophylactic rules were necessary was one that the Court found amply supported by the impressive record compiled during the congressional deliberations.¹¹⁸¹

Morgan was harder for the Justices, because it involved a provision preempting New York's literacy requirement, as to which there were no congressional findings of invidious racial operation. New York's law mainly excluded Puerto Ricans who did not read English. While such a law therefore had a disparate impact upon an ethnic minority, most of the Justices did not find it unconstitutional — but they found Congress's judgment “not too far out of line” with their own equal protection jurisprudence.¹¹⁸² Reflecting this relative consensus and following *South Carolina's* lead, Justice Brennan's opinion in *Morgan* held that section 5 did not limit Congress to “the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional.”¹¹⁸³ Instead, Congress's section 5 power extended to laws “ ‘adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion.’ ”¹¹⁸⁴ Because there was a factual basis under

1180. Warren imported the expansive *McCulloch* test for congressional authority under the Necessary and Proper Clause: “ ‘Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.’ ” *South Carolina*, 383 U.S. at 326 (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 421 (1819)).

1181. *Id.* at 308-15 (reviewing the evidence); *cf. id.* at 355-59 (Black, J., concurring as to the § 2 test and the factual basis for Congress's judgment but dissenting from the Court's upholding the unprecedented remedy of a national administrative veto for state electoral rule changes).

1182. See Brennan Conference Notes for *Morgan*, in Brennan Papers, *supra* note 129, Box I: 130, Folder 2. The quotation in text is from Justice White; similar sentiments were expressed by Justices Black, Douglas, and Stewart.

1183. *Morgan*, 384 U.S. at 649; *see id.* at 651 n.10 (stating that Congress can enact statutes going beyond judicially protected rights but cannot abrogate or dilute such rights).

1184. *Id.* at 650 (quoting *Ex parte Virginia*, 100 U.S. 339, 345-46 (1879)).

which Congress “could have believed” that language discrimination in voting was linked to a wide array of discriminations against the Puerto Rican community, the Court ruled that Congress acted within the discretion conferred by section 5. In dissent, Justice Harlan objected that the Court should not defer to congressional findings unless Congress had actually engaged in factfinding.¹¹⁸⁵ Four years later, in *Oregon v. Mitchell*,¹¹⁸⁶ the Court unanimously upheld a VRA amendment suspending literacy tests nationwide.¹¹⁸⁷

At the same time the Court was construing Congress’s Fourteenth and Fifteenth Amendment powers broadly against the states, it was suggesting new bases in the Reconstruction amendments for congressional regulation of private discriminatory conduct. In *United States v. Guest*,¹¹⁸⁸ the Court was faced with a federal criminal prosecution of private parties for allegedly interfering with the equal use of public facilities.¹¹⁸⁹ Solicitor General Thurgood Marshall asked the Court to trim back the *Civil Rights Cases* and find that section 5 permits Congress to reach private conspiracies to deprive people of their civil rights.¹¹⁹⁰ Justice Stewart’s initial draft opinion for the Court would have ruled that Congress did not have the authority to regulate purely private action under section 5,¹¹⁹¹ but he withdrew these paragraphs upon objection from Justices Black and Brennan.¹¹⁹² His revised opinion asserted that there was state responsibility, because the indictment charged that defendants had conspired with state actors to deprive the black victims of access to public facilities; this was a retreat from

1185. See *id.* at 660-69 (Harlan, J., dissenting).

1186. 400 U.S. 112 (1970).

1187. *Id.* at 131-34 (Black, J., delivering the judgment of the Court, and relying on the enforcement clauses of both the Fourteenth and Fifteenth Amendments); see *id.* at 144-47 (Douglas, J., concurring in part); *id.* at 216-17 (Harlan, J., concurring in part); *id.* at 231-36 (Brennan, J., joined by White and Marshall, JJ., concurring in part); *id.* at 282-84 (Stewart, J., joined by Burger, C.J., and Blackmun, J., concurring in part). The Court by 5-4 margins struck down that portion of the law which sought to lower the minimum age for voting from 21 to 18 in state elections, see *id.* at 124-31 (Black, J., joined on this issue by Burger, C.J., Harlan, Stewart, and Blackmun, JJ.), but upheld that portion of the law lowering the voting age in national elections, see *id.* at 119-24 (Black, J., joined on this issue by Douglas, Brennan, White & Marshall, JJ.).

1188. 383 U.S. 745 (1966).

1189. The indictment also charged defendants’ interference with the victims’ right of interstate travel. The Justices unanimously agreed that Congress could and did make private interference with a constitutional right to travel a crime. *Id.* at 757-60 (Stewart, J., for the Court), followed in *Griffin v. Breckenridge*, 403 U.S. 88 (1971) (upholding tort claim for relief against private parties by blacks denied freedom of travel).

1190. Brief for Appellant at 18-52, *Guest* (1965 Term, No. 65).

1191. See Justice Stewart, Draft Opinion 1 (*Guest*) (Jan. 26, 1966), in *Douglas Papers*, *supra* note 192, Container 1353 (O.T. 1965, Argued Cases, No. 65-99).

1192. See Memorandum from Justice Stewart to the Conference (*Guest*) (Feb. 21, 1966), in *Douglas Papers*, *supra* note 192, Container 1353.

statements in the *Civil Rights Cases*.¹¹⁹³ A majority of the Court were open to Marshall's argument that the *Civil Rights Cases* be overruled altogether.¹¹⁹⁴ Justice Brennan persuaded six Justices to endorse the following proposition:¹¹⁹⁵

[S]ection 5 empowers Congress to enact laws punishing *all* conspiracies to interfere with the exercise of Fourteenth Amendment rights, whether or not state officers or others acting under the color of state law are implicated in the conspiracy. Although the Fourteenth Amendment itself, according to established doctrine, "speaks to the State or to those acting under the color of its authority," legislation protecting rights created by that Amendment, such as the right to equal utilization of state facilities, need not be confined to punishing conspiracies in which state officers participate. Rather, section 5 authorizes Congress to make laws that it concludes are reasonably necessary to protect a right created by and arising under that Amendment; and Congress is thus fully empowered to determine that punishment of private conspiracies interfering with the exercise of such a right is necessary to its full protection.

This is the broadest articulation of Congress's authority under section 5 ever to have commanded a majority of the Court.

Soon after *Guest*'s broad statement of Congress's section 5 powers, the Court addressed Congress's powers under section 2 of the Thirteenth Amendment in *Jones v. Alfred H. Mayer Co.*¹¹⁹⁶ Construing the Civil Rights Act of 1866 to bar private as well as public race discrimination in property transactions, the Court then ruled that the law was "necessary and proper for abolishing all badges and incidents of slavery" as required by section 2. Justice Stewart's opinion distinguished the *Civil Rights Cases*, which had involved rights to public ac-

1193. *Guest*, 383 U.S. at 755-56; cf. *The Civil Rights Cases*, 109 U.S. 3, 17 (1883) ("[T]he wrongful act of an individual, unsupported by any [state] authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party . . . but if not sanctioned in some way by the state, or not done under state authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the State for redress.").

1194. Justices Douglas and Black had already suggested their willingness to do so in the *Katzenbach* cases, and Justice Brennan (who had held back on the earlier cases) expressed his willingness in the *Guest* conference. See Douglas Conference Notes for *Guest* (Nov. 12, 1965), in Douglas Papers, *supra* note 192, Container 1353. Justice Clark opined that § 241 could reach conspiracies to deny people of color their rights to use public accommodations covered by the CRA of 1964, a position that entailed a rejection of the *Civil Rights Cases*. Chief Justice Warren had earlier joined an opinion seeking to narrow or overrule the *Civil Rights Cases*. See *Bell v. Maryland*, 378 U.S. 226, 288-312 (1964) (Goldberg, J., concurring). Although we do not have a record of Justice Fortas' reasons at conference, it is likely that he, too, was in favor of overruling that precedent.

1195. *Guest*, 383 U.S. at 782 (Brennan, J., joined by Warren, C.J., and Douglas, J., concurring); see *id.* at 762 (Clark, J., joined by Black and Fortas, JJ., concurring) (agreeing with the Brennan statement of Congress's § 5 powers).

1196. 392 U.S. 409 (1968). See generally Note, *The "New" Thirteenth Amendment: A Preliminary Analysis*, 82 HARV. L. REV. 1294 (1969).

commodations not considered fundamental in 1866 the way property rights were in 1866 and thereafter.¹¹⁹⁷ Because it was not irrational for the 1866 Congress to conclude that ghettoization was a “relic of slavery,” Stewart ruled that Congress could make it a tort. “At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live.”¹¹⁹⁸ This functional approach to badges and incidents of slavery was more open-ended and deferential to Congress than the narrowly historical approach of the *Civil Rights Cases*.

All of the cases discussed above were handed down in the last four years of the Warren Court, the high point of the Court’s pro-civil rights activism. Although the post-Warren Justices were big fans of federalism, they were unable or unwilling to overturn any of the Warren Court’s activism.¹¹⁹⁹ Instead, the Burger Court modestly expanded upon the Warren Court precedents in three ways. First, the Burger Court continued and occasionally extended the Warren Court’s liberal construction of Reconstruction era statutes. For example, skeptical Justices not only reaffirmed *Jones* but expanded its holding to justify another part of the CRA of 1866, which made it illegal to discriminate in making private contracts.¹²⁰⁰ The Court’s dynamic expansion of Reconstruction era statutes assured a steady stream of lawsuits against private parties as well as local governments that abused the civil rights of minorities.

Second, the Court in *Fitzpatrick v. Bitzer*¹²⁰¹ ruled that Congress had authority under the Fourteenth Amendment to subject the states

1197. *Jones*, 392 U.S. at 440-41, 441 n.78 (opinion for the Court); see also *Civil Rights Cases*, 109 U.S. at 22 (distinguishing statutory right to be served at public accommodation from “those fundamental rights which are the essence of civil freedom,” such as the right to convey and receive property).

1198. *Jones*, 392 U.S. at 443. *But see id.* at 450-77 (Harlan, J., dissenting) (suggesting unlikelihood that 1866 Congress intended this norm to be enforceable against *private* defendants).

1199. There are several reasons for this: (1) In most of the cases, the Department of Justice (including Nixon’s) supported the nationalizing civil rights vision; Congress was even stronger in its support. Anti-civil rights decisions would have brought a firestorm of protest onto the Court. (2) Two of the Nixon Justices (Blackmun and Powell) were strong adherents of *stare decisis*, which they extended to Warren Court precedents. (3) Most of the Nixon Justices were somewhat sympathetic to the need for national civil rights laws, and all the holdover Justices were committed to that posture.

1200. See *Runyon v. McCrary*, 427 U.S. 160 (1976) (reaffirming *Jones* and upholding Congress’s Thirteenth Amendment authority to create a cause of action for refusal to contract on the basis of race, 42 U.S.C. § 1981 (2000)); *id.* at 187-89 (Powell, J., concurring) (expressing skepticism that *Jones* was right but adhering to it for reasons of *stare decisis*); *id.* at 189-92 (Stevens, J.) (same); see also *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658 (1978) (overruling *Monroe v. Pape*, 365 U.S. 167 (1961)).

1201. 427 U.S. 445 (1976). See generally Vicki C. Jackson, *Holistic Interpretation: Fitzpatrick v. Bitzer and Our Bifurcated Constitution*, 53 STAN. L. REV. 1259 (2001).

to suit in federal court and to abrogate their Eleventh Amendment immunity from such litigation. Although the Nixon Justices had joined to revive the Tenth and Eleventh Amendments as a limitation on Congress's authority to impose labor regulations on states as employers,¹²⁰² they all ultimately agreed with Solicitor General Robert Bork that the Reconstruction amendments authorized Congress' extension of Title VII to state employers and its abrogation of state immunity from Title VII lawsuits.¹²⁰³ By holding state immunity abrogated, the Court exposed the states not only to backpay judgments, but also awards of counsel fees to prevailing job discrimination challengers.¹²⁰⁴

Third, the Burger Court took a broad view of Congress's authority to assure voting rights. Not only did the Court interpret the VRA expansively, but it reaffirmed the *Katzenbach* cases in *City of Rome v. United States*.¹²⁰⁵ Justice Marshall's opinion for the Court ruled that the VRA's preclearance requirements can, consistent with section 5, bar proposed voting practices that have a racially discriminatory effect, even if there is no evidence of discriminatory intent.¹²⁰⁶ The opinion was remarkable insofar as it was handed down the same day the Court made clear that the *Washington v. Davis* standard applied to Fifteenth Amendment cases.¹²⁰⁷ Hence, the constitutional precept that voting rules having discriminatory effects were invalid only if there were some evidence of discriminatory motive as well, was not a ceiling to Congress's section 5 power.

The rules of national authority looked very different in 1981 than they had looked in 1961, and the changes encouraged the expansive exercise of regulatory authority by Congress. The Commerce Clause, Thirteenth Amendment, and Fourteenth Amendment were grounds for national antidiscrimination laws and hate crime laws applicable to private as well as public actors. The Fourteenth and Fifteenth Amendments had been read to authorize the VRA, which created tough rules against racial vote dilution and essentially put southern states into federal voting rights receivership for at least a genera-

1202. William E. Leuchtenburg, *The Tenth Amendment over Two Centuries: More than a Truism*, in *THE TENTH AMENDMENT AND STATE SOVEREIGNTY* 41, 55-63 (Mark R. Kellenback ed., 2002).

1203. *Compare* Brief of the United States as Amicus Curiae, *Bitzer* (No. 75-251), with *Bitzer*, 427 U.S. at 456 (accepting the United States' position); *see also* Brennan Conference Notes for *Bitzer*, in Brennan Papers, *supra* note 129, Box I: 369, Folder 1 (Burger, Blackmun, and Rehnquist readily agreeing that § 5 authorized Congress to supersede the Eleventh Amendment; only Powell expressed doubts).

1204. 42 U.S.C. § 2000e-5(g) (2000).

1205. 446 U.S. 156 (1980), *followed and reaffirmed* by *Lopez v. Monterey County*, 525 U.S. 266 (1999).

1206. *Rome*, 446 U.S. at 173-78.

1207. *Mobile v. Bolden*, 446 U.S. 55 (1980) (handed down same day as *Rome*).

tion.¹²⁰⁸ States could be sued in federal court under all these statutes, and private plaintiffs could obtain damages and attorneys' fees under statutes authorized by the Reconstruction amendments. Except for *Bitzer*, a sex discrimination case, all these decisions were in race cases, but other IBSMs as part of their ongoing politics of remediation successfully petitioned Congress to adopt further antidiscrimination laws.¹²⁰⁹ All of these laws applied antidiscrimination rules to state as well as private employers, included monetary as well as injunctive remedies, and offered counsel fees to prevailing complainants.¹²¹⁰ The broad substance of modern antidiscrimination law was made possible by the Warren Court precedents of 1965-69, and the Burger Court's acquiescence in them.

While Congress was moving to protect ever more minority groups through broad antidiscrimination laws, the Court — repopulated with Reagan and Bush Justices — was becoming increasingly concerned that this national rule-fest was undermining the autonomy of the states. More important, forty years after *Brown*, and thirty years after the VRA and CRA, the idea of states' rights was no longer a shibboleth for segregation. The result has been a rollback of federal legislative power. At the turn of the millennium, a block of five Reagan/Bush Justices reasserted the federalism principle to draw limits on Congress's power. It is unclear how much of the Court's federalism rollback has been driven by a politics of preservation.¹²¹¹ On the one hand, most of the rollback precedents have not involved laws protecting people of color, women, or sexual minorities. Thus the Court in *United States v. Lopez*¹²¹² invalidated a federal gun possession law

1208. *E.g.*, *Connor v. Coleman*, 440 U.S. 612, 615-25 (1979) (Marshall, J., dissenting).

1209. *See* Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1994); Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified as amended in scattered sections of 29 U.S.C.); Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k); Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended in scattered sections of 29 U.S.C., 42 U.S.C., 47 U.S.C. and 2 U.S.C.); Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (codified as amended in scattered sections of 20 U.S.C., 29 U.S.C., and 42 U.S.C.); *cf.* Employment Nondiscrimination Act of 1995, S. 932, 104th Cong. (1995) (proposed (but not enacted) legislation protecting against sexual orientation discrimination in the workplace).

1210. *See* 42 U.S.C. § 2000e-5(k) (2000); 42 U.S.C. § 1988(b) (2000); 42 U.S.C. § 12205 (2000).

1211. My tentative view is that Justice O'Connor, the main theorist, has been inspired by constitutional principle and public policy rather than by a rollback of civil rights. *Compare* Bednar & Eskridge, *supra* note 1163 (principles and policies supporting the new federalism), *with* Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80 (2001) (criticizing the Court's changing the rules on Congress); Kramer, *We the Court*, *supra* note 1155, at 146-49 (contending the Court sought to retain interpretive control of the Constitution).

1212. 514 U.S. 549 (1995) (holding that Congress could not under its Commerce Clause power make it a crime to possess a gun near a school zone).

because it had no asserted connection to “‘commerce’ or any sort of economic enterprise.”¹²¹³ While this holding certainly set limits on *Heart of Atlanta* and *McClung*, Chief Justice Rehnquist’s opinion for the Court cited and relied on both precedents to frame his analysis.¹²¹⁴ In *City of Boerne v. Flores*,¹²¹⁵ the Court ruled that Congress did not have authority to bar the states from burdening religious minorities in ways that did not violate the free exercise clause. Citing the *Katzenbach* cases, Justice Kennedy’s opinion for the Court confirmed that section 5 authorizes Congress to adopt “measures that remedy or prevent unconstitutional actions,”¹²¹⁶ but does not authorize Congress to “make a substantive change in the governing law.”¹²¹⁷ Even if Congress identifies legitimate constitutional violations, as it did in the Religious Freedom Restoration Act, “[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”¹²¹⁸ This is a much tougher means test than that announced in *Katzenbach*.

On the other hand, the Court’s federalism rollback has also reversed gains made by women’s and disabled people’s politics and, more important, has imposed a narrowing theory of equality on the political as well as the judicial process. Recall the fate of the Violence Against Women Act (Section I.B.3.c). In *United States v. Morrison*,¹²¹⁹ Solicitor General Seth Waxman and various amici defended the tort statute as supported by the massively documented effects of sexual violence on interstate commerce and by the failure of state criminal justice systems to enforce sexual violence laws adequately.¹²²⁰ Five Justices rejected both arguments. Chief Justice Rehnquist’s opinion for the Court read *Lopez* for the proposition that Congress cannot regulate intrastate *noneconomic* activity simply by citing its cumula-

1213. *Id.* at 561.

1214. *Id.* at 558-59. *Compare id.* at 573-75 (Kennedy, J., joined by O’Connor, J., concurring) (emphasizing their commitment to not disturbing the twentieth century Commerce Clause jurisprudence), *with id.* at 584-602 (Thomas, J., concurring) (explaining that twentieth century jurisprudence should be reconsidered because inconsistent with original meaning of “commerce”).

1215. 521 U.S. 507 (1997). For a thoroughgoing critique, see Michael W. McConnell, Comment, *The Supreme Court, 1996 Term — Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153 (1997).

1216. *City of Boerne*, 521 U.S. at 517.

1217. *Id.* at 517-19.

1218. *Id.* at 520. From this proposition, there was no dissent. *Cf. id.* at 545 (O’Connor, J., dissenting in part) (agreeing with the Court’s test but disagreeing with its application).

1219. 529 U.S. 598 (2000).

1220. *E.g.*, Brief of Amici Curiae Equal Rights Advocates, et al., *Morrison* (Nos. 99-5, 99-29); Brief of Amici Curiae Lawyers’ Comm. for Civil Rights, et al., *Morrison* (Nos. 99-5, 99-29); Brief of Amici Curiae Law Professors, *Morrison* (Nos. 99-5, 99-29).

tive substantial effect on interstate commerce.¹²²¹ It is debatable whether the line must be drawn in this way as a matter of principle,¹²²² but the Chief Justice's distinction had the political virtue of drawing a line that could prevent the nationalization of criminal and family law (areas he marked as limited to state rulemaking), without calling Title VII or the public accommodation precedents into question.¹²²³ Nor was VAWA authorized by section 5 of the Fourteenth Amendment; it did not meet the *Boerne* "congruence" standard, because the only permissible congressional interest (forcing states to protect crimes against women) had little connection with the statutory means (creating a cause of action against people who engage in gender-based violence).¹²²⁴ Reaffirming the *Civil Rights Cases* and abrogating the Brennan statement (joined by six Justices) in *Guest*, the Chief Justice rejected the Solicitor General's argument that Congress could assert an interest in directly protecting against private violence under section 5.¹²²⁵ Again, the Court reaffirmed the VRA precedents but interpreted them as a ceiling rather than a floor for authorized congressional action.¹²²⁶

Just as important as the *Morrison* Court's stronger insistence that Congress be limited by tightly defined federalism limits was its insistence that sex discrimination jurisprudence be limited by the rules of the Court's previous race cases. The Chief Justice argued that if the Court allowed VAWA it would have to allow virtually any national regulation of family law, the core domain of the states. From a feminist point of view, this was questionable; part of the lesson of VAWA was that state family law left women vulnerable to unspeakable violence, a fact attested to by three dozen state attorney generals. The Chief Justice's argument was analogous to arguing that Congress in the 1920s did not have the authority to enact anti-lynching legislation, because allowing that authority would have permitted virtually any na-

1221. *Morrison*, 529 U.S. at 610-11. Thus, the hotel and restaurant in *Heart of Atlanta* and *McClung* could be regulated because their discriminatory conduct occurred in connection with economic activity, but the guns and rape of *Lopez* and *Morrison* could not be.

1222. *Cf. id.* at 637-45 (Souter, J., dissenting) (criticizing the economic-noneconomic activity distinction as ahistorical and unworkable).

1223. Thus, the Court rejected Congress's detailed factual findings that gender-based violence has substantial economic consequences — not because the findings were questionable, but because their methodology would, if accepted, provide Congress with a basis for regulating any area (or all areas) of criminal or family law. *Id.* at 614-19 (opinion of the Court).

1224. For a broader reading of *Boerne*, see *id.* at 664-66 (Breyer, J., dissenting). Two of the four dissenting justices (Souter and Ginsburg) did not address the § 5 issue.

1225. *Id.* at 621-25 (opinion of the Court).

1226. *Id.* at 626-27 (distinguishing *Katzenbach* cases because Congress was regulating state actors). For similar treatment of the ADEA as not meeting the *Boerne* standard for § 5, see *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000).

tional regulation of criminal law, another core domain of the states. By making the race cases the ceiling for Congress's power, the Court was imposing on Congress a model of discrimination that was not at all suitable for women's ongoing politics of protection and remediation.

These problems recurred in *Board of Trustees v. Garrett*.¹²²⁷ The issue was whether the Americans with Disabilities Act ("ADA") could constitutionally impose obligations on the states pursuant to *Bitzer*, which in turn required that Congress enacted the ADA under its section 5 authority. The Solicitor General and the disability community's many amicus briefs argued that Congress had ample evidence cataloguing a systematic and horrendous history of state discrimination against people with disabilities — more than enough evidence to demonstrate that states have long operated under premises reflecting prejudice against or stereotypes about disabled people.¹²²⁸ This evidence, they argued, was sufficient to meet *Boerne's* congruence and proportionality test. Five Justices thought not. Chief Justice Rehnquist's opinion for the Court rejected most of the evidence as irrelevant, for it did not identify a pattern of irrational state discrimination in state *employment*, the kind of discrimination charged by *Garrett*.¹²²⁹ More important, the Court held Congress to implementing the standard the Court had laid down in *Cleburne*, which held that disability was not a suspect classification but that prejudice-driven rules violated the Equal Protection Clause.¹²³⁰ This was a retreat from the Court's stance in *Morgan* and perhaps also *South Carolina*, where the Court had treated its own equal protection "standard of review" as reflecting some deference to the political process, and so gave Congress leeway to go beyond the Court's own equal protection jurisprudence.¹²³¹

Like *Morrison*, *Garrett* set limits on the Warren and Burger Courts' expansion of congressional power to enforce the Fourteenth Amendment. It is now unclear how much authority Congress has to

1227. 531 U.S. 356 (2001); see also Colker & Brudney, *supra* note 1211 (anticipating the Court's restrictive moves in *Garrett*).

1228. See Brief for the United States, *Garrett* (No. 99-1240); Brief of Morton Horwitz et al., *Garrett* (No. 99-1240) (describing history of state segregation and exclusion of disabled people); Brief of Amici Curiae Self-Advocates Becoming Empowered et al., *Garrett* (No. 99-1240) (comparing the eugenics-driven regime of institutionalization and exclusion of the disabled as analogous to Jim Crow). Interestingly, IBSMs of all sorts filed amicus briefs to show their solidarity in *Garrett* — including Lambda, the ACLU, NOW, and the Inc. Fund.

1229. *Garrett*, 531 U.S. at 369-74.

1230. *Id.* at 367-68 ("[S]tates . . . could quite hardheadedly — and perhaps hardheartedly — hold to job-qualification requirements which do not make allowance for the disabled.").

1231. See Colker & Brudney, *supra* note 1211; Melissa Hart, *Conflating Scope of Right with Standard of Review: The Supreme Court's "Strict Scrutiny" of Congressional Efforts to Enforce the Fourteenth Amendment*, 46 VILL. L. REV. 1091 (2001).

implement the politics of remediation for women, lesbian people, the disabled, and other IBSMs. Clearer is the particular understanding of equal protection among the five Justices who made up the majorities in *Morrison*, *Garrett*, *Adarand*, and *Shaw v. Reno*. Also like *Morrison*, *Garrett* reflects an understanding of antidiscrimination law that is derived from the race cases but views them ahistorically through the lens of the politics of preservation. These five Justices seem to understand the project of the Equal Protection Clause as purifying state decision-making by driving out (or underground) irrational criteria. This is a thin domestication of the race cases, as it slights the great anti-subordination goal of the Equal Protection Clause and allows the rationality goal to be easily evaded by an unrealistic intent approach. A twist added by *Garrett* and *Cleburne* is that the disability community has insisted on a model of rationality and anti-subordination somewhat different from those of earlier IBSMs. In contrast to the early civil rights, women's, and lesbian people's politics of recognition, which focused almost entirely on race/sex/sexual orientation classifications that formally excluded their members from important state benefits or obligations, the disability rights movement has early on focused on functional as well as formal discriminations. This IBSM views benign neglect as just as big a problem for its members as formal discrimination because of archaic stereotypes or prejudice.¹²³² The ADA's focus on "reasonable accommodation" illustrates the distinctiveness of the disability community's politics of recognition: society and employers are not treating us as equal citizens unless they take the trouble to accommodate our reasonable needs.¹²³³ Equal protection precedents like *Cleburne* suggest that the Supreme Court has never quite understood this, but *Garrett* compounds the deficiency of the earlier case by limiting the ability of Congress to be responsive to this politics.

At the dawn of the new millennium, therefore, the nationalizing agenda of the civil rights and other IBSMs has been incompletely realized. Not only is the Supreme Court reluctant to expand upon minorities' equality rights, but it has placed limits on Congress's ability to do so. As Table 4 illustrates, though, the "limits" cut back only from the most tolerant Warren Court precedents and remain much more liberal than those that would have applied in 1900 or even 1950. Moreover, and most surprisingly, the core limit on Congress's section

1232. See Arlene Mayerson & Silvia Yee, *The ADA and Models of Equality*, 62 OHIO ST. L.J. 535 (2001).

1233. I think there are some similarities between the disability community's model and the rule against pregnancy-based discrimination, which requires the employer to accommodate the pregnant employee's needs, even if just for a limited time.

5 authority — the state action requirement — has itself been expanded and in ways the Rehnquist Court has thus far respected.

TABLE 4
EVOLUTION IN CONGRESS'S AUTHORITY UNDER THE
RECONSTRUCTION AMENDMENTS

	<i>The Civil Rights Cases (1883)</i>	<i>The Warren Court (1969)</i>	<i>The Rehnquist Court (2000)</i>
<i>Thirteenth Amendment, § 2</i>	<i>Narrow View.</i> Congress can only abrogate statutes historically associated with slavery and may be able to bar some private activity.	<i>Liberalizing.</i> Congress can abrogate any state law or private practice that perpetuates slavery or its customs (<i>Jones</i>).	<i>No New Developments.</i>
<i>Fourteenth Amendment, § 5: What Ends Can Congress Regulate?</i>	<i>State Action Only.</i> Congress can only regulate official action by the states.	<i>Beyond State Action.</i> Congress can regulate private acts that deprive people of their civil rights (<i>Guest</i>). Congress can also regulate private action intertwined with the state (<i>Guest</i>).	<i>Back to State Action Only (Liberal Defined).</i> Congress must focus on state action (<i>Morrison</i>). But state action can include private actions intertwined with the state (Section II.E.3).
<i>Fourteenth Amendment, § 5: Level of Means Scrutiny</i>	<i>Not Addressed.</i>	<i>Rational Basis Review.</i> Congress has wide leeway to identify patterns of constitutional violations and remedy them prophylactically (<i>South Carolina</i>).	<i>Heightened Scrutiny.</i> Congress's response to a pattern of constitutional violations must be "congruent and proportional" (<i>Boerne; Morrison</i>).

3. State Responsibility for Discrimination

The holding of the *Civil Rights Cases*, that the Fourteenth Amendment only regulates state action, has been relatively stable through the twentieth century. The state action requirement serves several constitutional purposes, including the protection of individual

liberty as well as the values associated with the political question doctrine and federalism. But its content has been anything but stable, and the primary force driving the evolution in state responsibility has been the race cases, which have pressed the courts to hand down decrees invading previously immune state and individual prerogatives.¹²³⁴ For example, the suggestion made in the *Civil Rights Cases* that the Fourteenth Amendment is mobilized only against official state policies did not survive *Moore v. Dempsey* and other early NAACP challenges to unauthorized lawlessness by state officials. The assumption that ostensibly private actors were beyond the ambit of the Equal Protection Clause was interred by *Nixon v. Condon*, which held that the Texas Democratic Party was acting as the “organ” or “agent” of the state and therefore could be held accountable for race discrimination under the Fifteenth Amendment.¹²³⁵

The last of the Texas white primary cases, *Terry v. Adams*,¹²³⁶ illustrates several doctrinal theories that have permitted the Court to attribute public responsibility to ostensibly private actors in a wide array of cases, but without overruling the *Civil Rights Cases*. Even after Texas abandoned its campaign to exclude blacks from the Texas Democratic primary, it remained effectively segregated as a result of the activities of the whites-only Jaybird association; their endorsed candidates always won the primary. The Court held that the Jaybirds were imbued with enough state authority to be charged with violating the Fifteenth Amendment but produced several different opinions justifying the holding. Justice Clark (a native of Texas) invoked *Condon*'s and *Smith v. Allwright*'s holding that when a state *delegates* a core governmental function to an institution, the latter should be treated as the state for constitutional purposes.¹²³⁷ Justice Black, delivering the judgment of the Court, offered a variation on the delegation of public function theory: Texas's “duplication of its election processes”

1234. See Charles L. Black, Jr., *The Supreme Court 1966 Term — Foreword: “State Action,” Equal Protection, and California’s Proposition 13*, 81 HARV. L. REV. 69 (1967); William Van Alstyne & Kenneth L. Karst, *State Action*, 14 STAN. L. REV. 3 (1961). For a deeper theoretical discussion of state action, see LOUIS MICHAEL SEIDMAN & MARK V. TUSHNET, *REMNANTS OF BELIEF* 49-71 (1996).

1235. *Nixon v. Condon*, 286 U.S. 73, 84, 88 (1932); see also Brief for Petitioner at 14-19, 32-37; *Grove v. Townsend*, 295 U.S. 45 (1934) (1934 Term, No. 563) (making the same “organ of the state” argument for Texas’s post-*Condon* scheme, rejected by the Court in *Grove* but accepted in *Smith v. Allwright*, 321 U.S. 649 (1944), which overruled *Grove*).

1236. 345 U.S. 461 (1953). See generally Ronna Greff Schneider, *State Action — Making Sense Out of Chaos — An Historical Approach*, 37 U. FLA. L. REV. 737, 746-52 (1985).

1237. *Terry*, 345 U.S. at 484 (Clark, J., concurring, joined by Vinson, C.J., and Jackson & Reed, JJ.) (following *Allwright*, 321 U.S. at 664). This was plaintiffs’ theory. See Brief for Petitioners at 16-25, *Terry* (1952 Term, No. 52) (“[T]he Jaybird Party has by custom and practice become a state institution through which sovereign power is exercised by the people of the county.”).

through the Jaybirds amounted to “a flagrant abuse of those processes to defeat the purposes of the Fifteenth Amendment It violates the Fifteenth Amendment for a state, by such circumvention, to permit within its borders the use of any device that produces an equivalent of the prohibited election.”¹²³⁸ Justice Black’s theory was more expansive, because of its focus on protecting constitutional purposes.

The delegation of public functions idea had been the basis for the Court’s holding that a company town is subject to First Amendment limitation of its ability to suppress religion and speech in *Marsh v. Alabama*,¹²³⁹ handed down between *Allwright* and *Terry*. Civil rights advocates have been big fans of Justice Black’s purposive, functional approach to the delegation theory in *Terry* and *Marsh*, but his approach has not been one that the Court has often felt comfortable invoking.¹²⁴⁰ Thus, the Burger Court has declined to extend *Terry* and *Marsh* to render the First Amendment applicable to shopping malls¹²⁴¹ or to impose due process obligations on public utilities¹²⁴² or warehouse operators authorized to seize and sell goods to satisfy outstanding storage charges.¹²⁴³ Today, *Marsh* and *Terry* would be most persuasive when the state delegates an “exclusive prerogative of the State” — like elections — to a private party.¹²⁴⁴ In part because of *Marsh* and *Terry*, this does not happen very often.

Justice Frankfurter’s separate opinion in *Terry* focused on the participation of state and local officials in the overall scheme to exclude blacks from the primary.¹²⁴⁵ There are two variations on Frankfurter’s theory — joint participation of state officials and state encouragement or entanglement. Both have had broader application than the delega-

1238. *Terry*, 345 U.S. at 469 (Black, J., joined by Douglas & Burton, JJ.).

1239. 326 U.S. 501 (1946) (Black, J.).

1240. For example, five Justices (Warren, Douglas, Harlan, White, Marshall) in *Jones v. Mayer* opined in conference that the housing developer could be considered a state actor under *Marsh*, Brennan Conference Notes for *Jones*, in Brennan Papers, *supra* note 129, Box I: 161, Folder 1, but all abandoned it in their published opinions. See also *Evans v. Newton*, 382 U.S. 296, 320-21 (1966) (Harlan, J., dissenting) (criticizing the delegation of public functions extension of the state action doctrine).

1241. *Hudgens v. NLRB*, 424 U.S. 507 (1976) (overruling *Amalgamated Food Employees Union v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968)).

1242. *Jackson v. Metro. Edison Co.*, 419 U.S. 345 (1974) (finding that unlike voting (*Terry*), providing utility service is “not the exclusive prerogative of the State”).

1243. *Flagg Bros. v. Brooks*, 436 U.S. 149, 158-59 (1978) (distinguishing *Terry* and *Marsh* on the ground that they involved functions “exclusively reserved to the State,” unlike resolution of commercial disputes). See generally Paul Brest, *State Action and Liberal Theory: A Casenote on Flagg Brothers v. Brooks*, 130 U. PA. L. REV. 1296 (1982).

1244. *Jackson*, 419 U.S. at 353.

1245. “This is a case in which county election officials have participated in and condoned a continued effort effectively to exclude Negroes from voting.” *Terry v. Adams*, 345 U.S. 461, 476 (1953) (Frankfurter, J.).

tion of public functions theory embraced by the remainder of the *Terry* Court. The NAACP's great triumph in *Shelley v. Kraemer*,¹²⁴⁶ which Frankfurter enthusiastically joined, had suggested a state participation theory for viewing state action expansively. Following the arguments made by the ACLU and the Solicitor General,¹²⁴⁷ Chief Justice Vinson's opinion for the Court ruled that private agreements with racially restrictive covenants may not violate the Fourteenth Amendment, but that state judicial enforcement of them are violations.¹²⁴⁸ Although judges differ as to how broadly to read *Shelley*, most agree that it is an important state action precedent.¹²⁴⁹

Justice Frankfurter's opinion in *Terry* went further than *Shelley* in suggesting that conspiracies (including secret ones) between private parties and public officials create constitutional violations involving all participants.¹²⁵⁰ Like *Shelley's* theory, this has been influential. For example, Justice Stewart's opinion for the Court in *Guest* found state action on the basis of allegations that local officials were participants in the conspiracy to deny black people access to public facilities.¹²⁵¹ To the same effect was Justice Harlan's opinion in *Adickes v. S.H. Kress & Co.*¹²⁵² Unlike the delegation of public function theory, the state participation theory has frequently been applied by the Court in non-race cases¹²⁵³ as well as race cases.¹²⁵⁴ This is a potentially expansive understanding of the state action doctrine.

1246. 334 U.S. 1 (1948).

1247. See Brief of Amicus Curiae American Civil Liberties Union at 12-27, *Shelley* (1947 Term, Nos. 72, 87, 290 and 291); Brief of the United States as Amicus Curiae at 50-87, *Shelley* (1947 Term, Nos. 72, 87, 290 and 291).

1248. *Shelley*, 334 U.S. at 12-13, 18-23 (discussed *supra* Section I.A.1-2).

1249. Compare *Linscott v. Miller Falls Co.*, 440 F.2d 14, 20 (1st Cir. 1971) (Coffin, C.J., concurring) (reading *Shelley* to mean courts will not enforce "any agreement discriminating against the exercise of a person's constitutional rights"), with *Hardy v. Gissendaner*, 508 F.2d 1207, 1210 (5th Cir. 1972) (limiting *Shelley* to race cases).

1250. *Terry*, 345 U.S. at 475-77 (Frankfurter, J.).

1251. *United States v. Guest*, 383 U.S. 745, 756-57 (1966). This was also the holding of *United States v. Price*, 383 U.S. 787 (1966).

1252. 398 U.S. 144, 152 (1970). Harlan's opinion was a highly conservative reading of the Court's state action precedents. See *id.* at 188-203 (Brennan, J., dissenting in part) (sit-in cases require a more liberal approach to state action).

1253. See, e.g., *Tulsa Prof'l Collection Serv. v. Pope*, 485 U.S. 478 (1988) (procedural due process); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982) (closely divided Court finds state action in complaint alleging that private parties conspired with local officials to obtain attachments of complainants' property without due process of law; distinguishing *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978), on ground that no public-private conspiracy was alleged); *Dennis v. Sparks*, 449 U.S. 24, 27 (1980) (First Amendment); cf. *NCAA v. Tarkanian*, 488 U.S. 179 (1988) (closely divided Court rejects state participation theory in unusual context).

1254. See *Evans v. Newton*, 382 U.S. 296, 299 (1966) (invalidating trust arrangement preserving a park for use by whites only, on ground that state officials were involved in its

A state encouragement theory rests upon the notion that constitutional responsibility is appropriate when there is a history of state involvement with private discriminators such that the state might be said to have encouraged or condoned discrimination. In *Burton v. Wilmington Parking Authority*,¹²⁵⁵ the Court held a restaurant accountable under the Fourteenth Amendment for refusing to serve people of color, on the ground that a municipal parking authority as the restaurant's lessor had "so far insinuated itself into a position of interdependence with [the restaurant] that it must be recognized as a joint participant in the challenged activity."¹²⁵⁶

The NAACP developed a broad version of the state encouragement theory in the sit-in cases, discussed in Section I.A.2.¹²⁵⁷ The breach of the peace laws under which the protesters were arrested were race-neutral, and so the obvious state action was not clearly a violation of equal protection; the apparent discrimination, by the lunch counter managers, was not clearly attributable to the state. The Inc. Fund's theory started with the proposition that the lunch counter proprietors' segregationist policy was not "in obedience to personal taste or association," but followed by necessity from "custom" that characterized their communities; following custom, standing alone, could be state action according to the *Civil Rights Cases*.¹²⁵⁸ Additionally, southern polities were directly responsible for the prevalence of segregationist custom as a system of discrimination because of their apartheid laws.¹²⁵⁹

creation and administration); *Pennsylvania v. Bd. of Dirs. of City Trusts*, 353 U.S. 230 (1956) (finding that the equal protection clause applies to private college receiving monies from a trust in which state agency is a trustee).

1255. 365 U.S. 715 (1961).

1256. *Id.* at 725. Four Justices (including Frankfurter) were unpersuaded, however, that the state's position as lessor constituted the kind of joint participation that lent any encouragement; one of the four went along with the judgment on the basis of a state law construed to require race-based discrimination in public accommodations. Compare *id.* at 726-27 (Stewart, J., concurring), with *id.* at 727-28 (Frankfurter, J., dissenting) (rejecting Stewart's analysis as unsupported by the record), and *id.* at 728-29 (Harlan, J., dissenting) (same).

1257. On the sit-in cases generally, see Thomas P. Lewis, *The Sit-In Cases: Great Expectations*, 1963 SUP. CT. REV. 101; Monrad G. Paulsen, *The Sit-In Cases of 1964: "But Answer Came There None,"* 1964 SUP. CT. REV. 137.

1258. Brief for Petitioners at 20-21, *Garner v. Louisiana*, 368 U.S. 157 (1961) (1961 Term, Nos. 26-28) (invoking *Civil Rights Cases*, 109 U.S. at 3, 17, naming "custom" as one form of state action).

1259. Brief for Petitioners at 21-23, *Garner* (1961 Term, Nos. 26-28). The Inc. Fund viewed every human action a complicated amalgam of private and public choice; for most businessmen, segregation of their lunch rooms was dominated by the customs and laws of the community and polity. *Id.* at 23-24. The Inc. Fund pressed this understanding of state action also in Brief for Petitioners at 10-17, *Peterson v. City of Greenville*, 373 U.S. 244 (1962) (1962 Term, No. 71); Brief for Petitioners at 17, 26-29, *Bell v. Maryland*, 378 U.S. 226 (1963) (1963 Term, Nos. 9, 10 & 12). The primary authors of all three briefs were apparently Jack Greenberg and Charles Black, Jr.

At conference in the first lunch counter sit-in cases, only Justice Douglas supported the NAACP's theory; Justices Frankfurter, Clark, and Harlan spoke strongly against it.¹²⁶⁰ But none of the Justices was willing to affirm the convictions of the protesters, and so the Court reversed for lack of sufficient evidence in *Garner v. Louisiana*.¹²⁶¹ After Frankfurter left the Court, the Brethren were more willing to go along with the NAACP's arguments. In *Peterson v. City of Greenville*,¹²⁶² one of several sit-in cases decided in 1963, the Court ruled that Greenville could not enforce its trespass law against civil rights protesters who were asked to leave by a manager because of the "local custom" against serving black and white customers at the same counter. To the argument that discriminatory motives of the manager could not be attributed to the city, Chief Justice Warren responded with the Inc. Fund's point that the city bore responsibility for the private discrimination because it also had an ordinance barring integrated service at restaurants.¹²⁶³ The sit-in cases were the high point of the state encouragement theory. After 1969, the Court read the sit-in precedents narrowly.¹²⁶⁴ Without overruling the sit-in cases, the Court has not often expanded their ideas beyond the segregation context. For example, the Court has held that state regulation of private businesses, standing alone, does not constitute the kind of entanglement that triggers constitutional obligations.¹²⁶⁵

1260. See Douglas Conference Notes for *Garner* (Oct. 20, 1961), in Douglas Papers, *supra* note 192, Container 1269.

1261. 368 U.S. 157 (1961); see *id.* at 176-81 (Douglas, J., concurring) (accepting the NAACP's broad state encouragement theory of state responsibility). Douglas reported that Frankfurter and Black strongly supported the right of a merchant to call upon the police to expel people of color who trespassed on his or her property; only Warren and Brennan were sympathetic to his position. William O. Douglas, Memorandum re No. 26 — *Garner v. Louisiana*, O.T. 1961, and companion cases, Nov. 6, 1962; see also Bell v. Maryland, 378 U.S. 226, 288-316 (1964) (Goldberg, J., joined by Warren, C.J. & Douglas, J., concurring) (broad view of state responsibility to enforce antidiscrimination norm against public accommodations; arguing that the *Civil Rights Cases* were wrongly decided).

1262. 373 U.S. 244 (1963).

1263. *Id.* at 248; see *id.* at 253 (Harlan, J., concurring in the result) (the ordinance makes out "a *prima facie* case of invalid state action" that ought to be rebuttable upon showing that "the exclusion was in fact the product solely of private choice"); cf. Lombard v. Louisiana, 373 U.S. 267 (1963) (applying *Peterson* even though there was no segregationist ordinance, for municipal official encouragement of private racial discrimination was sufficient to establish state action).

1264. Compare Brief for Petitioners at 10-17, *Peterson* (1962 Term, No. 71) (making both local custom and state ordinance points), with *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 170-71 (1970) (Harlan, J., for the Court) (reading *Peterson* conservatively, along the lines suggested in text), with *id.* at 178-88 (Douglas, J., dissenting in part) (reading *Peterson* to find state responsibility through a broader inquiry into state toleration as well as compulsion), and *id.* at 188-203 (Brennan, J., dissenting in part) (similar).

1265. See generally David Strauss, *State Action After the Civil Rights Era*, 10 CONST. COMM. 409 (1993). Compare *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972) (finding that regulatory authority over establishment's liquor license does not render club a state actor),

As other IBSMs have joined the civil rights movement in challenging discrimination and censorship, they too have sought to expand state responsibility, usually relying on the theories suggested in the Texas white primary cases. For example, the organizers of the “Gay Olympics” ran afoul the United States Olympic Committee (“USOC”), statutorily vested with ownership of the term “Olympics.” The USOC refused to license the Gay Olympics to use the term. The supplicants’ lawyer, Mary Dunlap, argued that USOC was a state actor on the basis of all the theories floated in *Terry* and, as such, violated the Equal Protection Clause because it allowed most groups to use the term “Olympics,” but not the gay group. Reflecting a stingy understanding of state responsibility, a closely divided Court rejected Dunlap’s arguments in *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*.¹²⁶⁶ Justice Powell’s opinion for the Court agreed that the USOC was the statutory representative of this nation in the international Olympics movement — but this did not persuade him that the USOC performed functions that have “traditionally been the *exclusive* prerogative of the Federal Government.”¹²⁶⁷ Although the USOC and the federal government were entangled in a variety of ways, including lavish government subsidies and special privileges (like ownership of the Olympics term), Powell found no evidence of governmental encouragement or joint participation sufficient to attribute responsibility to the federal government for the USOC’s antigay policy.¹²⁶⁸

As this brief tour of the leading cases suggests, the current state action requirement is far more elaborate and elastic, depending on circumstances and the judges’ disposition toward the particular constitutional claim, than the barebones approach announced in the *Civil Rights Cases*. There are plenty of established loopholes to the earlier

and *Jackson v. Metro. Edison Co.*, 419 U.S. 345 (1974) (holding that pervasive state regulation does not render a public utility a state actor), with *Norwood v. Harrison*, 413 U.S. 455, 466 (1973) (ruling unconstitutional a program lending textbooks to racially discriminatory private schools because “[a] State may not grant the type of tangible financial aid here involved if that aid has a significant tendency to facilitate, reinforce, and support private discrimination”). *But cf.* *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass’n*, 531 U.S. 288 (2001) (private association of public and private secondary schools is state actor because of “pervasive entwinement” of public officials).

1266. 483 U.S. 522 (1987).

1267. *Id.* at 544 (quoting *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982)); see *SFAA*, 483 U.S. at 545 n.27 (USOC’s “representative” function in world athletics “can hardly be called traditionally governmental”). Two Justices disagreed. *Id.* at 549-56 (Brennan, J., joined by Marshall, J., dissenting).

1268. *SFAA*, 483 U.S. at 546-47 (rejecting state encouragement theory); *id.* at 547 n.29 (rejecting joint participant theory). Four Justices disagreed. *Id.* at 548 (O’Connor, J., joined by Blackmun, J., dissenting in part); *id.* at 556-59 (Brennan, J., joined by Marshall, J., dissenting).

understanding that the Fourteenth Amendment cannot apply to private parties — and all of them originated in and have developed in the context of the Court's race cases. One of the last major state action cases of the century was, fittingly, a race case which provided the Court with an opportunity for doctrinal synthesis. A sharply divided Court ruled in *Edmonson v. Leesville Concrete Co.*¹²⁶⁹ that non-government lawyers' deployment of peremptory challenges in civil cases are governed by *Batson's* interpretation of the Equal Protection Clause. Justice Kennedy's opinion for the Court could have simply rested on the fact that the state's involvement in the jury selection and deliberation process is so pervasive that the state is responsible for private actions in that process.¹²⁷⁰

Instead, the opinion announced a contextual approach to state action that is a conservative cousin to the Inc. Fund's theory in the lunch counter sit-in cases.¹²⁷¹ The most relevant context was historical, "over a century of jurisprudence dedicated to the elimination of race prejudice within the jury selection process."¹²⁷² Where racism has operated in matters of voting (*Terry*), juries (*Edmonson*), and property rights (*Shelley*), the Court has been particularly willing to find state action. (Recall the sliding scale approach in Section II.C.) In determining whether to attribute state responsibility to apparently private actors, Kennedy found it relevant to consider "the extent to which the actor relies on governmental assistance and benefits" (citing *Burton*); "whether the actor is performing a traditional governmental function" (citing *Terry* and *Marsh*); and "whether the injury caused is aggravated in a unique way by the incidents of governmental authority" (citing *Shelley*).¹²⁷³ The opinion deftly wove together these three

1269. 500 U.S. 614 (1991).

1270. This was the theory advanced by the Brief Amicus Curiae of the ACLU in Support of Petitioner at 2-3, *Edmonson* (No. 89-7743). Petitioner's counsel adopted the ACLU's theory at oral argument. 203 LANDMARK BRIEFS, *supra* note 199, at 299-300. It is interesting that the Court could have avoided the constitutional issue and rested on 28 U.S.C. § 1870. See Brief of Amicus Curiae ACLU in Support of Petitioner et al., *Edmonson* (No. 89-7743).

1271. Jack Greenberg's and Charles Black's Brief for Petitioners at 48-49, *Bell v. Maryland*, 378 U.S. 226 (1964) (1963 Term, No. 12), argued that the arrest of protesters for refusing to leave when managers requested was state action because the police and courts enforced the managers' racist preferences (*Shelley*), the racist customs were the product of state encouragement (*Peterson*), and the state's policy preferring property rights to liberty ones empowered racists over minorities struggling for equality. The brief then laid out a wide array of factors, including a substantive theory of the Equal Protection Clause, that courts should consider in deciding whether to attribute responsibility to the state. *Id.* at 50-59; see also Louis Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473 (1962); Mark Tushnet, *Shelley v. Kraemer and Theories of Equality*, 33 N.Y.L. SCH. L. REV. 383 (1988).

1272. *Edmonson*, 500 U.S. at 618.

1273. *Id.* at 621-22. For a similarly contextual inquiry finding state action in a nonrace case, see *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288 (2001).

themes to support its holding that the lawyer in a civil case is accountable as a state actor. The state structures and runs the jury selection and trial process, which is a core function of the state; the legitimacy of that process is important to the legitimacy of the state itself. Under those circumstances, it is not unfair to require all the lawyers to adhere to equal protection standards during their participation in this ongoing state project.¹²⁷⁴ *Edmonson* suggests that in cases involving racial discrimination, the state action doctrine entails a fair amount of flexibility, but is no clear signal as to how broadly the Court will apply its exceptions in other kinds of cases.

F. *The Imperial First Amendment*

The First Amendment was an anemic constitutional appendix in 1900, but a flourishing heart of the Constitution by 2000. Indeed, the First Amendment has been *imperial*, as its ambit continually expanded throughout the century. Applied to protect bland political speech and some literature early in the century, the First Amendment picked up steam as the century progressed. Justices from a wide array of political allegiances now apply the amendment stringently to bar virtually any state censorship of expression — and the expanding array of activities that now count as expression. In addition to political speech and literature, the First Amendment today provides strong protection to libel, commercial speech, expressive conduct like marches and flagburning, sexual speech and publications, identity speech, and expressive associations.

Identity-based and other social movements contributed to this imperial First Amendment.¹²⁷⁵ A strong First Amendment took shape after World War I to implement the concept that state censorship of speech and press is lethal to a pluralist democracy, because it undermines the search for truth through an open and critical process and contributes to inter-group hatred and fear.¹²⁷⁶ Its immediate benefici-

1274. Speaking for four Justices, Justice O'Connor's dissent maintained that the lawyer's strategic decisionmaking (including peremptories) is and ought to be a private "enclave" within the larger public process. See *Edmonson*, 500 U.S. at 633-34 (O'Connor, J., dissenting).

1275. This explanation complements that of Ronald Coase, *The Market for Goods and the Market for Ideas*, 64 AM. ECON. REV. 384 (1976) (arguing that the Court protects the "free market in ideas" much more than that in economic goods because the First Amendment has a strong cheering section in the chattering classes (journalists and law professors)), and was developed in a productive exchange I had with Professors Eugene Volokh and Robert Post in a joint AALS-APSA conference on constitutionalism in June 2002.

1276. *Whitney v. California*, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring) (the classic articulation of this understanding); see DAVID M. RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS* 299-380 (1997) (providing a conceptual history of this new understanding and its penetration into judicial opinions during and after WWI); David Bogen, *The Free*

aries were publishers, workers, and socialists, but this pluralism-driven understanding of the First Amendment also protected people of color, birth control advocates, and even sexual radicals in their public campaigns for progressive reform. Thus, by the 1970s, a strong First Amendment had an impressive constituency on the left. By the 1980s, the First Amendment was accumulating a constituency on the right, as countermovement groups found that it protected them against what they considered (over)enforcement of municipal and state laws adopted in response to identity-based politics of remediation. Zealous protection of people's right to express themselves in unpopular ways became a principle that progressives and traditionalists have come to agree on, through a giant pluralist logroll: in our live-and-let-live culture, most Americans are much more disturbed when the state censors their own identity expression than when the state fails to censor expression they don't like.¹²⁷⁷ And Americans have internalized the view that their own freedom against censorship depends upon their support for a First Amendment that prevents censorship of speech they do not like. So long as the state protects both Ellen DeGeneres' and Phyllis Schlafly's rights to be provocative, these women, and those allied with them, are relatively satisfied.

IBSMs and their countermovements have been involved in a disproportionately large number of leading First Amendment decisions,¹²⁷⁸ and have pioneered several of the First Amendment's important expansions. Specifically, the civil rights movement persuaded the Court to protect expressive activity and association claims; gay and AIDS activists have been on the cutting edge of sexual speech claims which have decisively moved the First Amendment beyond its simple attachment to political speech; the TFV movement, conversely, has deployed the First Amendment to recognize new ways in which silence is identity speech. Even as they have expanded its scope, IBSMs have exposed a central tension within the First Amendment's value

Speech Metamorphosis of Mr. Justice Holmes, 11 HOFSTRA L. REV. 97 (1982); Donald Ragan, *Justice Oliver Wendell Holmes, Jr., Zechariah Chafee, Jr., and the Clear and Present Danger Test for Free Speech: The First Year, 1919*, 58 J. AM. HIST. 24 (1971).

1277. The process is surely more complicated than the statement in text. It may well be that our nation's positive experience with a strongly anti-censorship First Amendment has helped create a culture that is live-and-let-live. See generally LEE BOLLINGER, *THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA* (1986) (this is the core purpose of the amendment).

1278. In addition to the cases discussed in this subsection, see, for example, *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam) (leading case for current version of clear and present danger test: racist, violent speech by KKK members cannot be punished unless it incites to immediate violations of law), *overruling* *Whitney v. California*, 274 U.S. 357 (1927); *New York Times v. Sullivan*, 376 U.S. 254 (1964) (leading libel case, rejecting lawsuit by segregationists based on SCLC ad attacking their support of apartheid); *Herndon v. Lowry*, 301 U.S. 242 (1937) (important precedent limiting clear and present danger test, reversing conviction of Communists for recruiting blacks to their radical cause).

system. Although the amendment is usually viewed as libertarian, protecting each individual's freedom to say what she wishes, after World War II the First Amendment's project was also deeply egalitarian, assuring equal treatment for unpopular viewpoints. To be sure, the two faces of the First Amendment are linked in the manner of the pluralist logroll described earlier: if I do not want the state to interfere with my expression, I have to be willing to forego state censorship of analogous expression I do not like. But the two faces of the First Amendment are also opposed, especially in group settings: your expression of identity can be through exclusionary speech and association that undermines my struggle for inclusion. My thesis is that the facile solution, always protecting liberty, is one that the Court has not always chosen and that does not solve the underlying conundrum.

1. *Beyond Speech and Assembly: Expressive Conduct and Association*

The First Amendment protects "speech," but not necessarily conduct. It protects "assembly" by individuals, and "speech" to persuade others to join, but does not necessarily invest organizations and associations with constitutional rights. After World War I, the Supreme Court was usually willing to protect labor unionists and socialists to speak out and to solicit others to join their organizations.¹²⁷⁹ But the Court was not willing to protect either conduct that left-wingers considered expressive, nor their organizations qua associations. The Court's idea of the First Amendment was highly individualistic and anti-totalitarian: the core case for protection was the Jehovah's Witness handing out leaflets and refusing to recite the Pledge of Allegiance. Relatively unprotected were lots of people doing things together ("mobs") — labor picketing, marching crowds, and secret organizations. The civil rights movement changed the paradigm. The race cases taught the Court that individual expression and episodic assembly could not move apartheid. For a despised group to make normative progress, it was not enough to leaflet and assemble; large numbers of people had to mobilize, in disruptive actions like marches and sit-ins, and had to organize, in permanent associations like the NAACP. The Justices after World War II reflexively protected people of color from vicious southern suppression, and followed civil rights lawyers in protecting expressive conduct and association. These doc-

1279. See, e.g., *Thomas v. Collins*, 323 U.S. 516 (1945) (invalidating Texas statute limiting freedom of labor organizers to persuade workers to join unions); *De Jonge v. Oregon*, 299 U.S. 353 (1937) (rejecting application of criminal syndicalism law to individual who organized a meeting of Communist Party members, unless there can be a showing of illegal activity).

trinal innovations have proved lasting ones. Specifically, they facilitated the women's, gay, welfare, and disability rights movements that came later.

The Communist Party cases of the 1950s suggested a wide berth for governmental regulation of "subversive" associations. "Subversive" is exactly how southern states viewed the NAACP, which they tried to drive out of their region by means of registration laws requiring the NAACP and other minority groups to turn over membership lists and other sensitive information.¹²⁸⁰ Challenging these laws, the NAACP presented itself not just as a collection of individuals acting upon their First Amendment assembly rights, but also as an *expressive association* devoted to the project of "eradicating color and caste discrimination from all facets of American life."¹²⁸¹ As such, the NAACP and its supporting amici maintained that the association could not be subjected to "restrictions whose purpose and effect is to destroy [the organization] or frustrate its activities."¹²⁸² This right of association went beyond the Speech and Assembly Clauses of the First Amendment.

The Supreme Court recognized such a right in *NAACP v. Alabama ex rel. Patterson*.¹²⁸³ "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association," which is therefore protected under the First Amendment (applicable to the states through the Due Process Clause). "[S]tate action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny."¹²⁸⁴ Con-

1280. See Murphy, *supra* note 124. See generally *supra* Section I.A.2. Florida, for the best documented example, established a series of legislative investigating committees that were originally aimed at exposing Communism and the NAACP in the state, see *Gibson v. Florida Legislative Investigating Comm.*, 372 U.S. 539 (1963), but that early turned its obsessive attention to "homosexuals" and their infiltration of the state. See William N. Eskridge, Jr., *Privacy Jurisprudence and the Apartheid of the Closet, 1946-1961*, 24 FLA. ST. U. L. REV. 703, 747-51 (1997).

1281. Brief for Petitioner at 3, *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) (1957 Term, No. 91); see *id.* at 4-7 (detailed account of NAACP's ideology and organizational activities to advance it); see Brief of Amici Curiae [including ACLU] at 21, *Patterson* (1957 Term, No. 91) (distinguishing freedom of individuals to associate from the equally important freedom of a permanent association "to exist and conduct its activities free of unreasonable and oppressive government restrictions").

1282. Brief of Amici Curiae at 8, *Patterson* (1957 Term, No. 91).

1283. 357 U.S. 449 (1958), followed and reaffirmed in *Bates v. Little Rock*, 361 U.S. 516 (1959); *NAACP v. Button*, 371 U.S. 415 (1963); *Gibson v. Florida Legislative Investigating Comm.*, 372 U.S. 539 (1963).

1284. *NAACP v. Alabama*, 357 U.S. at 460-61. Harlan added the "closest scrutiny" language in response to Justice Douglas' complaint that the cases cited, such as *American Communications Association v. Douds*, 339 U.S. 382, 402 (1950) (narrow construction of a statute regulating labor unions), suggested ordinary scrutiny for state regulation of group activities. See Memorandum from Justice Douglas to Justice Harlan, Apr. 22, 1958, in *Douglas Papers, supra* note 192, Container 1186. The Justices subsequently read the case to

trary to the NAACP's presentation, however, the Court focused on the rights of the individual members not to have their names disclosed.¹²⁸⁵ This was not a plausible strategy for the Court in *NAACP v. Button*,¹²⁸⁶ which involved a Virginia law prohibiting organizations like the NAACP from retaining and compensating attorneys who represented other persons in litigation as to which the NAACP did not have a direct interest. Justice Brennan's opinion for the Court treated the NAACP exactly the way it presented itself, as an advocacy corporation having First Amendment rights of its own.¹²⁸⁷ The NAACP's various litigation campaigns — theretofore its only effective means for redress of grievances in the South — were an essential part of its politically expressive activities and could not be burdened without the state's showing a compelling interest.¹²⁸⁸ Indeed, Brennan urged courts and legislators to err against censorship, lest associations not have "breathing space" they needed "to survive."¹²⁸⁹

At the same time it was defending its chapters against state intrusions, the NAACP's Inc. Fund was defending civil rights demonstrators arrested by southern authorities for engaging in protest marches and lunch counter sit-ins. The Supreme Court threw out virtually all the convictions that came to them on appeal, usually based on lack of evidence or vaguely worded laws.¹²⁹⁰ The hardest cases were the ones with the most participants. In *Edwards v. South Carolina*,¹²⁹¹ the Court overturned breach of the peace convictions of 187 black students who had engaged in a peaceful protest march at the state capital. Before *Edwards*, the Court had held that group marches were subject to reasonable state regulations, perhaps suggesting that such conduct was not entitled to the full protection of the "speech" and "assembly"

require a state burdening private associations to show a "compelling" interest. *Bates v. Little Rock*, 361 U.S. 516, 524 (1960).

1285. *Cf.* *United States v. Rumely*, 345 U.S. 41, 46-47 (1952) (interpreting lobbying statute not to require disclosure of individual supporters who wished to remain anonymous).

1286. 371 U.S. 415 (1963).

1287. *Id.* at 419-21 (describing the NAACP as an expressive association); *id.* at 428 (NAACP has standing to assert its own interests, as well as those of its members).

1288. *Id.* at 429-30 (civil rights litigation is core political expression); *cf. id.* at 462-63 (Harlan, J., dissenting) (public interest in high professional standards for law practice justifies the state regulation). Although not emphasized in the opinion, the Justices at conference saw the law as an effort to circumvent *Brown*. See Brennan Conference Notes for *Gray*, in Brennan Papers, *supra* note 129, Box I: 76, Folder 1.

1289. *Button*, 371 U.S. at 445 (quoted and followed in *New York Times v. Sullivan*, 376 U.S. 254, 272 (1964)).

1290. *E.g.*, *Shuttlesworth v. Birmingham*, 373 U.S. 262 (1963); *Garner v. Louisiana*, 368 U.S. 157 (1961); *Taylor v. Louisiana*, 370 U.S. 154 (1961).

1291. 372 U.S. 229 (1963).

clauses.¹²⁹² A unanimous Court in *Edwards* dispelled any doubt that assembly, marching, song-singing, “harangues,” and other forms of “peaceable” protest were protected under the First Amendment notwithstanding its provocative nature and hostility from its audience.¹²⁹³

In *Cox v. Louisiana*,¹²⁹⁴ the Court evaluated a more incendiary situation, where as many as 2000 civil rights marchers were ordered to disperse by the police in Baton Rouge. Reverend Elton Cox, the leader of the march, declined the request, and he was arrested for breach of the peace, obstruction of sidewalks, and interference with judicial proceedings. Carl Rachin’s brief for Reverend Cox invoked *Edwards* for the proposition that the state could not make “ ‘criminal the peaceful expression of unpopular views.’ ”¹²⁹⁵ The state responded that “ ‘where clear and present danger of riot, disorder, or other immediate threat to public safety, peace or order, appears, the power of the state to prevent or punish is so obvious.’ ”¹²⁹⁶ *Edwards* did not present such a danger; Cox’s march did. Rachin responded, in part, that the “danger” was the police’s reaction to Cox’s integrationist ideas. He read the First Amendment to contain an antidiscrimination feature: “to permit a demonstration until it advocates ideas with which the authorities or the general public disagrees is a discriminatory application of the law which contributes both an interference with freedom of speech and a denial of equal protection of laws”¹²⁹⁷

Except for the breach of the peace conviction, which was covered by *Edwards*, the Justices were unusually tentative in their votes at conference, largely because they believed there was a danger of hostility from white onlookers.¹²⁹⁸ Yet they bit the First Amendment bullet and reversed on most charges. On the sidewalk obstruction charge, Justice Goldberg’s opinion for the Court “reject[ed] the notion urged by ap-

1292. *Feiner v. New York*, 340 U.S. 315 (1951); *Cox v. New Hampshire*, 312 U.S. 569 (1941); cf. *Terminiello v. Chicago*, 337 U.S. 1 (1949) (divided Court protects provocative anti-Zionist, anti-Communist speech in a public auditorium, with hostile crowd outside).

1293. *Edwards*, 372 U.S. at 235-36. Based on *Edwards*, the Court summarily reversed the other convictions of peaceful demonstrators from South Carolina. *Henry v. City of Rock Hill*, 376 U.S. 776 (1964); *Fields v. South Carolina*, 375 U.S. 44 (1963).

1294. 379 U.S. 536 (1965) (*Cox I*); 379 U.S. 559 (1965) (*Cox II*).

1295. Consolidated Brief for Appellant at 12, *Cox v. Louisiana*, 379 U.S. 536 (1965); *Cox v. Louisiana*, 379 U.S. 559 (1965) (1964 Term, Nos. 24 & 49) (quoting *Edwards v. South Carolina*, 372 U.S. 229, 237 (1963)).

1296. Consolidated Brief for Appellee at 5, *Cox I & Cox II* (1964 Term, Nos. 24 & 49) (quoting *Cantwell v. Connecticut*, 310 U.S. 308 (1940)).

1297. Consolidated Brief for Appellant at 29, *Cox I & Cox II* (1964 Term, Nos. 24 & 49). At oral argument in *Cox I*, Rachin closed with this antidiscrimination goal of the First Amendment. 60 LANDMARK BRIEFS, *supra* note 199, at 723-24.

1298. Brennan Conference Notes for *Cox* (Feb. 21, 1964), in Brennan Papers, *supra* note 129, Box I: 113, Folder 6.

pellant that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech."¹²⁹⁹ Although reasonable police action could have been justified, it was not reasonable in the context of the Cox march, because the police had routinely allowed other marches and picketing to block public sidewalks. Adopting Reverend Cox's antidiscrimination goal for the First Amendment, the Court ruled that the state could not leave a law unenforced against expressive conduct and then spring into action against unpopular conduct no less expressive.¹³⁰⁰ The Court held, finally, that the law barring demonstrations near a courthouse was constitutionally applied to the marchers. Unlike the other measures, this one was narrowly drawn and evenly applied to fulfill the public purpose of preventing the sort of mob influence on judicial proceedings that Justice Holmes had found to be denials of due process in the Leo Frank and the Phillips County cases.¹³⁰¹

The NAACP's First Amendment cases established several propositions of law that have had enduring value for a variety of social movements as well as society and that have contributed to the development of a tough First Amendment. First, the core values of the modern First Amendment — protecting political dissent — are implicated when dissenters do so in groups, whether in institutions or just a big collection of people.¹³⁰² An expressive association makes an independent contribution to the First Amendment's project of encouraging robust debate about political issues and so has First Amendment protections apart from those of its members.¹³⁰³ Those protections must assure the association "breathing space" to pursue its normative agenda. Second, conduct like marching and picketing can be expressive; even though expressive conduct is not so strongly protected as pure speech, it can be regulated only for important public reasons and

1299. *Cox I*, 379 U.S. at 555.

1300. *Id.* at 556-58.

1301. *Cox II*, 379 U.S. at 561-64 (citing *Frank v. Mangum*, 237 U.S. 309, 347 (1915) (Holmes, J., dissenting)).

1302. The statement in text was hardly new law, but the NAACP cases gave it more First Amendment bite. For a recent example, see *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (holding that civil rights boycott of hardware store because of discriminatory practices cannot be the basis for an antitrust damages action).

1303. This was new law as regards the Speech Clause, but under the Press Clause of the First Amendment the Court had long protected the expressive rights of companies — and the civil rights movement gave the Court its opportunity to issue its classic opinion in *New York Times v. Sullivan*, 376 U.S. 254 (1964).

cannot be regulated because of its content.¹³⁰⁴ Third, the First Amendment not only protects against censorship of unpopular ideas but also protects against discriminatory enforcement of otherwise valid regulations. Even when the state does not openly engage in viewpoint discrimination, it may be readily inferred from past practice and other contextual evidence.¹³⁰⁵ These First Amendment principles, battled for by the civil rights movement, have contributed to the ability of other IBSMs to mobilize.

The nascent gay rights movement of the 1960s consisted of a small band of determined “homosexuals” who were directly empowered by the NAACP’s victories. The leading association was Frank Kameny’s Mattachine Society of Washington (“MSW”), which engaged in small protest marches and some federal court litigation that were never suppressed by the federal authorities — much as the authorities hated the participants. Indeed, in 1963, a House subcommittee had hearings to deprive MSW of its local status as an educational institution — a mini-witch hunt that went nowhere in large part because impartial counsel informed the subcommittee that it had no constitutional authority to penalize MSW because of its expressive activities.¹³⁰⁶ In this prophylactic way, the NAACP cases helped protect the struggling homophile movement, which scored many significant legal as well as cultural victories during the 1960s because of the force of their ideas and their factual presentations. After 1969, thousands of lesbian people came out of their closets, marched, protested, and formed hundreds of associations which reluctant state authorities were forced to recognize because of the civil rights cases. Lambda Legal Defense & Education Fund, Inc., lesbian people’s equivalent to the NAACP’s Inc. Fund, won its first legal victory when it forced the New York courts to register it as a gay-supportive legal assistance organization.¹³⁰⁷ State and federal courts also applied the NAACP cases to protect gay people’s

1304. Although suggested in the *Cox* cases and *Edwards*, the leading authority for the proposition in text arose out of the anti-war movement. *United States v. O’Brien*, 391 U.S. 367 (1968) (allowing the government to regulate draft-card burning); cf. *Texas v. Johnson*, 491 U.S. 397 (1989) (not allowing the government to prohibit flag-burning for political protest purposes).

1305. See, e.g., *Police Dep’t of the City of Chicago v. Mosley*, 408 U.S. 92 (1972).

1306. See *Amending District of Columbia Charitable Solicitation Act: Hearings Before Subcomm. No. 4 of the House Comm. on the District of Columbia*, 88th Cong., 2d Sess. (1963); David K. Johnson, “Homosexual Citizens”: *Washington’s Gay Community Confronts the Civil Service*, WASH. HIST., Fall/Winter 1994-95, at 44, 57-58 (account of these hearings).

1307. *In re Thom*, 301 N.E.2d 542 (N.Y. 1973), remanded to 350 N.Y.S.2d 1 (App. Div. 1973). Even the most conservative states have been required to treat gay associations with a modicum of fairness. See *Aztec Motel v. State*, 251 So.2d 849 (Fla. 1971) (invalidating state law revoking charters of groups whose officers were involved in “organized homosexuality”). See generally ESKRIDGE, *GAYLAW*, *supra* note 14, at 112-16 (surveying gaylegal deployment of *NAACP v. Alabama*).

right to associate with one another in gay bars¹³⁰⁸ and (most significantly) to require state colleges and universities to recognize lesbian and gay student associations.¹³⁰⁹ To this day, traditionalists continue to harass lesbian and gay groups and deny them routine benefits at public colleges and other institutions — and to this day even conservative judges will apply the right of association recognized in *NAACP v. Alabama* to overturn discriminatory state action against this feared minority.¹³¹⁰

2. *The Sexualized First Amendment*

As the NAACP cases reveal, the most celebrated First Amendment precedents of the twentieth century involved *political* expression and dissent, a triumph of the political pluralist ideology of the ACLU.¹³¹¹ By valorizing political speech, the ACLU and its allies early in the century acquiesced in and sometimes reinforced the American tradition of denigrating sexual speech, which was viewed as dangerous and disgusting — the epitome of irrationality, best left to morality and the bedroom. In the first decades of the twentieth century, any public discussion or depiction relating to human sexuality was culturally suspect and constitutionally unprotected as *obscene* or *indecent*.¹³¹² Comstockery was the regnant ideology among elite lawyers and tony judges. Resisters were few. Theodore Schroeder's Free Speech League called for the protection of sexual speech, as well as virtually any other kind of expression, but was eclipsed by the more moderate ACLU after World War I.¹³¹³ Margaret Sanger's 1919 Supreme Court appeal argued against state censorship of birth control information, but to deaf ears.¹³¹⁴ Most telling was New York's prosecution of the manager

1308. *One Eleven Wines & Liquors, Inc. v. Division of Alcoholic Beverage Control*, 235 A.2d 12 (N.J. 1967); see also Randy Shiels, *Big Business: Gay Bars and Baths Come Out of the Bush Leagues*, *ADVOCATE*, June 2, 1976, at 37 (describing the boom in gay bars during 1970s).

1309. The leading case is *Gay Students Organization v. Bonner*, 509 F.2d 652 (1st Cir. 1974), and others are discussed in Eskridge, *Establishing Conditions*, *supra* note 555, at 880-83.

1310. See *Gay Lesbian Bisexual Alliance v. Pryor*, 110 F.3d 1543 (11th Cir. 1997).

1311. See RABBAN, *supra* note 1276, at 302-10 (describing the triumph of the ACLU approach over more radical approaches); SAMUEL WALKER, *IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU* (1990).

1312. See, e.g., *Fox v. Washington*, 236 U.S. 273, 275-77 (1915) (holding that state may ban depictions of naked body); *United States v. Bennett*, 24 F. Cas. 1093 (C.C.S.D.N.Y. 1879) (No. 14,571) (leading case on obscenity standard: state may ban depictions that have bad tendencies and tempt vulnerable minds).

1313. See THEODORE SCHROEDER, "OBSCENE" LITERATURE AND CONSTITUTIONAL LAW: A FORENSIC DEFENSE OF FREEDOM OF THE PRESS (1911); see also RABBAN, *supra* note 1276, at 44-63 (describing Schroeder's philosophy and his Free Speech League).

1314. Sanger and her lawyer did not explicitly rely on the First Amendment, which was not formally applicable to the states until *Gilow v. New York*, 268 U.S. 652, 666 (1925), but

(First Amendment lawyer Harry Weinberger) and cast of Sholom Asch's *The God of Vengeance* for obscenity, on the ground that the play depicted sexual license, including a love scene between two women.¹³¹⁵ After defendants were convicted and the show closed, Weinberger begged the ACLU to support an appeal, which the ACLU declined: "The issue in the case," wrote its director, "is not primarily one of freedom of opinion — it is one of censorship on the ground of morality." There was no chance of success and no point in "agitating."¹³¹⁶ The same ideology that closed judges' minds to Sanger's argument that women needed to know about contraception closed even progressive minds to the argument that sexuality outside of conventional husband-wife marriages could be liberating for women and men.

Ironically, Weinberger won his appeal without the assistance of the ACLU. Although federal and state officials continued to censor sexually explicit and pro-homosexual plays, movies, and novels through the 1920s and 1930s — all without a peep out of the Supreme Court — progressive lawyers and gender-benders were often able to challenge the censors with success in lower courts and even legislatures. Official censorship of bawdy and gay-friendly Broadway plays *The Captive* and Mae West's *Sex* in 1927; Radclyffe Hall's lesbian classic, *Well of Loneliness* in 1929; and André Gide's homosexually explicit autobiography in 1935 were all overturned by New York appellate courts.¹³¹⁷ In the Second Circuit, Mary Dennett won her case against censorship of sex education materials, and Margaret Sanger won her case against the Comstock Act's suppression of birth control materials and information.¹³¹⁸ Even the ACLU came around. Its longtime affiliate Max Ernst won the Second Circuit case which liberated James Joyce's *Ulysses* from federal captivity.¹³¹⁹ On the eve of the next world war, sexual-

her due process liberty arguments emphasized that withholding information and suppressing discussion of contraception had disastrous effects on public health and women's health in particular. Brief on Behalf of the Plaintiff-in-Error at 41-44, *Sanger v. New York*, 251 U.S. 537 (1919) (1919 Term, No. 75); *see id.* at 47 (dissemination of information about contraception was allowed at common law and should be allowed under constitutional law as well).

1315. *See* KAIER CURTIN, "WE CAN ALWAYS CALL THEM BULGARIANS": THE EMERGENCE OF LESBIANS AND GAY MEN ON THE AMERICAN STAGE 25-42 (1987).

1316. Letter from Roger Baldwin to Harry Weinberger (Oct. 1, 1924) (on file with the Sterling Memorial Library Collection at Yale University), *quoted and discussed in* RABBAN, *supra* note 1276, at 311-12.

1317. *See* ESKRIDGE, GAYLAW, *supra* note 14, at 47-49 (account, with references, of these and other examples of and resistances to censorship of lesbian- or gay-themed art).

1318. *United States v. One Package*, 86 F.2d 737 (2d Cir. 1936) (birth control materials); *United States v. Dennett*, 39 F.2d 564 (2d Cir. 1930) (First Amendment protects sex education materials).

1319. *United States v. One Book Entitled Ulysses*, 72 F.2d 705 (2d Cir. 1934).

themed plays could open on Broadway, serious novels could be sold in the major cities, and the market for erotica was growing.

After World War II, a hodge-podge of social groups and movements vigorously opposed state censorship of sexual speech and press: Planned Parenthood and other birth control associations; literary figures (many of whom were lesbian) and their attorneys; gay and lesbian subcultures and the publishers that catered to them; and, increasingly, the ACLU. The sexual revolution of the 1960s ensured wider social support for the emerging anti-anti-obscenity movement. The constitutional wall between protected political speech and unprotected sexual speech was collapsing. Nowhere was its collapse more apparent than in the 1957 obscenity trial of Allen Ginsburg's sodomy-soaked, rebel-rousing poem *Howl*. Ginsburg elegized the madness of the "best minds of my generation," the men "who bit detectives in the neck and shrieked with delight in police cars for committing no crime but their own wild cooking pederasty and intoxication." The state seized this mix of nonconformity and deviant sexuality because it was "filthy, vulgar, obscene, and disgusting." In *People v. Ferlinghetti*, Municipal Judge Clayton Horn ruled that the First Amendment protects "novel and unconventional ideas," even when they "disturb the complacent." In a striking expansion of the First Amendment's (political) pluralism trope, he continued:¹³²⁰

The People state that it is not necessary to use [vulgar] words and that others would be more palatable to good taste. The answer is that life is not encased in one formula whereby everyone acts the same or conforms to a particular pattern. No two persons think alike; we were all made from the same mold but in different patterns. Would there be any freedom of press or speech if one must reduce his vocabulary to vapid innocuous euphemism?

Horn's avant-garde opinion coincided with a similarly inspired constitutional assault on obscenity at the U.S. Supreme Court.

In *Roth v. United States* and *Alberts v. California*,¹³²¹ the Eisenhower Administration and the California Attorney General defended obscenity laws by insisting that sexual speech is "worthless" from a First Amendment perspective, and its suppression essential to the maintenance of public morality.¹³²² The challengers and their amici, including the ACLU, mainly argued that obscenity laws over-

1320. See *People v. Ferlinghetti*, Decision of Oct. 3, 1957, reprinted in ALLEN GINSBURG, *HOWL: ORIGINAL DRAFT FACSIMILE* [etc.] 173-74 (Barry Miles ed., 1986). This 1986 edition is the source for the other quotations in the text.

1321. *Roth v. United States*, 354 U.S. 476 (1957) (decided together with *Alberts v. California*).

1322. Brief for the United States, *Roth v. United States*, 354 U.S. 476 (1957) (1956 Term, No. 582); Brief for the Appellee, *Alberts v. California*, 354 U.S. 476 (1957) (1956 Term, No. 61).

shot their mark because they were so vaguely worded.¹³²³ California had included the circuit court opinion in *One, Inc.* (the early homosexual magazine case discussed in Section I.C.1) as an example of the depravity that would be unleashed if the state could not censor sexual expression — which Abe Fortas (representing a publisher) turned around to maintain that obscenity laws suppressed valuable ideas.¹³²⁴ Indeed, Fortas concluded, “Sex is a legitimate topic for free discussion in a mature society.”¹³²⁵ Representing Alberts, Stanley Fleishman not only argued that obscenity had constantly been deployed to suppress literary classics and “ideas of critical value to society,”¹³²⁶ but that the First Amendment values of truth-seeking, democratic discourse, and tolerance were just as much at stake in sexual speech cases as in political speech ones. “That ‘mental obscenity’ however constituted is reprehensible and evil is itself but a point of view — an opinion — and, indeed, a very contested one, and the speech, depictions, and contemplations disapproved under such thesis are merely expressions and manifestations of the contrary thought and view.”¹³²⁷ What he was doing was to show the Justices how their own focus on political speech was merely a “political” point of view, as to which the best rebuttals were the very materials the state sought to suppress.

Only Justices Black and Douglas were persuaded by the challengers, and even they went nowhere as far as Fleishman.¹³²⁸ Justice Brennan’s opinion for the Court held that obscene speech is unprotected by the First Amendment, but only if the state regulates “material which deals with sex in a manner appealing to prurient interest,” that is, “material having a tendency to excite lustful thoughts.”¹³²⁹ This was a standard that protected speech and writings about birth control,

1323. See Brief of the ACLU as Amicus Curiae, *Roth* (1956 Term, No. 582); see also Brief of Max L. Ernst Amicus Curiae, *Roth* (1956 Term, No. 582); Brief Amicus Curiae [for the Southern California Branch of the ACLU], *Alberts* (1956 Term, No. 61).

1324. See Brief Amicus Curiae for Greenleaf Publishing Co. and HMH Publishing Co. at 24, *Roth* (1956 Term, No. 582). This remarkable brief was also signed by Charles Reich (later the nation’s first well-known gay law professor) and Harry Kalven (later a leading First Amendment scholar).

1325. *Id.* at 22.

1326. Brief for the Appellant at 78-89, *Alberts* (1956 Term, No. 61).

1327. *Id.* at 95; see *id.* at 94-105 (many other fascinating arguments, a treasure trove of First Amendment thinking).

1328. *Roth v. United States*, 354 U.S. 476, 508-14 (1957) (Douglas, J., dissenting) (criticizing the criminalization of speech or press because they provoke (common) sexual responses and insisting on a literal application of the First Amendment).

1329. *Id.* at 487 n.20 (opinion of the Court) (invoking MODEL PENAL CODE § 207.10(2) (Tent. Draft No. 6, 1957), which limited proscribable obscenity to work that, “considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters”).

as well as the homophile journal *One* and other tame depictions of sexual nonconformity.¹³³⁰ Brennan's nice compromise opinion seems in retrospect naive — and institutionally expensive, for it engaged intellectually helpless Justices in a twenty-five-year binge of substantially worthless First Amendment litigation to set the parameters of allowable speech about sexuality.

In 1966, the Court overturned the suppression of the *Memoirs of a Woman of Pleasure (Fanny Hill)*, a ribald eighteenth century novel depicting a series of homoerotic and other unconventional sexual escapades.¹³³¹ Justice Brennan, who delivered the judgment of the Court, rescued *Fanny Hill* because it had social value as literature. Underneath the opinion was the author's view that "art" is "a purposive and rational endeavor addressed to the understanding," the mind of the audience — in contrast to "pornography," or "writings or pictures whose purpose is predominantly aphrodisical."¹³³² Thus, on the same day that the Court lifted the censorship of *Fanny Hill* it affirmed censorship of fifty paperback novels depicting "such deviations as sado-masochism, fetishism, and homosexuality," whose literary appeal was (to the Court) outweighed by its prurient interest.¹³³³ The Court also that day upheld a conviction for peddling relatively tame erotica that the Court accepted as obscene largely because it "pandered" to impressionable adolescents.¹³³⁴ All these decisions carried dissenting opinions. Justice Douglas' dissent accepted the normative stance Fleishman and Fortas had urged in *Roth*, and that the nascent lesbian liberation movement was pressing: the idea of benign sexual variation. Speaking to the Court's suppression of sado-masochistic erotica, Douglas said:¹³³⁵

1330. *See One, Inc. v. Olesen*, 355 U.S. 371 (1958) (per curiam) (summarily reversing censorship on the basis of *Roth*); *see also Manual Enters., Inc. v. Day*, 370 U.S. 478 (1962) (overturning censorship of male physique magazines); *Kingsley Int'l Pictures Corp. v. Regents*, 360 U.S. 684, 685 (1959) (invalidating state law barring depictions of "sexual immorality, perversion, or lewdness . . . as desirable" in movies, as this was viewpoint discrimination).

1331. *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General*, 383 U.S. 413 (1966).

1332. *See Memorandum of Mr. Justice Brennan In Re: The Obscenity Cases at 41, in Brennan Papers, supra* note 129, Box I: 96, Folder 3 (Administrative File, O.T. 1963).

1333. *Mishkin v. New York*, 383 U.S. 502, 505 (1966) (describing the censored materials); *see id.* at 508 (affirming the censorship, even though the "normal" person would not be aroused by the materials; the materials can be censored if they have a prurient appeal to members of a "clearly defined deviant sexual group").

1334. *Ginzburg v. United States*, 383 U.S. 463, 474 (1966). Justice Brennan's remarkable opinion accepted an argument based on pandering that the government did not make. *See* Brief for the United States, *Ginzburg* (1965 Term, No. 42), and drew dissents from Justices Black, Douglas, Harlan, and Stewart.

1335. *Ginzburg*, 383 U.S. at 491 (Douglas, J., dissenting); *see Memoirs*, 383 U.S. at 431-32 (Douglas, J., concurring); *see also* Brief of the ACLU and the ACLU of Pennsylvania,

Man was not made in a fixed mould. If a publication caters to the idiosyncracies of a minority, why does it not have some “social importance”? . . . However plebian my tastes may be, who am I to say that others’ tastes must be so limited and that other tastes have no “social importance”? . . . Catering to the most eccentric taste may have “social importance” in giving that minority an opportunity to express itself rather than to repress its inner desires How can we know that this expression may not *prevent* antisocial conduct?

Except for Douglas, the other Justices participating in the *Memoirs* trilogy in 1966 revealed no well-informed perceptions about the inner lives of sexual nonconformists.

In the late 1960s and early 1970s, frank discussions and depictions of sexuality in novels, movies, and other media exploded.¹³³⁶ Gay publications, more than any others, mingled erotica with ideas and opinions.¹³³⁷ Justices Douglas, Brennan, Stewart, and Marshall were prepared to relax the state’s role as censor of sexual speech — but the Court moved in precisely the opposite direction, frequently in cases involving homoerotic materials. In *Miller v. California*,¹³³⁸ the Nixon Justices plus Justice White upheld state suppression of “depictions of cunnilingus, sodomy, buggery, and other similar sexual acts performed in groups of two or more.”¹³³⁹ In the face of the substantially unsuccessful history of censorship, Chief Justice Burger’s opinion for the Court expanded permissible state regulation of obscene speech to include materials offensive to the moral standards of the local rather than national community.¹³⁴⁰ *Miller* also suggested that states should be more specific as to exactly what kind of sexual depictions they were barring; this motivated twenty-two states to amend or revise their obscenity laws between 1973 and 1977.¹³⁴¹ It also triggered a brief new wave of censorship, especially of gay publications, almost all of which the Burger Court upheld, sometimes in broadly written or even igno-

Amici Curiae at 30-37, *Ginzburg* (1965 Term, No. 42) (urging the Court to overrule *Roth*, whose vague standards allowed suppression of valuable speech).

1336. And so did prosecutions and appeals to the Supreme Court. Between 1967 and 1973, the Court summarily affirmed or reversed obscenity convictions based upon the Justices’ own examination of the materials under the *Memoirs* test. *See, e.g.*, *Redrup v. New York*, 386 U.S. 767 (1967) (per curium).

1337. *See generally* RODGER STREITMATTER, *UNSPEAKABLE: THE RISE OF THE GAY AND LESBIAN PRESS IN AMERICA* (1995).

1338. 413 U.S. 15 (1973).

1339. Brief for Respondent at 26, *Miller* (No. 70-73).

1340. *Miller*, 413 U.S. at 30-34; *see also* *Kaplan v. California*, 413 U.S. 115 (1973) (holding obscene a book describing a “variety of sexual contact, homosexual and heterosexual”); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973) (upholding closure of adult theatre).

1341. *See* Brief for Appellant at 23-26, *Ward v. Illinois*, 431 U.S. 767 (1977) (No. 76-415).

rant opinions.¹³⁴² Notwithstanding these efforts, pornography grew like weeds in a vacant lot — and the cases eventually stopped coming to the Supreme Court, in part because most governments (including the federal government) reduced or abandoned their efforts to censor written materials and in part because local censorship efforts were easily evaded by national channels of communication such as mail service, telephone, and the internet. Suppression of written pornography has been superseded by campaigns against pornographic films. These campaigns have emphasized channeling such movies into private use (recall *Stanley*) or red-light zones.

In *Young v. American Mini Theatres*,¹³⁴³ upholding a zoning ordinance restricting theatres showing “indecent” materials, the Nixon Justices fragmented on the issue of sexual speech.¹³⁴⁴ Justice Stevens’ plurality opinion announced, “even though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society’s interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammelled political debate.”¹³⁴⁵ Speaking for four dissenters, Justice Stewart objected that the Court had consistently applied rigorous First Amendment scrutiny to sexually vulgar or offensive expression.¹³⁴⁶ He objected to Justice Stevens’ suggestion that sexual speech has no value. “The fact that the ‘offensive’ speech here may not address ‘important’ topics — ‘ideas of social and political significance’ . . . does not mean that it is less worthy of constitutional protection. ‘Wholly neutral futilities . . . come under the protection of free speech as fully as do Keats’ poems or Donne’s sermons.’”¹³⁴⁷ Concurring in the plurality’s result, Justice Powell declined to join Justice Stevens’ effort to create a First Amendment

1342. See *Ward v. Illinois*, 431 U.S. 767, 771-72 & nn.3-5 (1977) (White, J.) (upholding statute criminalizing depiction of “abnormal” sex and lumping together rape, sado-masochistic sex, and same-sex foreplay and consensual intercourse); Eskridge, *Establishing Conditions*, *supra* note 555, at 892-95 (describing the binge of antigay censorship and the Supreme Court’s ongoing encouragement).

1343. 427 U.S. 50 (1976).

1344. This was the first time the Nixon Justices did not vote as a block in an obscene or indecent speech case.

1345. *Mini Theatres*, 427 U.S. at 70 (Stevens, J., joined by Burger, C.J., and White & Rehnquist, JJ.).

1346. *Id.* at 84-85 (Stewart, J., joined by Brennan, Marshall & Blackmun, JJ., dissenting) (citing, for example, *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975) (display of nudity on a drive-in movie screen); *Cohen v. California*, 403 U.S. 15 (1971) (protecting public display of jacket inscribed with “Fuck the Draft”)).

1347. *Mini Theatres*, 427 U.S. at 87 (Stewart, J., dissenting) (quoting *Winters v. New York*, 333 U.S. 507, 528 (1948) (Frankfurter, J., dissenting)).

sliding scale, with sexual speech near the bottom.¹³⁴⁸ In *FCC v. Pacific Foundation*,¹³⁴⁹ a similarly divided Court upheld an FCC order barring indecent radio programming during hours that children would be likely listeners. Like earlier regulatory decisions, these have had little discernible effect on the availability of sexually explicit material, which has grown tremendously.

Responding to the inefficacy of censorship as well as continued ACLU and progressive objection to it, the Rehnquist Court has been protective of indecent speech. In *Sable Communications v. FCC*,¹³⁵⁰ the Court allowed Congress to prohibit *obscene* commercial use of the telephone but unanimously invalidated the statute's prohibition of *indecent* commercial services.¹³⁵¹ Since *Sable*, the Court has routinely treated indecent speech as constitutionally valuable and has invalidated broad congressional efforts to regulate it, even when Congress has justified its regulations as needed to protect children.¹³⁵² It is clear from the caselaw that Congress can regulate obscene speech (though it is far from clear exactly what that entails) and can protect children from indecent expression (but only in laws that are narrowly tailored to achieve that goal and without unduly blocking adults from obtaining such materials).

Although gay rights groups have not brought these lawsuits, the gay-friendly ACLU has done so, more than atoning for its early sex-negative history.¹³⁵³ Additionally, the Court's protection of sexually

1348. *Id.* at 73 n.1 (Powell, J., concurring in part and in the judgment) ("I do not think we need reach, nor am I inclined to agree with, the holding . . . that nonobscene, erotic materials may be treated differently under First Amendment principles from other forms of protected expression.").

1349. 438 U.S. 726 (1978). As in *Mini-Theatres*, Justice Stevens suggested a sliding scale of First Amendment protection, depending on the overall value of the speech. *Id.* at 745-48 (plurality opinion). Four Justices (Brennan, Stewart, Marshall & White) dissented. *Id.* at 777; *see also id.* at 762 (Brennan & Marshall, JJ., dissenting). Justices Powell and Blackmun concurred in the judgment. *Id.* at 755.

1350. 492 U.S. 115 (1989).

1351. *Id.* at 124-26 (bar to obscenity okay); *id.* at 126-31 (bar to indecent speech not okay, distinguishing *Pacific Foundation*); *cf. id.* at 133-36 (Brennan, J., joined by Marshall & Stevens, JJ., dissenting) (arguing that the bar to obscene speech was also unconstitutional).

1352. *See Ashcroft v. The Free Speech Coalition*, 122 S.Ct. 1389 (2002) (invalidating federal statute regulating images of children in sexually explicit positions on grounds of overbreadth, distinguishing *New York v. Ferber*, 458 U.S. 747 (1982)); *United States v. Playboy Entm't Network*, 529 U.S. 803 (2000) (invalidating federal statute regulating "sexually explicit adult programming" by cable providers as content regulation which fails strict scrutiny); *Reno v. ACLU*, 521 U.S. 844 (1997) (invalidating federal statute enacted to protect minors from encountering "indecent" or "patently offensive" communications on the internet).

1353. Since the presidency of Norman Dorsen, an early gay rights pioneer, the ACLU has been highly gay-friendly. Moreover, openly lesbian and gay voices, such as those of Nan

explicit speech has been of disproportionate importance to gaylaw, both because it has opened up valuable sources of information about same-sex intimacy for all lesbian and gay people and because it has helped normalize the idea of benign sexual variation generally.¹³⁵⁴ The Rehnquist Court has also normalized and protected sexual speech in another, more explicitly gay-protective way. Because homosexuality (unlike sex or race) is not typically apparent upon casual observation, it is easier for the gay person to “closet” her or his sexual status, a phenomenon that has also made it hard for gay people to organize politically. In the 1950s and 1960s, it was dangerous and even legally dubious for a gay person to “come out of the closet,” but judges in the 1970s started to recognize the importance of identity speech to gay people and to afford it protection under the First Amendment.¹³⁵⁵

The Rehnquist Court has probably settled the matter in dictum. Justice Souter’s opinion for the unanimous Court in *Hurley*, the Boston parade case, situated its ruling that the parade organizers were promulgating a message when they excluded an openly gay contingent, as the mirror image of the gay people’s expressive conduct: “a contingent marching behind the organization’s banner would at least bear witness to the fact that some Irish are gay, lesbian, or bisexual, and the presence of the organized marchers would suggest their view that people of their sexual orientations have as much claim to unqualified social acceptance as heterosexuals and indeed as members of parade units organized around other identifying characteristics.”¹³⁵⁶ It would appear that coming out speech of all sorts is expression protected by the First Amendment. It remains to be seen whether the Court will someday accept the further argument David Cole and I

Hunter (who founded the ACLU’s Gay and Lesbian Rights Project), have been prominent in the Union during this period.

1354. See Jeffrey Sherman, *Love Speech: The Social Utility of Pornography*, 47 STAN. L. REV. 661 (1995); Scott Tucker, *Radical Feminism and Gay Male Porn*, in MEN CONFRONT PORNOGRAPHY 263 (Michael S. Kimmel ed., 1990). For an opposing gay viewpoint, see JOHN STOLTENBERG, REFUSING TO BE A MAN: ESSAYS ON SEXUAL JUSTICE (1989).

1355. See *Acanfora v. Bd. of Educ.*, 491 F.2d 498 (4th Cir. 1974) (finding gay teacher’s “coming out” protected by First Amendment, but not his earlier lies about his sexual orientation); *Gay Law Students Ass’n v. Pac. Tel. & Tel.*, 595 P.2d 592 (Cal. 1979) (interpreting state labor law’s protection of employees for “political” expression to include gay people’s “coming out” speech); Nan D. Hunter, *Identity Speech and Equality*, 79 VA. L. REV. 1695 (1993) (tracing emergence of “open homosexuality” as a political claim).

1356. *Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 574 (1995); see also *id.* at 570 (noting that the GLIB’s “participation as a unit in the parade was equally expressive . . . in order to celebrate its members’ identity as openly gay, lesbian, and bisexual descendants of the Irish immigrants, to show that there are such individuals in the community”).

have made, that expressive conduct also includes sodomy and other expressions of affection or love.¹³⁵⁷

3. *First Amendment-Equal Protection Clashes: Defining Who We Are by Whom We Exclude*

So long as racial minorities, women seeking birth control information, and lesbian people were engaged in their politics of protection against state oppression, the First Amendment was an important ally. This changed once the minority's politics of remediation persuaded legislatures to adopt antidiscrimination laws. Supporters of the politics of preservation have assailed antidiscrimination laws as intrusions into their liberties, including their First Amendment rights to speak freely against "special privileges" to minorities, to engage in expressive conduct such as protests and parades, and to form expressive associations excluding minority persons. The Court's construction of strong First Amendment bright-line rules against state censorship of expressive conduct and association on the basis of content or viewpoint fits well with the preservationist response. Specifically, the First Amendment has been asserted as a shield against particular applications of laws penalizing hate speech, crimes motivated by hate or prejudice, and work environments that female employees consider hostile. Generally, courts have limited the reach of such legislation to the extent they censor people's ability to say what they believe, read what they want, and think what they will. Recall the failure of Professor Catharine MacKinnon's anti-pornography law to satisfy First Amendment scrutiny, notwithstanding her claim that speech and press regulated by the law had direct and serious third-party effects (Section I.B.3.b). The most interesting cases are the ones where an antidiscrimination law applies to limit traditionalists' right to expressive association.

My thesis is that the expressive feature of identity politics brings into sharp relief both the censorial features of equality jurisprudence and the egalitarian features of free speech jurisprudence. They generate intractable clashes in the cases where an expressive association excludes people both because of who they are *and* because of what they signify — because who they are has expressive significance for the association. The first big Supreme Court case was *Roberts v. United States Jaycees*.¹³⁵⁸ The U.S. Jaycees was an organization fostering the development of "young men's civic organizations," drawing them into

1357. David Cole & William N. Eskridge, Jr., *From Hand-holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct*, 29 HARV. C.R.-C.L. L. REV. 319 (1994).

1358. 468 U.S. 609 (1984), followed in *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 545 (1987).

community service, and inculcating them with “a spirit of genuine Americanism.” Minnesota ruled that its public accommodation anti-discrimination law applied to the Jaycees and required its local chapters to integrate women. The U.S. Jaycees objected that the “core purpose” of their expressive association was for *young men* to get together and learn their “collective voice.”¹³⁵⁹ They read the right of association recognized in the NAACP cases as reflecting the nation’s commitment to pluralism as well as individual liberty. Because the state was seeking to dictate, and not just uncover the Jaycees’ membership, its intrusion was greater than that in *NAACP v. Alabama*.¹³⁶⁰ As Phil Lacavora’s amicus brief for the Boy Scouts put it, “[a]n essential ingredient of this right to join with others is the right to define the group’s identity and purposes through membership criteria,” which necessarily entails a “prerogative to exclude others from the group.”¹³⁶¹ The state and supporting amici (including NOW, the Inc. Fund, the ACLU) questioned any effect of integration on the Jaycees’ expressive enterprise and defended the desegregation of the Jaycees as necessary to the state’s compelling interest in rooting out vestiges of sexism in public accommodations as well as state organs.¹³⁶²

The Supreme Court unanimously agreed with the state.¹³⁶³ Justice Brennan’s opinion for the Court read the NAACP cases as valuing “collective effort on behalf of shared goals” as “important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority,” but argued that this freedom is most strongly implicated when the association is small, highly selective, and focused on normative goals associated with its membership limitations.¹³⁶⁴ Because the Jaycees were a large, unselective, and normatively unfocused association, the antidiscrimination law imposed few burdens on its expressive features. And the state’s “compelling interest in eradicating discrimination against its female citizens justifies

1359. Brief of Appellee at 11-13, *Roberts* (No. 83-724).

1360. *Id.* at 13-15. “Where the purposes of these organizations are linked in their membership composition, the power sought by the State is the power to destroy those purposes.” *Id.* at 14.

1361. Brief of the Boy Scouts of America as Amicus Curiae in Support of Affirmance at 11, *Roberts* (No. 83-724); see also *id.* at 6-11 (providing a detailed history of the important role associations have played in America’s social and political history).

1362. See Brief Amicus Curiae of ACLU and Minnesota Civil Liberties Union in Support of Appellants, *Roberts* (No. 83-724); Brief of Amicus Curiae NAACP Legal Defense and Education Fund, Inc. in Support of Petitioner, *Roberts* (No. 83-724); Brief of Amici Curiae the National Organization for Women et al., *Roberts* (No. 83-724).

1363. Chief Justice Burger and Justice Blackmun did not participate. Justice Rehnquist silently concurred in the Court’s judgment. Justice O’Connor concurred in much of the majority opinion but presented her own rationale for the result.

1364. *Roberts*, 468 U.S. at 622-23.

the impact that application of the statute to the Jaycees may have on the male members' associational freedoms."¹³⁶⁵ Concurring in the judgment, Justice O'Connor interpreted the NAACP cases as most strongly protecting only those associations whose activities were themselves expressive under the First Amendment, and providing little protection to associations whose activities were commercial or otherwise nonexpressive.¹³⁶⁶ Because the Jaycees were closer to the commercial than to the expressive end of the scale, they had minimal associational rights that were being sacrificed by the concededly important antidiscrimination policy.

Roberts can be faulted for understating the censorial features of equality jurisprudence. Title VII tells private employers that they cannot represent themselves as associations reflecting the values of race or sex segregation, and its anti-harassment guidelines require employers to police sexist and racist expression by their employees. Calling the association "commercial" (O'Connor) or "unselective" (Brennan) does not negate the fact that the state is censoring private expression and expressive association. The *Roberts* Justices did not fairly treat the central claim of the Jaycees and their friends the Boy Scouts, that the ability of Americans to form expressive associations entails the ability to exclude members whom the association believes (perhaps unfairly) would undermine its message and its internal cohesion. That does not mean the Jaycees should have prevailed in *Roberts*. As the state and its amici argued, the normative linchpin of the case was whether the state's interest in promoting women's equality is a compelling interest and justifies integration of associations like the Jaycees. The Supreme Court had confronted a similar claim more forthrightly in *Bob Jones University v. United States*,¹³⁶⁷ which ruled that the fundamental interest in eradicating racial discrimination justified the federal government's refusal to provide tax exemptions to a college that excluded different-race couples on religious principle.

What the Justices could not see in *Roberts*, they could see in *Hurley*.¹³⁶⁸ Had the Boston parade been a municipal event, the First Amendment would have protected lesbian people's right to participate in the parade either as individuals or as a group, for the reasons

1365. *Id.* at 623.

1366. *Id.* at 634-36 (O'Connor, J., concurring in part and in the judgment). "An association must choose its market. Once it enters the marketplace of commerce in any substantial degree it loses the complete control over its membership that it would otherwise enjoy if it confined its affairs to the marketplace of ideas." *Id.* at 635-36.

1367. 461 U.S. 574 (1983); see PHILIP B. HEYMANN & LANCE LEIBMAN, *THE SOCIAL RESPONSIBILITIES OF LAWYERS: CASE STUDIES* 139 (1988) (background of the case).

1368. See generally William N. Eskridge, Jr., *A Jurisprudence of "Coming Out": Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 *YALE L.J.* 2411 (1997).

suggested above. But the state courts ruled that the parade was private, and that makes a First Amendment difference: if a private group were trying to present a message that would be defeated or diluted by the presence of lesbigay participants, then its First Amendment rights are implicated, as the Supreme Court held in both *Hurley* (an expressive conduct case) and *Dale* (an expressive association as well as speech case).¹³⁶⁹ The Supreme Court was right to say that the presence of openly gay marchers or assistant scoutmasters could be understood as a derogation from some traditionalist messages, including “we tolerate homosexuals only if they are in the closet.”¹³⁷⁰ But it was wrong in both cases to stop with that conclusion. In both *Hurley* and *Dale*, the state was asserting a compelling interest in eradicating antigay discrimination in important public accommodations and ensuring that lesbigay people not be excluded. Apparently, the Court in both cases assumed that this state goal went to the content of the private groups’ expressive identity. Identity politics is a politics of presence; presence carries a message; therefore, exactly as the parade organizers and the Boy Scouts had argued in their briefs, a group cannot control its own expression unless it can control its own membership.

But if the foregoing is correct, *Roberts* and *Bob Jones* were wrongly decided.¹³⁷¹ The majority in *Hurley* and, especially, *Dale* understated the subordinating features of the First Amendment. By protecting centers of social power in their efforts to exclude gay people because of what they supposedly represent, the First Amendment of *Dale* does what the Equal Protection Clause protected gay people against in *Romer v. Evans* — denial of important social rights because of stereotyping and prejudice. The state courts that were reversed in *Hurley* and *Dale* viewed the First Amendment as tolerating state regulations that interpreted antigay exclusions as going to status rather than expression — exactly the same as the Supreme Court did in *Roberts* and *Bob Jones*.

Roberts, *Bob Jones*, *Hurley*, and *Dale* can best be understood and reconciled by reference to this Article’s theory of IBSMs. For the traditionally stigmatized individual (the black person, the woman, the gay person), exclusion is always a matter of both status and message and

1369. *Hurley*, 515 U.S. at 576-77; *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647-61 (2000).

1370. *Dale* was beclouded by serious question whether the Boy Scouts was an expressive association or was expressing any opinions as to gay people or homosexuality. *See Dale*, 530 U.S. at 665-78 (Stevens, J., dissenting).

1371. *Roberts* can be saved if one accepts O’Connor’s commercial-expressive continuum, but it is incoherent. As the Court’s recent cases recognize — another example of the imperial First Amendment — commercial speech is expressive. *Roberts* can also be saved if one accepts Brennan’s exception for large unselective groups, but in that event *Dale* is wrongly decided. *See Dale*, 530 U.S. at 697 (Stevens, J., dissenting).

can therefore usually be analyzed as a matter of antidiscrimination law or First Amendment law. So the Court can usually say that women are excluded from all-male clubs for reasons having to do only with their status and not their message, or they can say the opposite. What motivates one answer or the other is social norms and how far the IBSM has progressed in its politics of recognition. Race is such an officially irrelevant trait that judges will view race-based exclusions through equality lenses except in the most extreme cases (the KKK). Sex is a trait that remains relevant sometimes but not often, and so judges will be inclined to view sex-based exclusions through equality lenses. In both cases, by the way, the judicial task is made easier by the reluctance of private associations to justify their exclusions as actual expressions of racism or sexism.¹³⁷² Private associations or their counsel are not so bashful in expressing their views that homosexuality is both relevant and really malignant.¹³⁷³ To the extent that homosexuality is a trait that most judges tend to view as both salient and icky, they will view private exclusions through libertarian lenses. Accordingly, those judges who view sexual variation as malignant will be much more likely to side with liberty in liberty-equality clashes than judges who view sexual variation as tolerable or even benign.

III. IDENTITY-BASED SOCIAL MOVEMENTS AND META-CHANGES IN CONSTITUTIONAL DISCOURSE AND JURISPRUDENCE

Surely it is clear that IBSMs and their countermovements were critically important to constitutional doctrine in the twentieth century. This was equally true at the level of constitutional meta-discourse and jurisprudence. As much as any other socio-economic development of the century, the social movements surveyed in this Article were a moving force behind the big changes in the larger ways law professors, judges, and lawyers have understood and analyzed constitutional issues. As I shall argue in this part, no theory of constitutional law can be adequate or successful which does not centrally involve IBSMs and their jurisprudence. These social movements and their countermovements have been testing grounds that have deepened the insights and

1372. Thus, *Roberts* would have been a harder case if the Jaycees had argued the following: we are an all-male group because we represent an ideology of sexism. Our fundamental organizing message is, "Business is for guys! Women belong at home (though they can be our guys' guests for lunch)." The Jaycees made nothing like this argument, and they won no votes at the Supreme Court. See 147 LANDMARK BRIEFS, *supra* note 199, at 593-95, 599 (during oral argument in *Roberts*, counsel for Jaycees could not name a single policy position or message that would be changed if women became members).

1373. The Boy Scouts' attorneys (without any reference to the Boy Scouts of America's own official message) said this: "Believing that homosexual conduct, along with other sex outside of marriage, is immoral, Boy Scouting does not want to promote homosexual conduct as a form of behavior." Reply Brief for Petitioners at 5, *Dale* (No. 99-699).

revealed the deficiencies of the big jurisprudential schools of the twentieth century — legal realism and legal process — and have generated a third, critical theory.

Constitutional law in 1900 was originalist and formal in its methodology, substantive but modest in its prohibitions, and largely served the interests of economic and social elites. The Supreme Court read the First Amendment and the Equal Protection Clause much more narrowly than their broad phraseology would have supported, but in what the Justices claimed was strict adherence to the original expectations of the ratifying states in 1791 and 1868, respectively.¹³⁷⁴ The Court tolerated state censorship or discriminations that had firm roots in tradition. Episodically, the Court enforced the Contract, Takings, and Commerce Clauses against state or federal economic regulation, but for the most part the Court upheld most such laws. A nonactivist Court suited elite interests fine, as it protected the legal stability that was important to the flourishing of modern commerce, megabusinesses, and finance. The Justices' episodic bouts of nonoriginalist activism came in cases in which the interests of socio-economic elites were immediately threatened, as in the income tax and Pullman strike cases of 1895.¹³⁷⁵

How different is constitutional law in the new millennium! The Court's methodology is unmistakably dynamic and policy-saturated. Although the Court's review is more proceduralist and less openly substantive than it once was, statutes fall like trees in timber season every time the Court sits. The Justices' activism knows no ideology: conservatives are just as activist as moderates. And the Court's activism has benefited oddball as well as ordinary people — ACT-UP protesters and performance artists, members of the KKK as well as the NAACP, pregnant schoolteachers and men refused admission to professional school, the elderly and the disabled who need a place to live, latino and black schoolchildren, parents and traditionalists wanting homosexual-free spaces, women seeking abortion and women pro-

1374. See, e.g., *Colorado v. Patterson*, 205 U.S. 454 (1907) (reading the First Amendment as only barring "prior restraints," which had been condemned by Blackstone and the colonists); *Plessy v. Ferguson*, 163 U.S. 537 (1896) (reading the Equal Protection Clause as having no bearing on social or political rights); *The Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1893) (reading the Equal Protection Clause to impose heightened scrutiny only for race-based classifications); see also *Hans v. Louisiana*, 134 U.S. 1 (1890) (broadly reading the Eleventh Amendment, well beyond its text, to reflect original expectations of the framers of the amendment and the original Constitution).

1375. See *In re Debs*, 158 U.S. 564 (1895) (asserting federal Commerce Clause as basis for federal court injunctions suppressing the Pullman Strike); *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601 (1895) (invalidating the federal income tax, upon a wild theory that it was inconsistent with U.S. CONST. art. I, § 4). See also *Lochner v. New York*, 198 U.S. 45 (1905) (liberty of contract), and cases applying *Lochner*.

testing their mission, cross-burners as well as flag-burners, lesbigay public school and university students.

It is impossible to imagine this dramatic transformation without considering the role of IBSMs and their countermovements. The complicated dialogue among their lawyers, the judiciary, and the country at large has driven these revolutionary developments in constitutional law and its accompanying theory and jurisprudence. Among the big normative legacies of these social movements are both justifications for and critiques of dynamic constitutional interpretation, the representation-reinforcing role of judicial review, and popular constitutionalism.

A. *Legal Realism, Social Movements, and the Living Constitution*

According to the conventional wisdom among legal historians, the originalist methodology dominating American constitutionalism during the nineteenth century gave way in the twentieth to a "Living Constitution" pioneered by social evolutionary thinkers such as Oliver Wendell Holmes, Jr., Woodrow Wilson, and Louis Brandeis.¹³⁷⁶ The doctrinal history developed in Part II of this Article supports the general account of the twentieth century as an era of consciously dynamic constitutionalism but suggests that the pioneers were not just the Harvard- and Princeton-trained intellectuals, but were also lawyers and leaders of social movements whose members' interests were not represented among the original framers. Indeed, principles for the Living Constitution were laid out, perhaps for the first time, by Elizabeth Cady Stanton, Virginia Minor, and other women's suffragists in the 1870s. As Adam Winkler has demonstrated, these early advocates for women's politics of recognition pioneered the evolutive theory of law, whereby fundamental law in a democracy must change to accommodate the widening circle of citizenship. Arguing before a Senate committee in 1870, Stanton asserted women's constitutional right to vote on the basis of a broad reading of the Fourteenth Amendment's Privileges and Immunities Clause, the Guarantee Clause of Article IV, and the Bill of Attainder Clause of Article I; although none of these provisions explicitly assured women's rights, they had to be interpreted broadly in light of women's equal

1376. See Howard Gillman, *The Collapse of Constitutional Originalism and the Rise of the Notion of the "Living Constitution" in the Course of American State-Building*, 11 *STUD. AM. POL. DEV.* 191 (1997); see also Morton J. Horwitz, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISES OF LEGAL ORTHODOXY* 140-42 (1992); PAUL W. KAHN, *LEGITIMACY AND HISTORY: SELF-GOVERNMENT IN AMERICAN CONSTITUTIONAL THEORY* 77-89 (1992).

citizenship, and their general principles were undermined by excluding women from the franchise.¹³⁷⁷

The suffragists' approach to law anticipated and may have influenced the progressive constitutionalists, especially Holmes, who deemphasized history and custom and celebrated social policy as the proper grounding for evolving legal standards.¹³⁷⁸ By the lights of the women's movement and the later civil rights movement, however, Holmes's evolutive approach to law was hardly sufficient. Their central claim would have been that Holmes had a thin understanding of democracy and citizenship. Like other progressives, Holmes deferred to the operation of an often unrepresentative political process and most stringently criticized courts for standing in the way of the reforms desired by popular majorities.¹³⁷⁹ Justice Holmes's opinion for a unanimous Court in *Giles v. Harris* was as presentist, policy-oriented, and deferential to the political process as his *Lochner* dissent — but is not the kind of Living Constitution that looks admirable in retrospect. Although Justice Brandeis, “the People's Lawyer,” was a constitutional dynamicist more in tune with the needs of ordinary people, his jurisprudence, like Holmes's, was cautiously evolutive and deferential to the normal political process.¹³⁸⁰ As Justices on the Court, neither objected to decisions applying *Plessy* to allow racial segregation in public schools, for example.¹³⁸¹ While neither Holmes nor Brandeis had the kind of egalitarian constitutional vision the early suffragists or anti-apartheid thinkers had, they were open to updating the Constitution to protect women and people of color from harm.

Attorneys for people of color and feminists in the first decades of the twentieth century were not as learned as Holmes and Brandeis, nor were they intimately familiar with the dynamically-inclined theo-

1377. Adam Winkler, *A Revolution Too Soon: Woman Suffragists and the “Living Constitution,”* 76 N.Y.U. L. REV. 1456, 1479-83 (2001); see *id.* at 1482-1518 (carefully tracing this new form of argument in legislative and then judicial fora — and its rejection in the 1870s).

1378. E.g., Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469, 474 (1897), reprinted in COLLECTED LEGAL PAPERS 167, 186-87, 195 (1920); see Winkler, *supra* note 1377, at 1524-25 (circumstantial evidence that the suffragists' “new departure” directly influenced Holmes).

1379. E.g., *Lochner v. New York*, 198 U.S. 45, 75 (1906) (Holmes, J., dissenting); see also Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908) (strongly criticizing courts for interfering with legislative reforms).

1380. See generally ALPHEUS T. MASON, *BRANDEIS: A FREE MAN'S LIFE* (1946); EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION* 115-40 (2000); PHILIPPA STRUM, *LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE* (1984).

1381. See *Gong Lum v. Rice*, 275 U.S. 78 (1927), where the Court (including Holmes and Brandeis) upheld against equal protection attack the segregation of Chinese students in “colored” schools and treated it as settled that federal courts would not intervene in state and local decisions about how to manage their public schools.

ries of the legal realists that unfolded in the 1920s and 1930s.¹³⁸² But early IBSM lawyers like Moorfield Storey, Louis Marshall, and Morris Ernst were well-connected with current thinking among lawyers and scholars, and organizations like the NAACP and Planned Parenthood were advised and assisted by leading law professors such as Felix Frankfurter of Harvard and Edwin Borchard, Charles Black, and Fowler Harper of Yale. The big contributions of IBSM attorneys were to give legal voice to the needs and aspirations of the disempowered, to apply theories of living constitutionalism to the problems faced by women and minorities, and to enrich American thinking about what democratic constitutionalism ought to look like.

The first two parts of this Article provide early examples of their dynamic methodology. Consider the common themes of Louis Brandeis's brief in *Muller* (1908), Jonah Goldstein's brief in *Sanger* (1919), and U.S. Bratton's brief in *Moore v. Simpson* (1923). None of these briefs pretended to be "discovering" the original meaning of the Due Process Clause or to be applying precedent.¹³⁸³ There was little conventional legal analysis in the briefs. Instead, each document massively educated the Justices in what counsel believed were the most relevant factual materials — the harms to American women and families due to overwork of female employees (Brandeis), state censorship of birth control information and devices (Goldstein and Sanger), the mob-driven and lawless operation of the Phillips County system of criminal justice (Bratton).¹³⁸⁴ The premise was that the Court should apply the general libertarian policy of the Due Process Clause to accommodate the current and valid needs of the nation's citizens. This was the key insight of dynamic constitutionalism: the general principles and policies embodied in various constitutional provisions must be applied in light of current social facts and the felt necessities of our citizens. As a practical matter, this meant that history took a back seat

1382. The legal realists carried forward Holmes's project of understanding law as an evolving response to social problems. See generally NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 65-159 (1995); LAURA KALMAN, LEGAL REALISM AT YALE, 1927-1960 (1986). Although the realists did not focus on constitutional law as much as the common law, their view was that the Constitution evolved at the hands of judges, who sought to mask the evolution in shrouds of doctrine. E.g., Karl Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1 (1934).

1383. Indeed, Brandeis's brief was crafting a way around the recent *Lochner* precedent, and Bratton's invited the Court to ignore the Leo Frank case. Although there was no contrary precedent, there was certainly no precedent supporting Goldstein's argument that women had a due process right to contraceptives.

1384. The detailed factual materials were found in different spots in each submission. Brandeis's entire brief was the social science and comparative law data. Goldstein's brief incorporated points documented in greater detail by the supplement written by his client, Sanger. Bratton's brief relied on the massively detailed record compiled for the Court by the appellants.

to social and political science.¹³⁸⁵ A deeper premise of these and other social movement briefs was the notion that old constitutional policies needed to be updated to take account of the experience of minorities in the United States and that laws oppressing or subordinating the interests of women and racial minorities were normatively unacceptable.¹³⁸⁶

Civil rights attorneys often won important constitutional precedents with these kinds of arguments. Among the early landmarks were *Guinn*, *Buchanan*, *Moore*, *Herndon*, *Powell*, *Norris*, *Chambers*, *Allwright*, and *Shelley*. All but *Guinn* swept beyond the expectations of the framers of the Reconstruction amendments, and most went against probable intent; at least three of the decisions overruled or narrowed Supreme Court precedents.¹³⁸⁷ Although Justices authoring opinions in these cases did not openly embrace a Living Constitution, they emphasized the general (purpose) rather than specific (original) intent of the framers and distinguished away unhelpful precedents based upon the remarkable and compelling facts of the race cases. Equally important, the series of cases brought to the Court by civil rights organizations educated the Justices as to the overall situation in the South. Even before the school segregation cases (*Gaines* through *Brown*) were brought, civil rights groups showed the Justices in one appeal after another the multifarious ways southern “law enforcement” could deny people of color their right to vote and to hold property and could convict them of crimes they did not commit. For each member of the Court, there was, at some point, a moment of recognition that there was no justice to be had for blacks in the South — and that increasing numbers of blacks were not going to stand for it anymore. At the same time the NAACP was litigating the cases, it was seeking to change the political background against which they were evaluated, at first just by popularizing the abuses of apartheid but then by direct political action. The Association’s key role in the Senate rejection of Judge Parker’s nomination for the Supreme Court in 1930, and the subsequent defeat of numerous pro-Parker senators whom the NAACP targeted, served notice that it was no longer politically safe to

1385. See generally JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE* (1995).

1386. I emphasize that the point in text was not made in the early briefs. For people of color, the argument usually was that the liberationist policy of the Reconstruction amendments had been lost in the *Plessy* era, and the Court needed to retrieve that lost policy. For women, I am surprised that little was made of the way in which the Nineteenth Amendment might represent a new constitutional development requiring a rethinking of other constitutional policies.

1387. *Moore* either narrowed or overruled *Frank v. Mangum*, 237 U.S. 309 (1915), see *supra* Section II.A.2; *Allwright* overruled *Grovey v. Townsend*, 295 U.S. 45 (1935), see *supra* Section I.A.1; *Shelley* substantially narrowed *Corrigan v. Buckley*, 271 U.S. 323 (1926).

support judges who were friendly to apartheid.¹³⁸⁸ In part because of the NAACP's normative prestige and political clout, the Justices named after 1930 were a remarkably pro-civil rights bunch, open to reinventing the Constitution to meet current social demands.¹³⁸⁹

The briefing and deliberation in *Brown v. Board of Education* were the apotheosis of dynamic constitutionalism (Section I.A.2). There was plenty of legal discussion in the Inc. Fund's briefs, but the supportive precedents were ones that the Inc. Fund itself had won with presentist pitches under the Equal Protection Clause. The Social Science Statement attached to the Inc. Fund's brief was one intellectual fulcrum of the case for overruling *Plessy*. Arguing that educational segregation was based upon fantastic views of racial variation and had tangibly bad consequences for the country as well as for people of color, the Social Science Statement sought to motivate the Court to assemble the little precedents into a big one.¹³⁹⁰ The Solicitor General's brief was also openly present-oriented and set forth a second conceptual fulcrum for reevaluating *Plessy*: apartheid was an embarrassment to the democratic principles underlying the entire Constitution and to American foreign policy during the Cold War.¹³⁹¹ In an effort to buy time needed to reach consensus, Justice Frankfurter persuaded the Court to require further briefs, focusing particularly on the lessons of original intent. All sides came up with impressive research efforts, supplemented by law clerk Alex Bickel's excellent memo, which Frankfurter circulated to the Court.¹³⁹² It does not appear that any Justice was persuaded that the framers or ratifiers

1388. See GOINGS, *supra* note 663, at 54-74 (NAACP's successful campaigns to unseat pro-Parker senators in 1930-36).

1389. To wit: Cardozo (1932) was a sweet-natured liberal; Black (1937) was a closeted opponent of apartheid; Frankfurter (1938) had been an NAACP advisor; Douglas (1939) was a rabid realist and nonconformist devoted to civil rights; Murphy (1940) had created a civil rights division when he was Attorney General; Stone (promoted 1941) was a realist devoted to civil rights; Jackson (1941) was a conservative sometimes sympathetic to civil rights claims; Rutledge (1943) was a realist devoted to civil rights; Burton (1945) and Minton (1949) were former senators with pro-civil rights records; Clark (1949) was Truman's pro-civil rights Attorney General. Only Byrnes (1941) was a segregationist.

1390. See Social Science Statement, *supra* note 96; *supra* Section I.A.2.

1391. See Brief of Amicus Curiae United States at 2-8, *Brown* (1952 Term, Nos. 8, 101, 191, 413, 448); *id.* at 3 ("For racial discriminations imposed by law, or having the sanction or support of government, inevitably tend to undermine the foundations of a society dedicated to freedom, justice, and equality."). For important background and details of the openly presentist support of the federal government to the anti-apartheid campaign, see MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* (2000).

1392. The Bickel memo was revised and published as Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955) [hereinafter Bickel, *The Original Understanding*] (concluding that the framers did not believe the Fourteenth Amendment required immediate desegregation of schools but were open to the possibility over time).

of the Fourteenth Amendment, on balance, “intended” to render public school segregation constitutionally problematic, and the amendment was not so interpreted in the nineteenth century.¹³⁹³ In the teeth of historical evidence that educational apartheid was not the object of the Equal Protection Clause, versus moral and social science evidence that such a policy had malignant consequences, the Warren Court emphatically chose the latter and dished off 100 years of history in a couple of sentences.¹³⁹⁴ Handed down the same day, *Bolling* interpreted the Fifth Amendment to bar school segregation in the District of Columbia, a result that would never have occurred to the framers of either that amendment (1791) or the Fourteenth (1868).¹³⁹⁵ Appropriately, Chief Justice Warren’s opinion in *Bolling* made no mention of original intent.

Brown and *Bolling* were a watershed. Not only were the briefs strongly presentist in orientation, but the Court’s opinions were exclusively so. That the Court’s greatest and most legitimate constitutional decisions were rendered with no originalist support — and wide belief that original intent supported *Plessy* — called forth a generation of relatively open constitutional dynamism. An important academic defense of the Living Constitution was penned by then-closeted gay Professor Charles Reich: “[I]n a dynamic society,” the Constitution “must keep changing in its application or lose even its original meaning. There is no such thing as a constitutional provision with a static meaning. If it stays the same while other provisions of the Constitution change and society itself changes, the provision will atrophy.”¹³⁹⁶ After Supreme Court Justices had signaled that they were a ready audience for these arguments, attorneys for people of color, women, and gay people urged the courts in case after case to update the Constitution to protect them from state oppression and to give teeth to their claims of equal citizenship. Not surprisingly, most of the Court’s landmark individual rights decisions since *Brown* have ignored original expectations or any meaningful explication of pre-civil rights constitutional

1393. See Kluger, *supra* note 17 (the Justices were not persuaded); see also J. MORGAN KOUSSER, *DEAD END: THE DEVELOPMENT OF NINETEENTH CENTURY LITIGATION ON RACIAL DISCRIMINATION IN SCHOOLS* (1986).

1394. *Brown v. Bd. of Educ.*, 347 U.S. 483, 489 (1954): The parties’ discussion of the original materials “and our own investigation convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive.”

1395. The Fifth Amendment, of course, was adopted (1791) when slavery was still recognized in the Constitution. The Congress that voted for the Fourteenth Amendment (1868) adopted statutes recognizing racial segregation in D.C. schools.

1396. Charles A. Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673, 735-36 (1963). Although Professor Reich was seeking to explain the constitutional philosophy of Justice Black, which was pretty dynamic, he has told me that the Justice believed the article was more Reich than Black.

history as a basis for their holding. Instead, these decisions have been justified by what general constitutional principles or purposes would seem to require under present social circumstances. Or they have been justified by reference to precedents that themselves updated the Constitution through a present-minded purposivism. These kinds of arguments have been a common feature of Supreme Court decisions selectively incorporating various Bill of Rights provisions into the Due Process Clause (such as *Gideon*; Section II.A.1); applying the Due Process Clause to strike down vague statutes (such as *Papachristou*; Section II.A.3); recognizing a right of sexual privacy (such as *Griswold* and *Roe*; Section II.B); sweeping away laws barring sexual and marital relations between people of different races (*Loving*; Section II.C); subjecting sex-based classifications (such as *Craig*; Section II.C.1) and affirmative action programs (such as *Adarand*; Section II.C.3) to heightened scrutiny; striking down obsolescent death penalty laws (such as *Furman* and *Coker*; Section II.D); examining state voting restrictions under strict scrutiny (such as the one-person, one vote cases; Section II.E.1); expanding Congress's power to reach discriminatory conduct (Section II.E.2) and state responsibility for discriminatory acts of private parties (such as the sit-in cases; Section II.E.3); and protecting people's expressive conduct and association against state censorship (such as the NAACP and Boy Scout cases; Section II.F).

The dynamic constitutionalism arguably legitimated by the race discrimination cases encouraged women's and gay people's movement lawyers not only to ignore original intent, but also to bypass the NAACP's painstaking case-by-case approach to winning new constitutional standards. The contraception briefs written by Fowler Harper and Thomas Emerson, the sex discrimination briefs of Dorothy Kenyon and then Pauli Murray and Ruth Bader Ginsburg, and the abortion briefs submitted by Sarah Weddington and others leapfrogged the early civil rights strategy of starting with dramatic, fact-based precedents (like *Moore*, *Powell*, *Chambers*, *Sipuel*) and building upon them in a series of cases leading up to a landmark decision recognizing a broad constitutional principle (*Brown v. Allen* and *Fay*, *Gideon*, *Malloy* and *Miranda*, *Brown v. Board of Education*). The feminist briefs went straight for the landmark opinion; rather than ending up with *Brown*, they wanted to start with it. And their briefs followed the approach of the *Brown* briefs: they described present social realities (such as the central role for women in modern society and the malign effect of contraception bans and sex discriminations on their ability to enjoy their new role), posited one or more general constitutional principles set at a high level of generality, and concluded that the outdated legal disability was inconsistent with the principle(s). As Ginsburg later described the process, movement lawyers were pushing the Court immediately toward a "[b]oldly dynamic interpreta-

tion, departing radically from the original understanding” of the Fourteenth Amendment.¹³⁹⁷ She was certainly correct, as the Reconstruction amendments were not aimed at eliminating any discriminations against women, and their supporters had even betrayed women’s rights in the course of their struggle; gay rights were not even on the cultural radar in that period. So the Supreme Court’s decisions in *Reed*, *Frontiero*, *Craig*, *Hogan*, *J.E.B.*, and *Romer v. Evans* had no asserted connection to original constitutional expectations. Two landmark decisions did emphasize originalist history — *Roe* and *Hardwick* — but those exemplars of originalism only reinforce one’s doubts about that project, because the history invoked by the Court in each case was slanted and simply wrong on many points.¹³⁹⁸ That these have been the most widely criticized of the Court’s decisions in the last generation does not augur well for originalism as a legitimating mechanism.

More than a generation of judges and law professors have grown to maturity under the shadow of *Brown* and *Griswold*. Their dynamic methodology has called forth most of the great academic theories of judicial review for a generation, including the work of Charles Black, Alexander Bickel, John Hart Ely, Thomas Emerson, Kenneth Karst, and Catharine MacKinnon. What their work shares methodologically is not only its assumption of constitutional dynamism, but its deep discussion of what constitutional norms *Brown* and *Griswold* (and their progeny) best support. For the foregoing theorists the baseline is inclusion of the once-disparaged and marginalized as full participants in politics and society.¹³⁹⁹ That was arguably not the framers’ baseline in 1868 as to people of color, and certainly not as to women and gay people. As women’s and gay people’s rights occupy an increasing share of the Court’s docket, the connection between original intent and the Court’s decisionmaking will become only more attenuated.

1397. Ruth Bader Ginsburg, *Sexual Equality Under the Fourteenth and Equal Rights Amendments*, 1979 WASH. U.L.Q. 161, 161.

1398. See *Roe v. Wade*, 410 U.S. 113, 174-77 (1973) (Rehnquist, J., dissenting) (criticizing the majority’s misleading account and pointing to the longstanding state tradition regulating and barring abortions); Goldstein, *History, Homosexuality*, *supra* note 601 (criticizing *Hardwick’s* deployment of history).

1399. See BICKEL, LEAST DANGEROUS BRANCH, *supra* note 140; JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980); CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (Ox Bow Press 1983) (1969); THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1970); KENNETH L. KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION (1989); KENNETH L. KARST, LAW’S PROMISE, LAW’S EXPRESSION: VISIONS OF POWER IN THE POLITICS OF RACE, GENDER, AND RELIGION (1993); CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989); Charles L. Black, Jr., *The Lawfulness of Segregation Decisions*, 69 YALE L.J. 421 (1960).

The Living Constitution has been a big success but has exposed judicial review to theoretical and practical difficulties, parallel to the difficulties faced by legal realist theory after 1935.¹⁴⁰⁰ Most of the difficulties are variations of a legitimacy problem: Can the rule of law be persuasively sustained when the Justices are free to ignore original expectations and even precedent when interpreting the open-textured individual rights provisions of the Constitution? Is judicial activism supporting civil rights any more legitimate than the discredited judicial activism supporting economic rights? Shouldn't dynamic constitutionalism be the product of popular movements working to transform norms through constitutional amendments (or moments), rather than elite responses to minority lawsuits? These questions will occupy the remainder of this section. My argument is that this Article's history of IBSMs sheds novel light on these traditional topics.

To begin with, the apparent triumph of dynamic constitutionalism has not meant the death of originalism. Indeed, dynamism and originalism form a dialectical relationship somewhat akin to that of (*progressive*) social movements and their (*traditionalist*) countermovements. So even as the Warren Court viewed the Fourteenth Amendment differently than the framers apparently did, its most dynamic opinions (after *Brown/Bolling/Cooper*) called forth articulate dissents from the lawyerly Justices Frankfurter and Harlan,¹⁴⁰¹ and even the Warren Court's liberals were not so dynamic as to jettison the long-established state action requirement (the sit-in cases) or to extend heightened scrutiny to sex-based classifications (*Hoyt*). The tension between constitutional dynamism and originalism has become sharper since the Warren Court, for a simple reason. The Living Constitution has been associated so strongly with IBSMs that it was bound to become controversial once countermovements gained traction in national politics, as they have in response to the remedial measures pressed by the civil rights and women's rights movements and to the sexual conduct claims implicit in the pro-choice and gay rights movements. Supporters of privatized segregation, the anti-ERA campaign, and the pro-life and TFV movements argue in common that the Supreme Court has reneged on history and has violated the rule of law by interpreting the Fourteenth Amendment way beyond the origi-

1400. On legal realism's crisis of legitimacy, see EDWARD A. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM & THE PROBLEM OF VALUE* (1973).

1401. See, e.g., *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 449-80 (1968) (Harlan, J., dissenting); *Malloy v. Hogan*, 378 U.S. 1, 14-33 (1964) (Harlan, J., dissenting); *Fay v. Noia*, 372 U.S. 391, 448-70 (1963) (Harlan, J., dissenting); *Baker v. Carr*, 369 U.S. 186, 266-330 (1962) (Frankfurter, J., dissenting); *Mapp v. Ohio*, 367 U.S. 643, 672-86 (1961) (Harlan, J., dissenting).

nal expectations of its framers.¹⁴⁰² Representatives of these counter-movements now occupy important positions of power in Congress and the White House, as well as one-third of the seats on the Supreme Court. Whatever a scholar's or lawyer's motivation, he or she is assured a responsive audience for any article or brief arguing that original intent should be the linchpin for constitutional interpretation or, better yet, deploying such a methodology to support an interpretation favored by the countermovement.

For this reason, originalist work has grown like weeds in a vacant lot since the (seeming) triumph of constitutional dynamism. Much of it has been quite bad, and some of the worst work has gotten the most attention. Robert Bork, a brilliant scholar of antitrust law, has shown a tin ear for constitutional history. His overblown attacks on *Griswold*, analytically vulnerable but politically unassailable, cost him a seat on the Supreme Court.¹⁴⁰³ Infuriated but wiser from the experience, Bork shrewdly argued in *The Tempting of America* that the culture of constitutional dynamism fostered by *Brown* is a threat to the rule of law but that *Brown* itself was defensible under the proper (originalist) methodology.¹⁴⁰⁴ According to Bork, *Brown* could have rested on this syllogism: the goal of the Reconstruction amendments was equality for people of color; twentieth-century experience revealed that apartheid predictably yielded unequal schools (etc.) for the marked ("colored") race; with this new knowledge, what was not apparent to the framers is clear to us — segregated education (etc.) is inconsistent with the original purpose of the Fourteenth Amendment.¹⁴⁰⁵ Unfortunately, Bork's argument comes nowhere close to meeting the standard professional historians (or even law office historians) would require. Bork cited no evidence for his view of the purpose of the Equal Protection Clause. Historians have shown that the *original* purpose was much narrower. Rather than general equality for people of all races, the framers' apparent purpose was to ensure equality only as to "civil rights" (to hold property, access to courts) but not as to social (associational) or political (voting) rights.¹⁴⁰⁶ To reach Bork's result, you not only have to ig-

1402. Although the early massive resistance movement in the South gave original intent criticisms little emphasis in the 1950s, see BARTLEY, *supra* note 117, at 290-91, they became mainstays of the politics of preservation in the 1960s and afterward.

1403. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 8-9 (1971).

1404. BORK, *supra* note 900, at 75-77, 143-45, 154-55.

1405. *Id.* at 81-82. Bork conceded that even if *Brown* was right, *Bolling* (requiring desegregation of D.C. public schools) was wrong under originalist premises. *Id.* at 83.

1406. The House manager of the Fourteenth Amendment specifically assured fence-sitters that the amendment would only cover "civil rights" and that civil rights "do not mean that all citizens shall sit on juries, or that their children shall attend the same schools." CONG. GLOBE, 39th Cong., 1st Sess. 1117 (1866) (remarks of Rep. Wilson). Historians sup-

nore strong evidence of the framers' *specific intent* (how they thought their amendment would apply), but also of their *general intent* (the purpose of the amendment).

A more rigorous legal historicist, Michael McConnell, has defended the result in *Brown* along specific intent lines. He maintains that in the 1870s there was much support in Congress for the view that the Fourteenth Amendment rendered public school segregation unconstitutional and, from that evidence, argues that the Framers expected school segregation to fail.¹⁴⁰⁷ Virtually no one has been persuaded by McConnell's learned account. Post hoc assertions by legislators in the 1870s about what they meant to do in the 1860s are not reliable evidence about the real deal made in 1868, and for most legal historians there is simply too much evidence that the moderate supporters of the Fourteenth Amendment believed it allowed segregated schools.¹⁴⁰⁸ So far, even the smartest originalist defense of *Brown* has not met historicist standards. And neither McConnell nor Bork has defended either *Bolling* or *Loving* as consistent with original meaning, nor could they easily do so. Because *Brown/Bolling/Loving* are universally accepted as key decisions in the constitutional canon, their incompatibility with originalism undermines the latter's claim to be the lodestar for constitutional interpretation.¹⁴⁰⁹ Reaffirmation of

port this civil/social/political rights distinction as a key one for the framers. *E.g.*, MICHAEL LES BENEDICT, *A COMPROMISE OF PRINCIPLE: CONGRESSIONAL REPUBLICANS AND RECONSTRUCTION, 1863-1869* (1974); EARL MALTZ, *CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863-1869* (1990); WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* (1988).

1407. Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 1005-29 (1995) (presenting a brilliant and rigorous account of Senator Sumner's effort to provide a federal remedy for school segregation, an effort that, McConnell argues, had majority congressional support in 1874 and failed only because of Sumner's death and the Democratic victory in the elections that year).

1408. *See generally* RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 22-27, 117-27* (1977); Alfred H. Kelly, *The Congressional Controversy Over School Segregation, 1867-1875*, 64 AM. HIST. REV. 537 (1959). For specific responses to McConnell, see Michael J. Klarman, *Brown, Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881 (1995) (critical analysis of the history as unpersuasive), and Earl M. Maltz, *Originalism and the Desegregation Decisions — A Response to Professor McConnell*, 13 CONST. COMM. 223 (1996) (same).

1409. The list of indefensible decisions is longer than just the anti-apartheid cases. A host of other foundational decisions are either hard to support or wrongly decided under originalist premises, including *Mapp*, *Gideon*, *Malloy*, and the other Bill of Rights "incorporation" precedents, compare Fairman, *supra* note 640 (advocating skepticism of any incorporation), with Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57 (1993) (criticizing Fairman's methodology); *Roe* and the subsequent abortion decisions, see *Roe v. Wade*, 410 U.S. 113, 174-77 (1972) (Rehnquist, J., dissenting); *Fay* and the Warren Court's habeas decisions, see *Fay v. Noia*, 372 U.S. 391, 448-70 (1962) (Harlan, J., dissenting); the Court's one-person, one-vote decisions, see *Baker v. Carr*, 369 U.S. 186, 266-330 (1961) (Frankfurter, J., dissenting); *Reed*, *Craig*, and the Court's sex discrimination cases, see Ginsburg, *supra* note 1397 (celebrating the Court's dynamic reading of

Plessy would be, for most Americans, too high a price to pay for the Court to insist on pure originalism. A wide array of academics have questioned whether original-meaning constitutionalism is possible: judges are not capable of coming up with historicist accounts that answer current constitutional issues and satisfy the standards of neutral historiography;¹⁴¹⁰ such an enterprise is conceptually impossible because changed circumstances render historical actors incapable of answering the questions posed by present-day cases;¹⁴¹¹ originalist method cannot constrain judges, who can reach the result they want simply by changing the level of generality at which they ask the originalist questions, as Bork tried to do.¹⁴¹² Like Bork, the most dogmatic originalist Justices have often abandoned it as a methodology when it does not support the results suggested by the politics of preservation.¹⁴¹³

Yet originalism lives. And flourishes.¹⁴¹⁴ In my view, it does not persevere because lawyers believe that original intent actually con-

equal protection in those cases); *Furman*, see *Furman v. Georgia*, 408 U.S. 238, 376-82 (1971) (Burger, C.J., dissenting); *Papachristou*, see *City of Chicago v. Morales*, 527 U.S. 41, 102-06 (1999) (Thomas, J., dissenting); *Croson and Adarand*, see Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753 (1985); cf. text accompanying notes 225-229 (Reagan Administration's rebuttal to NAACP's originalist arguments). I have not listed First Amendment decisions; outside of the religion clauses, original intent does not seem to have played a major role in this area generally. So the originalist scholar or judge faces the objection that he or she must reconcile his or her preferred method with the growing host of precedents inconsistent with it; she or he must have a theory that takes account of *stare decisis*, which has proven a daunting task.

1410. E.g., Flaherty, *supra* note 2 (giving a detailed critique of the low standards of most originalist scholarship and judicial opinions).

1411. E.g., Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983) [hereinafter Tushnet, *Following the Rules*].

1412. See Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980); Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057 (1990).

1413. Compare ANTONIN SCALIA, A MATTER OF INTERPRETATION (1997) (strongly advocating an originalist approach as the only legitimate constitutional interpretation), with *Lucas v. South Carolina Coastal Comm'n*, 505 U.S. 1003, 1028 n.15 (1992) (Scalia, J.) (stating that evidence that framers would only have expected the Takings Clause to apply to physical takings is not dispositive as to regulatory takings today), and *Adarand Contractors, Inc. v. Pena*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part and concurring in the judgment) (following the majority in ignoring evidence that affirmative action to help people of color was acceptable to the framers of the Fourteenth Amendment).

1414. Originalists have penned thoughtful responses to the anti-originalist claims made in the previous paragraph, see Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226 (1988), and some nonoriginalists have even switched sides, in part or entirely. See Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611 (1999) (tracing the renaissance of originalist or quasi-originalist argumentation within the legal academy). And there has been a renaissance of original meaning analysis in Supreme Court opinions, e.g., *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995). Yet it is significant that evidence of original meaning has been of greatest value and interest to scholars and judges writing about issues

strains judges in the close cases. A more likely reason for the survival of originalism is symbolic and strategic. Original meaning remains, for many people, the most obvious methodology for applying a social contract, especially a written one like our Constitution. Even though the cognoscenti understand the analytical problems with (and loopholes in) arguments from original intent, and understand that it cannot be a general theory of judicial review, originalist arguments retain a symbolic power that dynamic arguments do not have — especially in a culture that is cynical and distrustful of state officials (including judges) and is therefore nervous about their exercising discretion. Original intent arguments signal to judges and other public officials, adversaries and neutral parties, your movement's constituents, and other Americans that you are committed to the rule of law and its values. Such values include stability in constitutional rules or principles, historical objectivity rather than judicial subjectivity in determining how they should apply to particular cases, the authority of previous constitutional authors to bind judges and citizens to their prescriptions.¹⁴¹⁵ Especially in this age of distrust, Americans think these are excellent ideals and insist that judges at least pay lip-service to them.

Strategically, the lawyer or the judge ignores these ideals at her peril and therefore wants to tie her legal stance to this tradition (or at least to deny their inconsistency). Traditionalists were able to score points with moderates against the Warren Court because many of its rulings were unpopular *and* many made no serious effort to tie their results to tradition and original meaning. The Burger and Rehnquist Courts have been no more constrained by rule-of-law values than the Warren Court was, but they have more often sought to cover their tracks with originalist arguments. Even if the arguments do not satisfy professional historians, the choreography of the judicial opinion — the way it marshals its arguments — is apparently more important than the analytical rigor of the arguments.¹⁴¹⁶ George W. Bush can claim that Justices Scalia and Thomas are not “judicial activists” even

of federalism and separation of powers — not individual rights that have been the focus of IBSM attention in the last century. Issues of free speech and association, cruel and unusual punishment, due process, and equal protection remain little encumbered by limits suggested by original constitutional meaning; most judges pay it little heed, and most law professors still do not research it.

1415. Constitutional text is the best rule-of-law criterion, but the Constitution's individual rights provisions are too open-textured to serve that role in particular cases. Precedent (*stare decisis*) serves that role better in particular cases and conduces toward stability but (as we have seen in this study) has a tendency to depart from original constitutional meanings over time. Most rule-of-law constitutional theories take account of text, original meaning, and *stare decisis*.

1416. And neither is as important as the politics and etiquette of the opinion: Who won? Was the decision a wipeout for one side, or a compromise giving each social group something? Were the losers disrespected?

though they vote to strike down many laws without any plausible basis in original constitutional meaning, because they signal their respect for original intent and openly denounce constitutional dynamism. The masters of spin in post-realist America lead its politics of preservation.

The perseverance of originalism, ironically, owes much to IBSM attorneys themselves and their academic allies. Civil rights attorneys in particular have long argued that the central purpose of the Reconstruction amendments was to reverse the subordination of African Americans and other people of color. Consistent with this heroic reading of the historical materials, Thurgood Marshall's *Brown* briefs made a detailed argument that its framers saw the Fourteenth Amendment as ensuring the full equality of the freed slaves and that, contrary to *Plessy*, state-enforced segregation had been shown, through precedents the NAACP had litigated, never consistent with actual equality (especially in education).¹⁴¹⁷ Note how similar Marshall's argument was to the one Bork would make thirty-five years later. As the *Brown* Justices understood, Marshall's argument was subject to the same objection as Bork's, that the framers did not understand "equality" as broadly as the civil rights movement did. Marshall could have responded that the framers did not insist that their understanding of equality had to remain the governing standard in the long rather than the short term.¹⁴¹⁸ This then becomes a coherent originalist argument that takes account of the historical evidence — but of course this is a methodology differing little from the dynamic constitutionalism that lay at the heart of the Inc. Fund's politics of recognition and that Judge Bork passionately attacks.

Once traditionalists revealed the rhetorical power of historicist arguments, civil rights lawyers returned — after a post-*Brown* departure — to such arguments for their side. Ironically, their best original intent arguments have come in a line of cases that traditionalists usually win — the constitutionality of affirmative action. In *Bakke*, Eric Schnapper's brief for the Inc. Fund demonstrated that the Congresses adopting the Reconstruction amendments also enacted a number of statutes that conferred benefits in an explicitly race-based manner.¹⁴¹⁹ That no one thought that race-based remedial legislation was problematic in the 1860s suggested that such laws should not be subject to

1417. See Brief for Appellants at 67-120, *Brown* (1953 Term, Nos. 1, 2, 4, and 10) (general purpose); *id.* at 120-89 (specific intent).

1418. This was essentially the argument of Bickel, *The Original Understanding, supra* note 1392, at 59-65 (arguing that the framers intended to leave most segregation alone in the short term but to be open to constitutional change over time).

1419. Brief of NAACP Legal Defense and Education Fund, Inc., as Amicus Curiae at 10-53, *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (No. 76-811); see Schnapper, *supra* note 1409 (published version of the evidence assembled in the *Bakke* brief).

strict scrutiny in the 1980s. The Reagan Administration responded to these arguments in *Wyganr*; Solicitor General Fried's amicus brief argued that Reconstruction's race-based laws represented only "compensation for actual, identified victims of discrimination" and were therefore distinguishable from modern remedial measures, where there is not such a tight fit between identifiable victims and the race-based government program.¹⁴²⁰ Fried's response mischaracterized some of the earlier statutes, one of which was for the benefit of all "destitute colored people in the District of Columbia,"¹⁴²¹ a class just as generalized as those benefiting from modern affirmative action. Fried's response also demanded an unrealistic standard for originalist evidence, for discussions and analogues 100 years ago will never be exactly like those of the present. Although accepting the Reagan Administration's position, Justice O'Connor's opinions in *Croson* and *Adarand* completely ignored the originalist arguments and were almost as dynamic as Chief Justice Warren's opinion in *Brown*. Even more openly dynamic and normative were the concurring opinions of the Court's two most outspoken originalists, Justices Scalia and Thomas.¹⁴²²

More important, academics allied with IBSMs have put forth various hermeneutical theories that mediate the tension between past commands and present needs.¹⁴²³ Charles Reich's defense of the Living Constitution as needed to prevent constitutional ossification is an early example. In the spirit of Reich's idea, the most popular theory of recent years has been Mark Tushnet's metaphor of *translation*: constitutional law can be understood as a translation of directives issued in

1420. Brief for the United States as Amicus Curiae Supporting Petitioners at 14-16, *Wyganr* (No. 84-1340).

1421. Res. 4, 40th Cong., 15 Stat. 20 (1867) (appropriating \$15,000 "for the relief of freedmen or destitute colored people in the District of Columbia").

1422. Both Justices concurred for purely presentist reasons, having to do with their own theories of race-based stigma. See *Adarand Constructors Inc. v. Pena*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part and concurring in the judgment); *id.* at 240-41 (Thomas, J., concurring in part and concurring in the judgment). In *Croson*, Justice Scalia did consider originalist evidence and from it concluded that state race-based programs ought to be considered more suspicious than federal ones, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 521-24 (1989) (Scalia, J., concurring in the judgment), a conclusion that the Court adopted over Scalia's dissent in *Metro Broadcasting* and that the Court (including Scalia) renounced in *Adarand* for reasons of coherence with precedent (except for *Metro Broadcasting*, which was being overruled). This may be an example of "bait and switch" originalism: the judge latches onto any originalist argument that supports his bottom line, and then ignores the same evidence in cases in which evidence does not support his preferred position. See *Adarand*, 515 U.S. at 249-57 (Stevens, J., dissenting).

1423. For an introduction, see INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER (Sanford Levinson & Steven Mailloux eds., 1988); Symposium, *Legal Interpretation* 58 S. CAL. L. REV. 1 (1985).

the past to circumstances unanticipated by the authors.¹⁴²⁴ For *Brown*, Tushnet's question is not, How would the framers have treated public school segregation? The better questions are, What is the best analogue, at the time of the framing, for the practice now challenged? How would the framers have treated the analogue? One might (debatably) say that public education by the 1950s was so important to our political culture that it resembled the access to courts that Americans in the 1860s believed to be a core civil right. (Again, note the similarity of the translation argument to Bork's originalist defense of *Brown*.)

Constitutional translation requires normative judgments as well as a sophisticated understanding of historically situated analogues. Both form the basis for Anne Goldstein's and my historicist criticism of *Hardwick*, which relied on the long-standing pedigree of laws criminalizing "homosexual sodomy." Contrary to Justice White's anachronistic opinion, sodomy laws were not aimed at same-sex or "homosexual sodomy," which was not a regulatory concept until the late nineteenth century.¹⁴²⁵ Translated into modern concepts, general sodomy laws like Georgia's were aimed at three things: (1) sexual assault (especially by adults against minors), (2) sexual pleasure not tied to sincere procreative effort, and (3) natural law gender roles within marriage.¹⁴²⁶ The first, and primary, goal of sodomy laws does not justify their being applied to consensual sodomy, the conduct in *Hardwick*. The second and third goals were considered normatively appropriate in 1868 but are problematic after *Griswold/Eisenstadt* (goal 2) and *Frontiero/Craig* (goal 3). The Due Process Clause needs to be read in light of those recent cases, which have transformed the constitutional landscape to problematize the original goals of those laws.¹⁴²⁷

The last step in a historicist argument against *Hardwick* depends on a normative fulcrum, whereby values acceptable in the past can no longer count as constitutional justifications. Finding and defending that fulcrum are key moves in constitutional hermeneutics. The most famous is Bruce Ackerman's idea of *synthesis*, whereby old intentions are reinterpreted in light of new norms and principles instantiated by "constitutional moments." The Reconstruction amendments (1866-71)

1424. Tushnet, *Following the Rules*, *supra* note 1411, at 800-01. For a listing of scholars who have followed Tushnet's use of the translation metaphor, see Lawrence Lessig, *Fidelity in Translation*, 71 TEXAS L. REV. 1165, 1171 n.32 (1993).

1425. Goldstein, *History, Homosexuality*, *supra* note 601, at 1081-86.

1426. See ESKRIDGE, *GAYLAW*, *supra* note 14, at 161-64.

1427. To the extent that the purpose of sodomy laws now includes the state's expression of antigay moral sentiments, the purpose created by Justice White in the teeth of the statute he was upholding, that purpose is at least problematic under *Romer v. Evans*. See *id.* at 149-51.

were one such moment, the New Deal's triumph over the Old Court (1937-38) was another.¹⁴²⁸ Ackerman's synthetic argument for *Brown* is a normative two-step: step one starts with the norms instantiated by Reconstruction, which step two updates to accommodate New Deal norms. Like the framers of the Fourteenth Amendment, the *Plessy* Justices could plausibly accept in 1896 that the state was not responsible for private prejudices or capable of enforcing social equality, but the advent of the modern regulatory state requires a broader view of state responsibility for private prejudices and social inequality, exactly as the Court recognized in *Brown*.¹⁴²⁹ Applying a cognate notion of synthesis, Reva Siegel argues that a better sex discrimination jurisprudence can be crafted by reading the Fourteenth Amendment through the lens of the Nineteenth Amendment, which she views as an important constitutional moment where the polity rejected the separate spheres norm.¹⁴³⁰ Once the Constitution has recognized women as full citizens (Nineteenth Amendment), the Fourteenth Amendment must be updated to assure women full equality, with particular attention to equality within the household as well as in public life.

Just as the twentieth-century experience with IBSMs suggests skepticism about simple originalist theories, it suggests skepticism about synthetic theories whose fulcrum is a single legal event, whether it be the Nineteenth Amendment (Siegel) or the Court's switch-in-time to avoid New Deal Court-packing (Ackerman). There is no reason the Nineteenth Amendment has to be read broadly: it was as easy to implement as it was hard to pass, but its broader significance depended completely on what normative engagement accompanied it — very little until the 1960s. Likewise, I see little normative bite to the switch-in-time, for reasons that Barry Cushman has developed in persuasive detail,¹⁴³¹ but considerable bite to the fact that the voters endorsed FDR and his New Deal in four presidential elections, which enabled FDR to transform the Court with nine appointments.

The history in this Article suggests a different synthetic theory of constitutional change — and a legal realist theory for limited judicial activism. Leaving normative justification and modification for the next section, the descriptive theory posits constitutional protection as primarily a function of the political progress a minority group has

1428. BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 49-50 (1991).

1429. Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 *YALE L.J.* 453, 531-36 (1989).

1430. Siegel, *She the People*, *supra* note 237, at 965-68.

1431. *See* CUSHMAN, *supra* note 657.

made.¹⁴³² So long as the minority is socially despised and not politically organized, it will be subject to pervasive state segregation into inferior spheres of the culture, with more aggressive policies of suppression adopted if mainstream society becomes fearful of the minority. So long as the victim group is completely powerless, the Supreme Court will not protect it against suppression, but courts will sometimes protect individual victims under the libertarian provisions of the Constitution (due process, free speech). Thus, courts imposed procedural protections in criminal cases that distanced the polity from the worst abuses of apartheid and the postwar anti-homosexual panic. Indeed, from a legal realist point of view, politics is the main constraint on an activist Court.¹⁴³³ Any Supreme Court decision or series of decisions viewed as challenging a national equilibrium in favor of a norm or against a despised group will be subject to likely political discipline.¹⁴³⁴ Knowing this (and probably sharing the views of fellow Americans anyway), the Supreme Court will not overturn big measures that strike the Justices as lastingly popular, no matter how lawless they seem.¹⁴³⁵

If the minority survives and is able to organize effectively against its suppression, there will be a shift from a segregation regime toward some kind of public tolerance of the minority. Supreme Court Justices may be a little in advance of the political process (as they were for blacks) or a little behind the times (as for lesbians), but sooner or later they will accommodate constitutional doctrine to reflect new norms as regards the minority, for the same political reasons.¹⁴³⁶ Liber-

1432. The political and institutional agenda of the Court and the traditions of the provision being construed are also important variables, but as to IBSM issues they are molded by the variable emphasized in the text.

1433. See William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term — Foreword: Law as Equilibrium*, 108 HARV. L. REV. 23 (1994) (setting forth this realist theory).

1434. There are many possible disciplines: (1) impeachment of Justices, (2) jurisdiction-stripping laws, (3) constitutional amendments, (4) budget cuts to starve the judiciary administratively, (5) defiance or refusal to support implementation of judicial decrees, (6) stacking the Court with new Justices opposed to the unpopular ruling. Options (1)-(5) are not often exercised, but their threat may serve a deterrent purpose, especially the threat of noncompliance. Option (6) is often exercised and certainly disciplines the Court in the medium term.

1435. The best examples of this point are the Court's acquiescence in the *Kulturkampf* against Mormon polygamy, notwithstanding apparent violations of core First Amendment rights. See *Davis v. Beason*, 133 U.S. 333 (1890) (polygamists and persons advocating polygamy can be denied right to vote); *Late Corp. of the Church of Jesus Christ of Latter Day Saints v. United States*, 136 U.S. 1 (1890) (allowing confiscation of Mormon Church property); *Reynolds v. United States*, 98 U.S. 145 (1878) (religiously motivated bigamy can be a crime).

1436. Thus, the Court was willing to take a strong stand for awhile against southern apartheid, so long as they believed the rest of the nation was supportive; took a much stronger stand when the political climate grew strongly supportive during the Great Society; and then beat a slow retreat as national politics gradually lost interest in implementing

tarian texts will protect the minority against more criminal prosecutions (Due Process Clause) and state censorships (First Amendment), and the Equal Protection Clause will for the first time be available to the minority. Constitutional protection will sometimes come wholesale (entire laws or regimes will fall) rather than just retail (specific individuals will be freed from excessive state persecution). The challenge for the state, including judges, in this transition is to accommodate the minority and to encourage it to assimilate, but without alienating traditionalists alarmed by the new status of a group they still dislike or distrust. Even under a regime of tolerable variation, the state will adopt “no promo” policies, whereby the majority expresses its disapproval of conduct repugnant to it. So long as there is a vigorous politics of preservation supporting the state, judges will tend to uphold no promo policies, as the Supreme Court did as regards abortion, homosexuality, and racial integration. Even when there is no stable political equilibrium as to such an issue, widespread political support favoring laws mildly disrespecting a “questionable” minority will affect the Court’s judgment: the Justices themselves probably share the views of their fellow citizens, and even if they do not, they will rarely be willing to risk much of the Court’s political capital to protect minorities in a big way until public opinion shifts.

The gay rights and abortion movements are currently stuck in the tolerance zone, but the social movements seeking rights for people of color and women have for the most part moved to the next level, normal politics. Having persuaded the community that their trait variations ought be deemed irrelevant for most regulatory purposes, these movements have become part of the political system, which will enact laws seeking remediation of discriminatory mores to which the state has contributed. At this point, the normative burden has shifted: Justices who drag their feet will be subject to political lampooning, and those who join the triumphant minority’s public rhetoric will be lauded. Constitutional protections become cleaning up operations, removing outlier discriminations and fine-tuning the terms of clashing group interests. Once a minority group has become a part of normal politics, the judiciary will generally enforce remedial laws with enthusiasm, occasionally trimming back laws that go too far and protecting

Brown. As for women’s rights issues, the Court pounced on outlier laws like the Connecticut contraception law (*Griswold*), the Idaho inheritance law (*Reed*), the Oklahoma beer law (*Craig*), the Mississippi nursing school law (*Hogan*), and the VMI segregation policy (*Virginia*) — all easy kills — but balked at challenges to pregnancy discrimination (*Geduldig*), veterans’ preferences (*Feeney*), and exclusion of women from armed forces registration (*Rostker*). The Court’s original enthusiasm for *Roe v. Wade* has waned as the pro-life movement has waxed (and notwithstanding wide popular support for *Roe*). About the only significant pro-gay decision the Supreme Court has ever handed down struck down a squirrely initiative (drafted by amateurs) adopted by a narrow margin in a small-population, outlier state and after an incendiary antigay campaign (*Evans*).

traditionalists against undue invasions of their liberties. Table 5 below encapsulates the role of judicial review in the ongoing politics of IBSMs.

TABLE 5
LEGAL REGIMES AND JUDICIAL ROLE IN THE LIFE CYCLE OF AN
IBSM

	Marginalized Group That Has Not Mobilized	Marginalized Group Mobilizes	Group Assimilated into Normal Politics
Traditionalist Citizens Not Fearful	[1] <i>Apartheid Regime</i> . Laws discriminating against minority and segregating it from the norm. Judiciary acquiesces (<i>Plessy</i>) but insists that rule of law apply (<i>Guinn</i>).	[3] <i>Tolerance Regime</i> . Courts assure minority rights to protest (<i>NAACP</i>). Minority gains legislative repeal or judicial invalidation of state discriminations (<i>Brown, Craig</i>).	[5] <i>Remedial Regime</i> . Anti-discrimination laws adopted and enforced. State subsidies or rules helping the minority. Courts clean up outlier discriminations (<i>Loving, Griswold</i>).
Traditionalist Citizens Are Fearful	[2] <i>Terror Regime</i> . Private violence against minority, without state interference. State violence against the minority may be slowed down by courts (<i>Moore, Powell</i>).	[4] <i>No Promo Regime</i> . Equality moves more slowly and bows to arguments that the state not promote nontraditional conduct (<i>Maher, Hardwick, Dale</i>).	[6] <i>Compromise Regime</i> . Traditionalists' ongoing hostility to minority protected in private enclaves (<i>Milliken, Bellotti</i>).

According to my analysis above, the shifts described in Table 5 can be defended on originalist as well as realist lines. Bickel's and Bork's dynamic purposivism, Reich's and Tushnet's idea of translation, Black's structuralism, Ackerman's synthesis can all plausibly connect the judicial decisions in the table with the normative projects launched by the First and Fourteenth Amendments. The originalist counterarguments that could be plausibly made (such as a requirement that constitutional innovation be justified by specific traditions accepted at the time of an amendment's framing) are of the same form that would defeat *Brown, Bolling, Loving*, and other foundational decisions that no

one dares to question. Whichever way you turn, the Living Constitution prevails. It either trumps or cannibalizes narrowly defined original meaning theories.

B. *Legal Process and Pluralist Theories of Judicial Review*

Table 5 describes a dynamic political system in which the Supreme Court episodically intervenes. Such a system is open to normative question: What is the purpose of the political system described in the table? Given that purpose, what role can the Supreme Court competently and legitimately play? Should the Court defer to other institutions that are more competent or legitimate in their decisionmaking? These are the same kinds of questions that assailed the legal realists in the 1930s. Early legal process thinkers like Harlan Fiske Stone, Felix Frankfurter, Lon Fuller, Willard Hurst, and Henry Hart accepted the inevitability of dynamic lawmaking but cautioned that such lawmaking must be informed by the properly derived policies and principles of law and cabined by the institutional limitations of the judiciary.¹⁴³⁷ Like the legal realists, the early process theorists were critical of the Supreme Court's activism in the *Lochner* era. Decisions striking down labor legislation were not well-grounded in the purposes and historical principles of the Due Process Clause, were too often ignorant of economic matters as to which legislators and agencies were more expert, and undermined the ability of legislatures to solve social problems and mediate between contending employers and unions. In short, they insisted that the Supreme Court not intervene in the political process without sound normative justification and recognition of its institutional limitations.¹⁴³⁸ Since the New Deal, Justices have been pervasively influenced by legal process thinking, which has generated several different theories of judicial review, all of them directly responding to the constitutional challenges posed by IBSMs during the century.

The norms that gained traction in the twentieth century were based on *democracy* and *pluralism*. By democracy, I mean governance

1437. For an introduction to these thinkers and their philosophy, see William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction to The Legal Process*, in HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS* (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (1958 tent. ed.).

1438. A classic exemplar of justified legal process activism was Justice Brandeis's opinion in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), which overruled a long line of choice of law precedents, in part because they were not workable and undermined important procedure policies of coherence, and in part because they were in tension with the norms of the new century's positivist understanding of federalism. Although *Erie* overruled precedents and was probably inconsistent with original intent, it is widely regarded as an excellent decision due to its complex understanding of the role of the judiciary in a federal system and its deft effort to correct an intolerable policy.

by representatives freely elected by the citizenry that is both responsive *and* accountable to them.¹⁴³⁹ By pluralism, I mean a political system whose goal is the accommodation of the interests of as many salient groups as possible, without disturbing the ability of the state and the community to press forward with collective projects.¹⁴⁴⁰ Pluralist democracies can and do function without judicial review, as the United Kingdom did for centuries. Because an elected legislature with sophisticated deliberative and factfinding resources is more reliable and more legitimate in solving problems and accommodating groups, judicial review might be initially suspect in a pluralist democracy.¹⁴⁴¹ Reasons like these were advanced against the Old Court's periodically stringent review of economic legislation, and against the view associated with some of the legal realists that whatever the courts did was "law."¹⁴⁴² The early critics of *Brown* and *Griswold* also made these points: because those decisions were not plausibly based upon traditional legal materials (constitutional text, original intent, precedent), the Court was illegitimately casting itself as a "super-legislature" with the power to trump state legislative policy judgments with which the Justices personally disagreed.¹⁴⁴³

Starting no later than the New Deal and continuing through the fin de siècle, IBSMs and later their countermovements spurred judges and scholars to re-justify activist judicial review in the post-*Lochner* era. The dilemma scholars and judges faced throughout the century was that democratically elected legislatures were the best organs to accommodate social change but that legislation, especially at the state and local levels, was usually not responsive to IBSMs. Thus, judicial

1439. See ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 125 (1956); Philippe C. Schmitter & Terry Lynn Karl, *What Democracy Is... And Is Not*, J. DEMOCRACY, Winter 1991, at 75.

1440. These features of pluralism are articulated and defended in ROBERT A. DAHL, PLURALIST DEMOCRACY IN THE UNITED STATES: CONFLICT AND CONSENT (1967); THEODORE J. LOWI, THE END OF LIBERALISM 51 (2d ed. 1979) (describing "interest group liberalism"); Nicholas R. Miller, *Pluralism and Social Choice*, 77 AM. POL. SCI. REV. 734 (1983).

1441. See JEREMY WALDRON, LAW AND DISAGREEMENT 212-13, 267-68 (1999) (arguing against judicial review, consistent with the old U.K. model); James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893) (urging deferential judicial review on the ground that disagreements are best worked out in the legislative process).

1442. See generally PURCELL, *supra* note 1400; ROBERT B. WESTBROOK, JOHN DEWEY AND AMERICAN DEMOCRACY (1991).

1443. E.g., *Griswold v. Connecticut*, 381 U.S. 479, 520-21 (1965) (Black, J., dissenting); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959) (criticizing *Brown* as desirable but unprincipled). Barry Friedman's ambitious project of historicizing the counter-majoritarian difficulty is relevant here. Friedman is skeptical of this concern. See, e.g., Barry Friedman, *The Counter-Majoritarian Problem and the Pathology of Constitutional Scholarship*, 95 NW. L. REV. 933 (2001).

deference to the political process seemed risky from the perspective of the pluralist system as a whole. Risks of too much deference included alienation of large numbers of people from lawful politics and the entrenchment of bitter inter-group hatreds, either of which could lead to violence and turmoil. This tension between the ideal and the real in the ongoing context of constitutional cases involving the rights of minorities generated several great theories of judicial review. At the same time, the experience of IBSMs and their countermovements exposed flaws in each theory.

The most famous constitutional theory of the last century is the theory suggested by footnote 4 of Justice Stone's opinion for the Court in *United States v. Carolene Products Co.*¹⁴⁴⁴ Stone's opinion upheld an economic regulatory law under a highly deferential standard of review. Footnote 4 posited that the "presumption of constitutionality" required by democratic pluralism did not hold for: (1) laws violating the clear commands of a "specific prohibition" in the Constitution, such as those rules in the Bill of Rights that are applicable to the states through the Due Process Clause; (2) laws restricting "those political processes which can ordinarily be expected to bring about repeal of undesirable legislation"; and (3) laws "directed at particular religious or national or racial minorities," with the additur that "prejudice against discrete and insular minorities" that curtails "the operation of those political processes ordinarily to be relied upon to protect minorities" ought to be policed by the courts.

Not only was Justice Stone thinking of civil rights cases when he drafted the footnote, but his colleagues on the New Deal Court found its philosophy congenial with the way they viewed cases involving racial and religious minorities, as David Bixby has documented.¹⁴⁴⁵ By 1938, the New Deal Justices were aware that people of color were politically excluded and denied fundamental rights in the South and believed that this state of affairs was fundamentally inconsistent with the principles of democracy that the United States claimed to represent in opposition to Nazi and Communist totalitarianism.¹⁴⁴⁶ The three paragraphs of *Carolene's* footnote 4 corresponded neatly with the three kinds of civil rights cases the Justices had already seen from the South: (1) The procedural due process cases (*Moore, Powell, Brown v. Mississippi*) reflected violations of "specific prohibitions" in the

1444. 304 U.S. 144, 152 n.4 (1938) (citations omitted).

1445. Bixby, *supra* note 657, at 764-66; see Lusky, *supra* note 912 (compatible account from the law clerk who helped draft footnote 4).

1446. See generally RICHARD PRIMUS, *THE AMERICAN LANGUAGE OF RIGHTS* (1999) (American constitutionalism in 1940s-1950s sought to assure ourselves as well as other countries that our nation is a true democracy); PURCELL, *supra* note 1400 (offering general account of legal intellectual concern that American practice, especially in the South, did not live up to democratic ideals).

Constitution by southern states against defendants of color. (2) The right to vote (*Guinn* and *Herndon*) and free speech (*Lowry*) cases also represented violations of specific constitutional provisions but more fundamentally involved judicial efforts to disrupt local political lock-ins. (3) African Americans were the template from which Stone created the category “discrete and insular minorities,” whose political marginalization the Court had already seen in equal protection cases (*Buchanan*, *Norris*, *Gaines*). In short, the pre-1938 civil rights cases formed the basis upon which the New Deal Court suggested the outlines for a new kind of individual rights activism just as it was abandoning the old liberty of contract activism.

The *Carolene* model suggested by the civil rights movement was a proceduralist approach that could be defended on both rule of law and institutional competence grounds.¹⁴⁴⁷ *Carolene*-based judicial review sought to (1) prevent deployment of the criminal justice system to brutalize minorities, (2) disrupt local political lock-ins, and (3) dismantle prejudice-based laws denying fundamental rights to minorities unrepresented in the political process. These were tasks well-suited to judges whose training and expertise were procedural. The Supreme Court was like a referee for the pluralist system, again a role congenial to life-tenured quasi-cloistered judges, and a role that rhetorically avoided charges the Court was a “super-legislature.” Not least important, Stone’s theory of judicial review had a connection not only to the Constitution’s particular provisions, but also to its structure and overall purpose. The civil rights movement inspired the Justices to create the great legal process theory of judicial review. As we shall now see, however, IBMs also revealed the Achilles’ Heel of the theory, namely, its inability to operate without a subtle substantive understanding of pluralist politics and a normative vision of what results the process is permitted to yield.¹⁴⁴⁸

Exactly how aggressive a referee a *Carolene* Court should be was a matter wholly unresolved in 1938.¹⁴⁴⁹ The Inc. Fund and the ACLU not only supplied the Court with a steady stream of cases justifying judicial correction of dysfunctional local democracies, but they set forth a theory justifying a broader judicial intervention than the Justices contemplated in 1938: as the Inc. Fund presented the matter, apart-

1447. See ELY, *supra* note 1399, at 88-104.

1448. For the genesis of this critique, see Mark Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037 (1980) (reviewing ELY, *supra* note 1399), and Lewis F. Powell, Jr., *Carolene Products Revisited*, 82 COLUM. L. REV. 1087, 1090-91 (1982).

1449. See Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287 (1982) (arguing that footnote 4 was aimed at hysterical, transitory persecution of minorities, not at the structural features of local governance such as apartheid).

heid was an interconnected system of racist rules and practices deeply inconsistent with both pluralist democracy and equal citizenship for people of color; episodic attention to the consequences of apartheid was insufficient, and so the Court, the only branch of government free from the political influence of southern bosses, should strike at its roots with broad antidiscriminatory and prophylactic rules. With the elevation of Earl Warren as Chief Justice, the Supreme Court was prepared to implement *Carolene* in a bigger way, starting with *Brown I*, which was in turn the model for an activist version of *Carolene*. Chief Justice Warren's opinion sweeping away public school segregation (1) enforced the core guarantee of the Equal Protection Clause, the centerpiece of the Reconstruction amendments; (2) overturned a regime that kept black people politically marginalized (education was a key feature of the politics of recognition); and (3) implicitly served notice that prejudice-based laws harming racial (discrete and insular) minorities would be carefully scrutinized (a process that followed immediately). Strict scrutiny for race-based classifications under the Equal Protection Clause swept away formal apartheid, permanently. After 1962, the Court moved toward an aggressive implementation of *Brown II*: not just desegregation, but systemwide integration became the goal. Similarly, the Justices' due process (incorporation) decisions imposed on state law enforcement a comprehensive set of defendant-protective rules, including new prophylactic rules, and came close to terminating the death penalty in the United States. The Warren Court's expansive application of the First and Fifteenth Amendments protected minority mobilization in the South, which helped prepare the way for the Voting Rights Act.

The Warren Court's activism was an aggressive *Carolene* jurisprudence, defended after the fact by John Hart Ely (a law clerk for Warren) as properly "representation-reinforcing." Yet the triumph of representation-reinforcement was part of its undoing — well before Ely defended it! Once formal apartheid was dismantled and people of color started voting, the operation of democratic pluralism actually got better, and therefore would seem to need less refereeing.¹⁴⁵⁰ Put less sanguinely, once the Warren Court's *Carolene* jurisprudence (and the Great Society's legislation) purged the South of mob-dominated show trials, statutory apartheid, easy-to-prove suppression of minority voting and expression, it was not clear what more a referee Court should do. The Court's liberals (Warren, Douglas, Brennan, Fortas, Marshall) wanted to do more, based upon substantive theories of racial justice and politics advanced by the Inc. Fund and the ACLU. For example,

1450. So long as its members can vote, a discrete and insular minority has many political advantages in a pluralistic system. See Bruce Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985) [hereinafter Ackerman, *Beyond Carolene*].

civil rights counsel argued that apartheid had lasting legacies that should render problematic educational and other policies that disparately impacted on people of color. Liberal Justices were receptive to this argument, but in seeking to implement it they were looking less like referees and more like liberals. This was happening at the very point when liberalism passed its political peak. And the Warren Court gave way to the Burger Court in 1969-71.

Consistent with the pragmatic politics of preservation that put them on the Court, the Nixon-appointed Justices embraced a more conservative legal process jurisprudence, associated with the older Felix Frankfurter, John Harlan, Alexander Bickel, Paul Bator, Philip Kurland, and others. Pluralists like the liberals, conservative process thinkers gave more emphasis to traditional rule of law values and legal methodologies, were more skeptical of the institutional capacity of the judiciary and more deferential to state and local governments, and emphasized traditionally libertarian rather than egalitarian norms. They supported *Brown* but believed, given the Court's institutional limitations, that it was an exceptional exercise of judicial activism and that the Court had little ability to implement a social program of integrated schools.¹⁴⁵¹ The conservative process thinkers were strongly critical of the Court's subsequent representation-reinforcing decisions, especially in the reapportionment, criminal procedure, habeas corpus, and lunch counter sit-in cases.¹⁴⁵² The Burger Court emphasized the first two *Carolene* roles for judicial review, namely, to enforce the rule of law against local violations and to disrupt political lock-ins and censorship. Following the leads of Harlan and Bickel in particular, the Burger Court gave a less activist reading to the third role, protecting minorities against prejudice-based laws. The Court deployed the *Carolene* formulation as its justification for not extending heightened scrutiny to classifications based on age (*Murgia*) and disability (*Cleburne*). For both substantive and institutionalist reasons, the Court adopted a hard-to-meet discriminatory motive test before it would strictly scrutinize laws having a disparate racial impact (*Hackney, Davis*).

1451. See Arthur Garfield Hays Conference: *The Proper Role of the United States Supreme Court in Civil Liberties Cases*, 10 WAYNE L. REV. 457, 476 (1964) (Bickel's remarks) (prophesying that several cases like *Brown* in a single year would spell doom to the Court).

1452. See ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* (1970); Paul Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963); Philip B. Kurland, *Egalitarianism and the Warren Court*, 68 MICH. L. REV. 629 (1970); see also *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 473 (1968) (Harlan, J., dissenting); *Malloy v. Hogan*, 378 U.S. 1, 15-21 (1964) (Harlan, J., dissenting); *Peterson v. City of Greenville*, 373 U.S. 244, 253 (1963) (Harlan, J., concurring in the result and dissenting in part); *Fay v. Noia*, 372 U.S. 391, 449-63 (1963) (Harlan, J., dissenting); *Baker v. Carr*, 369 U.S. 186, 266-330 (1963) (Frankfurter, J., joined by Harlan, J., dissenting); *id.* at 330-49 (Harlan, J., dissenting).

Carolene's armageddon was not the election of Richard Nixon, however. Its inadequacies as a general theory were revealed by the constitutionalization of women's rights. Women's demands for invalidation of laws restricting access to contraceptives and abortions and deploying sex-based classifications did not easily fit within the *Carolene* framework. (1) There was no constitutional provision, apart from the Nineteenth Amendment (applicable only to voting), that specifically guaranteed women's rights, and the original meaning and history of the Due Process and Equal Protection Clauses provided little support for abortion rights or strict scrutiny of sex-based classifications. (2) Since 1920, when women gained formal access to the political process, there have been few state efforts to interfere with women's exercise of the franchise, political activity on behalf of their causes, or publication of their books and literature. (3) Women are neither insular nor a minority of the population. Their main complaint is that the law reflects archaic "stereotypes," rather than invidious "prejudices." Why should the Court not leave the remediation of such laws to the normal democratic process? Indeed, there was evidence that the legislative process was working adequately when Court struck down abortion laws and sex-based classifications.¹⁴⁵³

From most legal process points of view, the Burger Court's opinions in *Frontiero/Craig* and *Roe/Danforth* were more activist than the Warren Court's decisions in cases like *Brown*, *Baker*, and *Loving*.¹⁴⁵⁴ Both sets of decisions aggressively construed open-textured constitutional provisions against the weight of original intent and precedent, but at least the Warren Court decisions could plausibly rest upon the representation-reinforcing philosophy of *Carolene*. The Burger Court decisions were responsive to the women's liberation movement without having a justifying constitutional theory. And the decisions seemed inconsistent with the deference the Court was showing state and local legislatures in its race discrimination cases. A more cautious, Bickelian process approach could have applied *Reed's* rational basis with bite to sex discrimination cases until the fate of the ERA had been determined and could have wiped the nineteenth century abor-

1453. See ELY, *supra* note 1399, at 164-70 (arguing that on the whole *Carolene's* third prong does not justify heightened scrutiny of sex-based classifications); John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973) (arguing that a woman's right to an abortion is a substantive right for which there is no constitutional basis). An Ely-type argument might be made that statutes adopted before women had the right to vote (such as the Texas abortion law in *Roe*) might be closely scrutinized, but that caveat would not have applied to the recent laws struck down in *Frontiero* and *Doe* (*Roe's* companion case).

1454. The Warren Court's penumbral opinion in *Griswold* might also be questioned along the lines in text. *Griswold* might be defended, as Justice White thought, on rational basis lines: its broad ban was too disconnected from any rational state objective.

tion laws off the books on grounds of vagueness and obsolescence, while avoiding decision on the newer statutes.

So neither liberal nor conservative representation-reinforcement theories of judicial review can easily justify the Burger Court's sex discrimination and abortion decisions. That is not necessarily fatal to such theories; they may be right and the Court's practice wrong. Although *Roe v. Wade* remains one of the Court's most controversial decisions, its central holding — that women have a liberty interest in deciding what to do about their pregnancies — has proven robust in the face of determined attack and even the appointment of six Reagan-Bush Justices.¹⁴⁵⁵ The sex discrimination decisions have been for the Burger Court what the anti-apartheid decisions were for the Warren Court: almost universally celebrated dispositions instantiating a great principle and becoming foundational precedents, notwithstanding their questionable legal foundations. The constitutional theory that best supports these Burger Court decisions is, in the retrospective project of this Article, the same substantive theory that ultimately justifies the Warren Court's race decisions. It is a theory about rationality in public policy and about respecting the individuals in all groups actively participating in the nation's pluralist politics. Just as the civil rights movement persuaded the nation's public culture that racial variation ought to be considered benign from a policy perspective and that people of color must be respected as full and equal citizens, so the women's movements have persuaded the nation's public culture that sex or gender variation ought to be considered benign from a policy perspective and that women must be respected as full and equal citizens.

Lesbigay people present more theoretical twists. Like people of color and unlike women, gay men, lesbians, and bisexuals have been brutalized by the criminal justice system, censored by the state, and excluded from numerous state benefits and obligations because of prejudice. But lesbigay people face prejudice and discrimination more explicitly tied to specific conduct than either women or people of color have traditionally faced. Unlike women or racial minorities, sexual minorities have not been the intended beneficiaries of any constitutional text. Unlike other minorities, lesbigay people have traditionally been anonymous and dispersed as a matter of state policy supporting the sexual closet; only after large numbers of them have become discrete (openly gay) and insular (concentrated in gay ghettos) has this

1455. See ELIZABETH ADELL COOK ET AL., *BETWEEN TWO ABSOLUTES: PUBLIC OPINION AND THE POLITICS OF ABORTION 31-68* (1992) (analyzing comprehensively the data through 1992).

group been able to protect its members in the political process.¹⁴⁵⁶ The *Carolene* model, whether liberally or conservatively conceived, cannot be applied to gay rights cases without a substantive response to gay people's politics of recognition: Is sexual variation normally benign as a matter of public policy? Should lesbian individuals be respected as full and equal citizens? Driven by repugnance as much as principle, a majority of the Burger Court Justices answered "no" to both questions and therefore were unwilling to give lesbian people the benefit of women's sexual privacy cases (*Hardwick*) or of *Carolene*-based heightened scrutiny for discriminatory laws (*Rowland*). Ironically, it has fallen to the conservative Rehnquist Court to handle gay rights cases in a mature way. The Court's opinion in *Evans* suggests a tentative move toward the substantive norms that are being adopted in many states: sexual orientation is not relevant to rational state policy in most cases, and lesbian people are now part of the larger pluralist system and therefore must be treated with respect.¹⁴⁵⁷

The future of *Evans* depends, however, not just on lesbian people's politics of recognition, but also on TFV people's politics of preservation, now well-represented on the Court. The same can be said of the future of *Casey* and *Roe*, the most controversial legacies of women's politics in constitutional law. Three cases, all decided June 28, 2000 (three of the last four cases decided by the Court in the last Term of the century I am examining), illustrate the contours of the current debate: *Boy Scouts of America v. Dale*,¹⁴⁵⁸ invalidating the application of an antidiscrimination law that required the Boy Scouts to tolerate openly gay scoutmasters; *Stenberg v. Carhart*,¹⁴⁵⁹ applying *Casey* to invalidate a state partial-birth abortion law; and *Hill v. Colorado*,¹⁴⁶⁰ upholding a state law barring close contact with anyone entering a health care facility. Typical for a Court with internal divisions for abortion and lesbian rights issues, the cases do not fit into an obvious doctrinal or even political pattern, beyond the trite observation that Justice O'Connor was in the majority for all three.¹⁴⁶¹ They

1456. See Ackerman, *Beyond Carolene*, *supra* note 1450; Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell,"* 108 YALE L.J. 485 (1998).

1457. Greatest progress toward the norms in text have been made in the states of the Northeast, surrounding the Great Lakes, and on the Pacific rim. See ESKRIDGE, EQUALITY PRACTICE, *supra* note 626, at 234-35 (mapping of different state policies toward gay people).

1458. 530 U.S. 640 (2000), discussed *supra* Sections I.C.3.c and II.F.3.

1459. 530 U.S. 914 (2000).

1460. 530 U.S. 703 (2000).

1461. The Court rejected First Amendment speech claims in *Hill* but accepted them in *Dale*. Constitutional text was relevant but ultimately not controlling in both those cases but was irrelevant in *Carhart* (the nontextual right to privacy). Precedent was ambiguous in all three cases; the Court followed the closest precedent in *Carhart*, 530 U.S. at 930-31, and dis-

do, however, illustrate several themes that have emerged from more than a half century of the legal process Court's grappling with IBSMs and identity politics.¹⁴⁶²

As has been the case for some time, neither the Justices nor the winning advocates defended the Court's constitutional activism in representation-reinforcing terms. The democratic process was not systematically dysfunctional for the two cases in which the Court struck down laws. There can be little doubt that pro-choice groups and the parents and religious organizations who supported the Boy Scouts had fair recourse to state organs in Nebraska and New Jersey to seek, and likely obtain, at least partial remedies for their normative complaints.¹⁴⁶³ Although religious groups and right-to-lifers half-heartedly presented themselves in *Dale* and *Hill* as unpopular minorities,¹⁴⁶⁴ it would have been a mockery of *Carolene's* third paragraph (prejudice against discrete and insular minorities) to compare politically correct disdain for traditionalists with the terrorizing prejudice visited upon people of color during apartheid, and the Justices wisely avoided any comparison. The only decent representation-reinforcement argument run by anyone in these three cases was by Justice Scalia in *Hill*. He argued that the Court was stacking the deck against advocacy by peaceful pro-life people: *Casey* and (that day) *Carhart* prevented them from seeking legislation against even the most horrible "murder" of fetuses, and with *Hill* the Court disallowed their next-best recourse, peaceful persuasion of women entering abortion clinics.¹⁴⁶⁵ It is significant that Scalia was invoking such arguments in dissent (only Justice Thomas

tinguished the closest in *Dale*, 530 U.S. at 658-59. Traditionalists lost in *Hill* and *Carhart* but won in *Dale*. The pro-choice movement won in *Hill* and *Carhart*, on quite narrow grounds in both cases. All of the decisions called forth passionate dissents.

1462. The Rehnquist Court, by the way, is no less a legal process Court than the New Deal, Warren, or Burger Courts. Five of the current Justices (Scalia, Kennedy, Souter, Ginsburg, and Breyer) are alumni of the Hart and Sacks "Legal Process" course at the Harvard Law School, and at least two others (Stevens and O'Connor) are clearly steeped in that tradition. Like the Burger Court, but more so, the current Court follows conservative legal process rhetoric but is quite activist.

1463. In *Carhart*, the pro-choice challengers might well have obtained substantial relief through litigation in state court. See 530 U.S. at 990-1005 (Thomas, J., dissenting) (arguing that majority's interpretation of the state law was incorrect as a matter of plain meaning). In *Dale*, the state court's interpretation finding the Boy Scouts to be a "public accommodation" was probably way beyond the legislature's original expectations and could have been the basis for a narrow, perhaps compromise, amendment to the law.

1464. See Brief of National Catholic Committee on Scouting et al. as Amici Curiae in Support of Petitioner at 4-15, *Dale* (No. 99-699) (arguing that law undermines ability of Scouting to inculcate the religious viewpoints of its sponsors); Brief Amici Curiae of the American Center for Law and Justice and the Ethics & Religious Liberty Commission Supporting Petitioners at 3-4, *Dale* (No. 99-699) (arguing that lower court forced minority group to "subscribe to the currently fashionable view that sexual morality is irrelevant to a person's character").

1465. See *Hill*, 530 U.S. at 762-65 (Scalia, J., dissenting).

went along) and with majority-taunting sarcasm. This has now become the Rehnquist Court norm. As affirmative action and discrimination on the basis of sex, gender, and sexuality have overtaken old-fashioned race-based discrimination against minorities on the Court's constitutional docket, *Carolene* (derived from the early race cases) and representation-reinforcement theories (devised to support the Warren Court's activism in later race cases) have become largely irrelevant to the Court's decisionmaking and have fallen to the status of debating points scored in dissenting opinions.¹⁴⁶⁶ Even the Rehnquist Court's voting rights jurisprudence — from *Shaw v. Reno* to *Bush v. Gore* — is at best a pastiche and at worst an inversion of representation-reinforcement theory.¹⁴⁶⁷

These three cases illustrate what have been the governing features of the Rehnquist Court's individual rights jurisprudence. No longer the bold perfecter of democracy, as Ely claimed for it, the Court now sees itself as a case-by-case protector of individual liberty and cautious manager of pluralist competition in American politics. That the current Court is so Bickelian is a function of a docket saturated with highly charged issues of identity politics. The proliferation of identity politics cases at the Court was an inspiration for Alexander Bickel's passive virtues theory, whereby the Court should avoid premature adjudication of constitutional issues by (1) refusing to take review or grant certiorari in cases where there is no consensus as to intensely contested matters; (2) dismissing the appeal of such cases on grounds of ripeness, mootness, standing, or political question rather than on the merits; or (3) deciding the merits on narrow grounds, such as statutory interpretation or a common law fact-specific constitutional construction.¹⁴⁶⁸ These strategies remain relevant, even as IBMSs have changed. Perhaps because it involved the hottest issue of the Term (partial birth abortion), the doctrinal debate in *Carhart* was the most Bickelian: Justice Breyer for the majority emphasized that the strike was based on technicalities (the law did not have a sufficient exception to save the life of the mother and was written too broadly), while Justice Thomas for the dissenters urged that the statute could have

1466. Notably, where the Rehnquist Court has been most activist — the affirmative action and racial gerrymandering cases — representation-reinforcement arguments have strongly cut against the activism and have shown up, if at all, in dissenting opinions. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 244-45 (1995) (Stevens, J., dissenting); *Shaw v. Reno*, 509 U.S. 630 (1993) (Stevens, J., dissenting); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 553-55 (1988) (Marshall, J., dissenting); see also *Johnson v. Transp. Agency*, 480 U.S. 616, 675-77 (1987) (Scalia, J., dissenting) (using sarcastic deployment of representation-reinforcement theory to taunt majority in sex-based affirmative action case).

1467. Thus, *Shaw v. Reno*, 509 U.S. 630 (1993), and *Shaw v. Hunt*, 517 U.S. 899 (1996), overturned bipartisan efforts of the first Bush Administration and North Carolina Democrats to remedy a century of black underrepresentation in Congress.

1468. BICKEL, *supra* note 140, at 169-98.

been saved by a narrowing construction.¹⁴⁶⁹ Like *Carhart*, *Dale* and *Hill* were written more as common law decisions building up toward doctrine rather than declaring it all at once, a “minimalist” style that the Rehnquist Court has wisely deployed for cases in which fiercely contested identity issues fall on both sides.¹⁴⁷⁰

The cases decided June 28, 2000, also illustrate the current Court’s libertarianism. In *Dale*, the Court overrode local egalitarian efforts to integrate openly lesbian people into public life with a broadly libertarian reading of the First Amendment protecting even ambivalent and incoherent speech and expressive association.¹⁴⁷¹ In *Carhart*, the Court reaffirmed rules against state burdens on women’s freedom to choose abortions, notwithstanding the gruesome parade of horrors in the pro-life briefs and the chief dissenting opinion.¹⁴⁷² In *Hill*, the Court allowed the state to restrict the liberty of pro-life advocates — but only because the law sought to protect the liberty of unwilling listeners, namely, women seeking abortions.¹⁴⁷³ While all of these resolutions were hotly contested, they do point to a larger phenomenon suggested by my history of IBSMs and constitutional law: while the Court’s most inspirational opinions have been the equal protection ones, its littler libertarian decisions (and some big ones like *Roe*) under the Due Process Clause and the First Amendment have been at least as important in shaping the experience of women, people of color, and lesbians today. The Court’s libertarian activism has also been supportable by reference to the Court’s comparative competence, the assurance that its judgments will be respected, and the structure as well as particular provisions of the Constitution.¹⁴⁷⁴

1469. Compare *Carhart*, 530 U.S. at 930-46, with *id.* at 989-97 (Thomas, J., dissenting).

1470. See Cass R. Sunstein, *The Supreme Court, 1995 Term — Foreword: One Case at a Time*, 110 HARV. L. REV. 4 (1996) (supporting the Court’s “minimalist” decisions *Evans*, the *VMI* case, and other controversial identity politics cases).

1471. Compare *Dale*, 530 U.S. at 666-78 (Stevens, J., dissenting) (criticizing Boy Scouts’ claim that its expressive association entails antigay membership), with *id.* at 655-56 (opinion for the Court) (Boy Scouts’ message, though not crystal clear, was expressive enough to merit First Amendment protection).

1472. *Carhart*, 530 U.S. at 983-89 (Thomas, J., dissenting).

1473. *Hill*, 530 U.S. at 714-18 (Rehnquist, C.J., for the Court); *id.* at 737-38 (Souter, J., concurring).

1474. The statement in text is an inversion of Ely’s famous, and brilliantly articulated, argument that the Constitution is more or less empty of substance (it is “constitutive!”), which is an interpretivist hint that judicial review should focus on process. To the contrary, the Constitution is saturated with substance, and most of it is libertarian! The Constitution makes it exceedingly hard for the state to deprive you of your liberty in criminal proceedings and flatly bars the state from invading your speaking liberty, your religious liberty, your liberty of assembly and association, your liberty to publish, your liberty to own property, your liberty of contract, your liberty to bear arms, and other unspecified liberties perhaps assured by the Ninth Amendment. The purpose of the federalist structure, the national separation of

The June 28, 2000, cases also illustrate the Supreme Court's strategy for managing pluralist competition. As I read its cases, the Court invites minority groups to bring their politics of protection and recognition into court, upon the promise that judges will immediately protect group members from unlawful (and sometimes unfair) treatment and may, at some future time, sweep away state discriminations against the group.¹⁴⁷⁵ The constitutional jackpot would be something like *Brown*, but winning *FrontierolCraig* is almost as big a deal. Even cases like *Evans* (gay people) and *Cleburne* (the disabled) encourage group members to keep coming back for more constitutional protections. Moreover, the Court's equal protection cases seek to remove certain kinds of lawmaking and political rhetoric from the public agenda. Although affirmative action continues to thrive in universities and administration of public programs, politicians know that they cannot simply adopt race-based quotas. Openly racist or sexist proposals have disappeared from normal politics. Even "coded" proposals may be vulnerable under *Washington v. Davis*. *Evans* does not make no promo homo policies out of bounds for normal politics but does post a warning that antigay initiatives and statutes are constitutionally vulnerable if their proponents openly appeal to antigay stereotypes and prejudices, as the proponents of Colorado's Amendment 2 did.¹⁴⁷⁶ Consistent with pluralism's preference for moderating inter-group rivalries, the Rehnquist Court's motive-based inquiry in equal protection cases probably has some effect in toning down rhetoric in minority-traditionalist clashes.

The free speech, association, and due process decisions manage pluralism in a different way, by assuring each identity-based group, traditionalist and not, that the Court will firmly protect its ability to speak out and organize to express its normative agenda.¹⁴⁷⁷ As the *Dale* briefs emphasized, a core feature of American society and politics has been group formation and expressive association.¹⁴⁷⁸ The Court considers this an important value that should be firmly pro-

powers, and the bicameralism and presentment requirements for lawmaking are largely libertarian. Habeas is protected for libertarian reasons.

1475. See *Dale*, 530 U.S. at 656-59 (Rehnquist, C.J., for the Court) (reaffirming anti-discrimination norm reflected in public accommodations laws); *Hill*, 530 U.S. at 716-18 (Rehnquist, C.J., for the Court) (reaffirming "right to be let alone" as a right the state must enforce to protect unwilling female listeners).

1476. See Eskridge, *No Promo Homo*, *supra* note 598 (providing examples of the law channeling discourse away from open prejudice or stereotypes).

1477. *Hill*, 530 U.S. at 714-15 (reaffirming pro-life protesters' freedom to leaflet, speak out, and carry signs on the streets and sidewalks); *Dale*, 530 U.S. at 647-49 (granting strong protection for liberty of expressive associations).

1478. See Brief for Petitioners, *Dale* (No. 99-699) (arguing that vibrant history of voluntary associations as a root of American democracy).

tected, whatever the ideology of the group. The limit, just as firmly enforced, is that an advocate cannot force his views or himself onto unwilling audiences or opposed advocates and cannot yoke the state into his project of closing off the fundamental liberties of others.¹⁴⁷⁹ Unlike dumb precedents from years past (*Plessy*, *Hoyt*, *Hardwick*), the current precedents make it clear that the Justices have heard and understood the perspectives of each side in the culture wars and are unwilling to dismiss either one entirely (a passive virtue). In *Dale*, for example, not only did the gay plaintiff find a brilliant articulator of his dilemma in Justice Stevens, but the Chief Justice's majority opinion agreeing with the Boy Scouts made a number of overtures to lesbian people's politics of recognition.¹⁴⁸⁰

The foregoing thesis (pluralism) can be tied to the thesis of the first section (dynamism) to provide a final retrospective for the doctrinal developments traced in Part II. IBSMs fueled a great dynamism in constitutional law, starting with the Due Process Clause and First Amendment and culminating in the creation of a highly dynamic Equal Protection Clause. The Court's decisions have been responsive to the most fundamental needs of minority groups, first protecting their members against some state violence and then contributing to the sweeping away of once-pervasive discriminations against the groups. But once minorities and women were substantially assimilated into normal politics, at the same time countermovements have arisen, the Court has created new doctrines to protect the most fundamental needs of both kinds of groups and to keep group conflict within the bounds of a moderating pluralism. Table 6 below summarizes the Court's doctrinal developments along these lines.

1479. See *Hill*, 530 U.S. at 715-18 (protection of unwilling audience); *Dale*, 530 U.S. at 647-57 (protection of integrity of expressive association).

1480. *Dale*, 530 U.S. at 660 (agreeing with Justice Stevens that "homosexuality has gained greater societal acceptance" but respectfully arguing that social disagreement with the Boy Scouts should not affect their First Amendment rights); see also *id.* at 650 (stating that people will differ as to whether "homosexual conduct" is consistent with being "morally straight"); *id.* at 653 (referring to *Dale* as "one of a group of gay Scouts" open about their sexual orientation); *id.* at 656-56 & n.2 (relying on *Evans* as to antidiscrimination laws and ignoring *Hardwick* notwithstanding its possible relevance to the Scouts' disapproval of "homosexual conduct"). But cf. *id.* at 643-44, 652, 655 (repeated references to *Dale* as an "avowed homosexual," suggesting that the Chief Justice still has a modest learning curve as to neutral parlance in gay rights cases).

TABLE 6

THE IMPACT OF IBSMS ON AMERICAN CONSTITUTIONAL DOCTRINE

	Protection Against Brutalization of Minorities, 1920s-40s	Towards Equal Citizenship for Minorities and Women, 1950s-70s	Assimilation of IBSMs into Normal Politics, and Accomodation of Traditionalists, > 1970s
First Amendment Jurisprudence	<i>Anti-Censorship.</i> The state ought not suppress ideas (<i>Well of Loneliness</i>), information (contraception cases), or radical proposals (Sanger and Goldman).	<i>Expressive Conduct and Association.</i> State must allow minorities public space for political protest through marches, sit-ins, etc. (<i>Cox</i>). State cannot suppress expressive organizations (NAACP cases).	<i>Imperial First Amendment.</i> First Amendment extends to speech about sexuality (<i>One</i>) and sexual speech (ACLU cases), but also serves as limitation on anti-discrimination laws (<i>Dale</i>).
Due Process Jurisprudence	<i>Procedural Due Process.</i> Minority is entitled to the protections of the rule of law, especially procedural protections in criminal cases (<i>Moore, Powell, Norris</i>).	<i>Substantive Due Process (Privacy).</i> The right to privacy protects against government snooping into people's personal lives (<i>Griswold, Stanley, Roe, Hardwick</i> dissents).	<i>Structural Due Process (Localism).</i> In defense of liberty, Court limits national IBSM regulation (<i>Morrison</i>). Recognizes privacy interest in parental control of children's rearing (<i>Casey; Troxel</i>).
Equal Protection Jurisprudence	<i>Rational Basis (Minimal) Scrutiny.</i> Traditional equal protection accepts regulatory distinctions so long as they have some plausible rationale (<i>Plessy, Goesaert</i>).	<i>Heightened Scrutiny.</i> Court develops "strict scrutiny" in race cases (post- <i>Brown</i> per curiams); "intermediate" scrutiny in sex cases (<i>Craig</i>); "rational basis with bite" in disability (<i>Cleburne</i>) and sexual orientation (<i>Evans</i>) cases.	<i>Classification and Motive.</i> The Court tries to tone down identity-based politics, keeping remedial measures on a short leash (<i>Adarand</i>). Appeals to "animus," even as against gays, discouraged (<i>Evans</i>).

C. *Constitutional Skepticism and Popular Constitutionalism*

The Supreme Court's pluralist strategy in the twentieth century has induced IBSMs to devote much of their energy to constitutional litigation. Inspired by the "success" of the civil rights movement, IBSMs since World War II have focused on the courts as the primary expression of their constitutional vision. The results of this constitutionalism, described in Parts I and II, have been inevitably disappointing for these social movements, and bitterly disappointing for progressives or radicals within each movement. Court-based constitutionalism has been most satisfactory (or least unsatisfactory) during the period when the social movement's main concern has been a politics of protection for its members against a brutalizing state. In those circumstances, the nascent social movement is too weak to challenge its members' oppression outside the channels of state authority; with national as well as local political processes inadequate as forums for such challenges, the courts with their libertarian bias are often the only plausible forum for resistance within the parameters of the liberal state. Courts have also been receptive to IBSMs' claims for equal citizenship, albeit only after a long process for most groups. Most frustrating, once each IBSM emerged as a mass movement and made the politics of remediation its central public goal, the judiciary has proven to be an unreliable, frequently useless, and possibly counterproductive state organ. During this disappointing process, dissenting voices from within the social movement have questioned the prominence of lawyers and their assimilationist agenda and the efficacy of their court-centered strategy.

Disillusionment with the constitutional consequences of the IBSM-Court dialogue has swept legal academia, as it has become more diverse. It has done so under the umbrella of critical theory.¹⁴⁸¹ Like realism and legal process, critical theory understands constitutional law dynamically. Like legal process, critical theory is normative, but in ways its thinkers consider deeper, less arid, and more socially productive than legal process.¹⁴⁸² The deep disappointment within minority

1481. By "critical theory," I include critical legal studies, which flourished in the 1970s and 1980s; critical race theory initiated by Derrick Bell's work; radical legal feminism, powerfully represented by the work of Catharine MacKinnon; and queer theory, skeptical of categorical thinking about sexuality, gender, and the law. The last three schools are most directly the products of IBSMs and centrally involved with the constitutional doctrines they have stimulated.

1482. Critical legal studies scholars seem to have felt some kind of Oedipal rage against their legal process teachers (Hart, Sacks, Bickel, Wellington, Wechsler, Bator) and made the legal process school their specific and repeated target, Eskridge & Frickey, *supra* note 1437 at cxix-cxxi, sometimes unfairly, *id.* at cviii-cx. Critical race, radical feminist, and queer theorists — the focus of this section — are not obsessed with legal process theory in that way but reject its premises, as revealed in their critiques of constitutional doctrines justified in legal process terms.

and progressive communities has given rise to a range of legal theoretical responses, ranging from progressives' dropping out of constitutional law (*constitutional skepticism*) to taking constitutional law from the judiciary and returning it to the people (*popular constitutionalism*). My theory of IBSMs and constitutional law suggests intractable dilemmas for both the constitutional skeptic and the popular constitutionalist. Let us start, however, with critical theory and its many deep connections to IBSM discontent.

1. *Inefficacy: Disappointment with the Court's Pragmatic and Institutional Responses to the Politics of Recognition and Remediation*

Advocates of equality for people of color, women, and lesbian people have been dismayed with many of the Supreme Court opinions affecting each group and disappointed that even the victories have arguably done their beneficiaries little tangible good. There has been no more sweeping constitutional triumph for a politics of recognition than the Inc. Fund's school desegregation cases (*Brown I* and *Bolling*). And there has been no more disappointing story than the nation's sorry implementation of *Brown II*. There are many accounts of this tragedy. Within mainstream law, the dominant narrative has been Lewis Powell's: locally controlled neighborhood schools are the most sensible way to do public education; busing and consolidation are doomed to educational as well as political failure; we will be stuck with de facto segregation so long as white people prefer living in substantially segregated neighborhoods.¹⁴⁸³ The Topeka school system litigated in *Brown* illustrates this pattern: a generation after the Court's decision, the system remained overwhelmingly segregated, because of housing patterns.¹⁴⁸⁴ This is the first limitation of judicial endorsement of a minority group's politics of recognition: as a practical matter, the Court is much more effective in stopping or slowing down bad state action than it is in forcing state actors to behave in affirmative ways or in changing

1483. This was Powell's argument in his *Swann* amicus brief and his separate opinion in *Keyes*, discussed *supra* Section I.A.3.a. More sophisticated variants of this argument are developed in, for example, JEFFRIES, JUSTICE POWELL, *supra* note 171, at 330-31 (stating that the combination of *Swann's* allowance of busing and *Milliken's* disallowance of interdistrict remedies doomed desegregation efforts); ROSENBERG, *supra* note 91, at 105-06 (arguing that *Brown II* decrees have been substantially ineffectual).

1484. *Brown v. Bd. of Educ.*, 671 F. Supp. 1290, 1296 (D. Kan. 1987) (denying complaint seeking integration), *rev'd*, 892 F.2d 851 (10th Cir. 1989), *vacated*, 503 U.S. 978 (1992) (vacating circuit court demand for integration in light of *Freeman v. Pitts*, 503 U.S. 467 (1992)); see also Mary Dudziak, *The Limits of Good Faith: Desegregation in Topeka, Kansas, 1950-1956*, 5 LAW & HIST. REV. 351 (1987). All of the school districts involved in the *Brown-Bolling* litigation are now overwhelmingly segregated by race. See RAYMOND WOLTERS, *THE BURDEN OF BROWN: THIRTY YEARS OF DESEGREGATION* (1984).

the behaviors or attitudes of private citizens. The Court really *is* the least dangerous branch.

Scholars have hotly debated how big a limitation this is and how one should respond to it,¹⁴⁸⁵ but several points are hard to deny. However dedicated the Court might be to equal rights for a minority, its work will have much greater impact if supported by lower courts and by the political branches. Little desegregation occurred between 1955 and 1966, in large part because the Supreme Court was uncertain as to how enthusiastically district judges would follow its lead and whether the Eisenhower Administration would back it up. Actual integration occurred all over the South between 1966 and 1971, in large part because the Johnson Administration and the Warren Court both pressed school districts to take affirmative action to integrate (and districts risked losing needed federal money if they did not). The Court's sex discrimination cases were easier for the nation to swallow because they were congruent with legislative reforms in states all over the country. The most successful effort to recognize same-sex unions came in a state (Vermont) where the judiciary set a new baseline (equal rights for same-sex couples), which the legislature then backed up with a thoughtful legislative compromise.¹⁴⁸⁶ Contrariwise, if the political branches set themselves against equal rights for a minority group, the Court will pull its punches or will try to avoid those issues altogether, for reasons Dan Kahan has suggested in (formal) detail.¹⁴⁸⁷ Heroic judges who vigorously enforce principles of justice in the teeth of intense community opposition and uncertain support from other institutions have not been able to generate lasting reforms, as the Hawaii same-sex marriage debacle suggests.¹⁴⁸⁸

The practical limits of what judges *can* do to advance a social group's politics of recognition or (especially) remediation strongly af-

1485. Compare ROSENBERG, *supra* note 91, at 107-56 (arguing that *Brown* had no positive impact advancing racial equality and contributed to heightened southern resistance), with Garrow, *Hopelessly Hollow History*, *supra* note 115 (arguing that *Brown* had many positive contributions, including inspiring civil rights activists).

1486. Compare Baker v. State, 744 A.2d 886 (1999) (holding state cannot discriminate against same-sex couples; remedy left to legislature), with 2000 Vt. Acts & Resolves 91 (creating new institution, "civil unions," for same-sex couples). See generally ESKRIDGE, EQUALITY PRACTICE, *supra* note 626, at ch.2 (account of the litigation and legislative response).

1487. Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607 (2000).

1488. Justice Steven Levinson's opinion in *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), held the state same-sex marriage bar to be sex discrimination subject to heightened scrutiny. His forward-looking opinion got little support from the governor or the legislature, which knifed it with a bill putting the matter on the 1998 ballot, where same-sex marriage went down to big defeat. See ESKRIDGE, EQUALITY PRACTICE, *supra* note 626, at 15-42 (detailed account of the shot-down Hawaii trial balloon).

fects what judges *will* do, once they become aware of those practical limits. Where private citizens as well as elected officials mobilize against judicial remedies, courts will back down. Thus, after the Hawaii voters and legislators rejected same-sex marriage by large margins, the previously bold Hawaii Supreme Court instantly declared the matter closed.¹⁴⁸⁹ An earlier example was the Supreme Court's twelve-year dodge of the different-race marriage issue. Attitudes over time are also important. If a traditionalist countermovement recruits lots of people to invest their time in political opposition to a minority right, the Supreme Court is likely to pull back. Thus, *Roe v. Wade* has been ineffective for many women because it generated a lot of political opposition, which has been able to enact abortion-discouraging laws that are now usually upheld by Justices appointed by Presidents elected with pro-life support.¹⁴⁹⁰ *Brown* has been ineffective for people of all colors wanting integrated schools, because de facto (re)segregation has occurred, and Courts populated by Republican Justices have (increasingly) restricted the authority of lower courts to insist on actual integration.¹⁴⁹¹

Derrick Bell has advanced an "interest-convergence" theory for this disappointment: "The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites."¹⁴⁹² The analytic of the present Article suggests why this is so, not just for blacks but also for latinos and other people of color, women, and lesbian people. Any significant redistribution of economic entitlements or social status within society is going to stimulate tremendous political opposition, and such redistributions to a stigmatized identity-based group will trigger some countermovement. If the Court views itself as a manager-maintainer of pluralism, it will be reluctant to "take sides" in a serious national clash between two well-organized and intensely motivated groups. The Court is typically will-

1489. See *Baehr v. Miike*, 994 P.2d 566 (Haw. 1999) (summarily reversing trial judge's finding that the same-sex marriage bar violated the state constitution and interpreting the popular constitutional amendment broadly).

1490. No promo abortion laws include bars to state funding of abortions; gag orders prohibiting state-paid doctors from discussing abortion with their patients; parental consent or notification (with judicial bypasses now) laws for minors seeking abortions; short waiting periods; detailed and normatively loaded informed consent disclosures. All of these restrictions have been upheld. See *Casey v. Planned Parenthood*, 505 U.S. 833 (1992); *Rust v. Sullivan*, 500 U.S. 173 (1991); *Webster v. Reproductive Servs.*, 492 U.S. 490 (1989); *Maher v. Roe*, 432 U.S. 464 (1977).

1491. E.g., *Missouri v. Jenkins*, 515 U.S. 70 (1995); *Freeman v. Pitts*, 503 U.S. 467 (1992).

1492. Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523-24 (1980). Bell further argues that *Brown* was the product of white America's concern that apartheid was undermining our position in the Cold War and was holding back economic development in the South. *Id.* at 524-25. For detailed support of Bell's thesis as to *Brown*, see DUDZIAK, *supra* note 1391.

ing to take sides only against social movements or countermovements it views as localized or loser-movements in the long run, my point in the previous section. Hence, for contested issues — affirmative action, abortion regulation, antigay laws and initiatives — the Court's incentive is to make no decisive doctrinal pronouncement until it is clear how cultural debate is going to be resolved. (*Brown* was timed about right, because the Court knew there was a national consensus that open apartheid was an embarrassment.¹⁴⁹³ *Hardwick's* timing could not have been worse, because the Court's clumsy strike for tradition came as lesbian people were persuading the national culture that homosexuality is at least a tolerable [rather than malignant] variation.) Until that happens, the Court's best strategies are to refuse to take cases requiring it to make hard choices, to compromise the hard choices, or to issue narrow, fact-bound opinions in those cases.

2. *A More Aggressive Politics of Remediation: Missed Opportunities for a Politics of Transformation*

A deeper reason for IBSM disappointment with the fruits of their constitutional politics has to do with ideological divisions within the social movements themselves. Minority experience under a terrorizing regime is far from monolithic. At any given time, some members of the minority accept their lot, some are immobilized by shame or anger, others dream of being treated like the majority, and yet others want little to do with the majority. As a social movement takes shape to resist the regime, (1) most members of the minority group, the *tories* and *bystanders*, want nothing to do with it;¹⁴⁹⁴ (2) *radicals* want to transform society based on their identity-generated normative vision;¹⁴⁹⁵ and (3) *integrationists* want to be assimilated as equals into society and law. If the social movement gains momentum, usually through skirmishes with the state and publicity for its grievances, group 1 shrinks

1493. The Court knew that because there had been highly favorable responses to its earlier trial balloons (such as the three anti-apartheid decisions in 1950); Justices like Warren and Frankfurter had fine political instincts suggesting the time was ripe; and both the Truman and Eisenhower Administrations (very different in other respects) had filed strong amicus briefs unequivocally arguing that racial segregation was unconstitutional.

1494. Tories are minorities who agree with the majority's assessment that their identifying trait sets them apart — women who believe that their place is naturally in the home, people of color who accepted apartheid, and self-loathing homosexuals, many of whom are homophobic. Bystanders are sympathetic to the social movement but do not want to be involved, for reasons of fear, competing priorities, or doubts about the movement's likely success.

1495. Examples of early IBSM radicals include Emma Goldman, an extreme pacifist who proclaimed women's utter need to be sexually and economically free from men and marriage; Marcus Garvey, an early black nationalist; and Harry Hay, a sexually liberated gay man who was the main founder of the Mattachine Society.

and group 3 grows, with group 2 fluctuating. Group 3 tends to assume disproportionate control of the IBSM, in large part because minority professionals are likely to be integrationist, and they have the leisure time, intelligence, money, and energy to work for the movement's advancement.¹⁴⁹⁶ Among minority professionals, lawyers are particularly prominent because they have a comparative advantage in understanding and plotting against the most tangible basis for the minority's disadvantages: the law. Whether representing minority defendants in criminal proceedings, filing constitutional challenges to state exclusions and discriminations, or drafting reform bills, lawyers were big players in the century's IBSMs.¹⁴⁹⁷ Indeed, the lawyers' successes are instrumental in the growth of the social movement: before sympathetic bystanders will join in a social movement, they need some proof that the movement is going to be successful and not too risky for them as a personal matter; victories in court or (better) the legislature are solid and well-publicized signs of (intermediate) success, and some signal that the law will protect bystanders who get involved.¹⁴⁹⁸

The lawyers and their allies are integrationists by inclination, and the more their social movement becomes committed to constitutional litigation the more integrationist it will be. The Aristotelian logic of equal protection law makes this likely: to win an equal protection case, the complainant must show that she and her disadvantaged group are "like" the people or group advantaged by the law's classification.¹⁴⁹⁹ So the Inc. Fund, the ACLU's Women's Rights Project, and Lambda have argued that race/sex/orientation are irrelevant to law and public policy and that people of color/women/lesbigays are similarly situated to whites/men/straights. As Part I suggested, this stance is fundamental

1496. One might be tempted to say — but I do not — that most minorities, like most other Americans, have been conservative in their preferences and satisfied with the status quo but for its discrimination against them; the ethos of the melting pot may be pervasive.

1497. Former ABA President Moorfield Storey was the NAACP's first head, Thurgood Marshall probably its most famous leader. Lawyers such as Pauli Murray, Dorothy Kenyon, and Ruth Bader Ginsburg were major leaders in the modern wave of feminism. After the nonlawyer Sanger, lawyers like Harriet Pilpel and Morris Ernst dominated Planned Parenthood. The modern lesbian rights movement had as its most prominent leaders the quasi-lawyer Frank Kameny and lawyers Tom Stoddard and Nan Hunter. The ACLU is thoroughly dominated by lawyers.

1498. Eskridge, *Channeling*, *supra* note 3, at 451-52, 460-67; see DENNIS CHONG, COLLECTIVE ACTION AND THE CIVIL RIGHTS MOVEMENT 103-40 (1991) (analyzing the civil rights movement as an "assurance game": once enough people join the movement and it seems assured of success, everyone wants to join).

Social movements had other options than constitutional litigation — grass-roots organizing, nonviolent protests, disruption, and even violence — and most deployed all but violence. As IBSM leaders could see, American social movements that did not work through the law tended to be terrible failures (e.g., the IWW, KKK, Communism).

1499. See CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 215-34 (1989).

to their politics of recognition. Although the lawyers' focus on such a politics had the effect of marginalizing radical voices within each movement, these voices were raised in objection as the social movement appealed to masses of people. For example, non-integrationist black nationalist thought, valorizing African heritage and identity, remained powerful throughout the century. Some of the founders of the NAACP were black nationalists like W.E.B. DuBois, who grew disaffected with the organization as it became increasingly integrationist.¹⁵⁰⁰ As the NAACP's and the SCLC's politics of recognition was being achieved, the civil rights movement fragmented into a variety of different voices as to the wisdom of the politics of recognition and the nature of the next step — the politics of remediation. Speakers as different as Harold Cruse, Malcolm X, Stokely Carmichael, and Charles Hamilton objected that the African-American community had an integrity worth preserving — and that integration into an unappreciative white-constructed community would be a calamity.¹⁵⁰¹ The same thing occurred among feminists and gay people: once lawyer-led social movements made advances toward formal equality, representing an integration of women and openly lesbian people into the marketplace and the public sphere, critical voices argued that fundamental differences were being ignored and distinctively feminist and queer voices were being silenced.

In short, even if lawyer-led IBSMs were completely successful in persuading the Supreme Court to carry forth their politics of recognition and remediation (which they have not been) and the Court were able to do so effectively (which it has not), there would still be mounting dissatisfaction within the "beneficiary" groups. This disaffection has inspired a generation of critique among law professors — critique that has gone beyond discontent within the social movements and has illuminated public law. One line of critique has focused on the failure and perhaps the inability of judges to accept minority understandings of equality. The NAACP's briefs challenging race discrimination posed three interconnected models of equality: a *rationality* model, positing that race was irrelevant to proper goal-oriented public policy; an *anti-subordination* model, maintaining that race-based classifications were aimed at ensuring that blacks remained in a subordinate position and that this was unjust; and a *pluralism* model, arguing that race-based exclusions created destructive animosity among ex-

1500. See MANNING MARABLE, W.E.B. DUBOIS: BLACK RADICAL DEMOCRAT 75-98 (1986).

1501. STOKELY CARMICHAEL & CHARLES HAMILTON, BLACK POWER: THE POLITICS OF LIBERATION IN AMERICA 54-55 (1967); HAROLD CRUSE, THE CRISIS OF THE NEGRO INTELLECTUAL (1967); Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758, 767-71 (recovering black nationalist thought as an ideological counterpoint to integrationism).

cluded peoples. From the NAACP's point of view, the Fourteenth Amendment embodied all three understandings. In *Brown*, the Supreme Court ambiguously seemed to agree, and *Loving* fully adopted the NAACP's theory: the *irrational* classification was part of a program that *subordinated* people of color based upon a *divisive* philosophy of white supremacy. The disparate impact and affirmative action cases, however, saw more conservative Courts privilege the rationality model and slight the anti-subordination model.¹⁵⁰²

Critical scholars have faulted the Court for sacrificing the anti-subordination goal for other goals of the Fourteenth Amendment. A second line of critique maintains that the anti-subordination goal, properly understood, requires a radical politics of remediation: when the state has long discriminated against and even persecuted human beings because of traits now recognized as benign, the effects on the mores and attitudes of the community will linger long after the formal persecution and discrimination end; a constitutional provision that, literally, requires the state to afford the *equal protection* of its laws to all persons ought to be read to impose a responsibility on the state to do a lot more than end the formal discrimination.¹⁵⁰³ This is an elementary principle of remedial justice: if *A* has contributed to *B*'s harm, it is not enough for *A* to cease harmful conduct; *A* also has a moral responsibility to help *B* correct the harm through reparations and new institutions. This is also the principle of *Brown*, as interpreted in *Green* and *Swann*: it was not enough for state and local governments to repeal rules requiring racially segregated schools; the governments were obligated to create a whole new "unitary" school system structured in ways that would actually advance the interests of African Americans. As the temporal distance from apartheid has increased, however, the Court has been less willing to impose affirmative remedial obligations on school boards or other state actors. Critical race scholars have lamented this development.¹⁵⁰⁴

Feminists have been perhaps even more radical. Consider discrimination on the basis of pregnancy, which the Court held was not a form of sex discrimination.¹⁵⁰⁵ As in other disparate impact cases (but with less justification), the majority Justices viewed the discrimination

1502. But the anti-subordination model has hardly disappeared. From Alex Bickel to Clarence Thomas, critics of affirmative action claim that it contributes to prejudice and stereotypes against people of color. And the Justices seem to believe that otherwise rational policies having an unintended differential impact on people of color do not contribute to their subordination the way policies targeted at them would do.

1503. See ROBIN WEST, *PROGRESSIVE CONSTITUTIONALISM* (1994).

1504. See, e.g., Anthony Cook, *The Temptation and Fall of the Original Understanding*, 1990 DUKE L.J. 1163 (reviewing BORK, *supra* note 1404); Lawrence, *supra* note 185.

1505. *Geduldig v. Aiello*, 417 U.S. 484 (1974).

through the lens of rationality, but their liberal feminist critics insisted that it be viewed through the anti-subordination lens as well. As Wendy Webster Williams explained it, the goal of the feminist legal movement “has been to break down the legal barriers that restricted each sex to its predefined role and created a hierarchy based on gender.”¹⁵⁰⁶ She and her allies documented in their briefs to the Court and their subsequent testimony before Congress, how employer discrimination based on pregnancy are a fundamental barrier to women’s advancement in the workplace. So-called difference feminists go even further than Williams and argue that state and private employers should adopt rules providing extra support and benefits to pregnant women, as a needed first step to remedy disadvantages women face in the workplace.¹⁵⁰⁷ Radical feminists such as Catharine MacKinnon suggest that difference as well as liberal feminists are too timid. Instead of arguing that women should not be penalized for their pregnancy or should be helped out a little, feminists should be challenging the legal and cultural regime which renders pregnancy special.¹⁵⁰⁸ This, she argues, is the fundamental flaw in equal protection law: man is the measure of all things. Feminists should insist that gender neutrality is an oxymoron if calibrated from such a metric.

Critical thinkers assail the failure of integrationists to seek major changes in the institutions minorities are clamoring to enter. That is, rather than limiting their energies to a politics of incremental remediation, minorities and their organizations ought to be engaging in a *politics of (radical) transformation*. Minorities must challenge the melting pot ideal and insist on a *creole* or even *separatist* regime where minorities can retain their distinctiveness. Feminist and gaylegal theories of the family provide an excellent example of this critique. Although most feminist family law reforms have sought to assure women better treatment within marriage (the end of coverture, erosion of the marital rape exemption), more radical voices like Emma Goldman have maintained that the institution of marriage itself was problematic from a feminist perspective. The voices of marriage critics remained marginal in the women’s rights movements for most of the century but have resurfaced in academic work about family law. In that venue, the politics of recognition has been arguably disastrous for women, whose

1506. Wendy W. Williams, *Equality’s Riddle: Pregnancy and the Equal Treatment/Special Treatment Divide*, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 331 (1984-1985).

1507. Compare Brief of Amici Curiae Coalition of Reproductive Equality, *Guerra* (No. 85-494) (urging Court to uphold state law requiring employers to grant women extra leaves on account of pregnancy), with Brief of Amici Curiae National Organization for Women et al., *Guerra* (No. 85-494) (arguing that the law was a sex discrimination that should be remedied by extending the same benefits to men).

1508. For MacKinnon’s general critique of liberal and difference feminism, from which I derive the account in text, see MACKINNON, *supra* note 1499, at 220-22, 225-27, 244-45.

political leaders supported no-fault divorce and whose constitutional lawyers won men equal treatment in the rules of alimony. These and other privatizations of marriage law have been on the whole bad for many women and terrible for some.¹⁵⁰⁹ Feminist and lesbian scholars of family law have responded with proposals for transformation of the field. Rather than giving women the same choices as men in an institution where women's choices are often going to be rotten ones, these critics propose that the institution be radically changed or abandoned. Martha Fineman, for example, argues that the state should not subsidize horizontal (romantic) relationships at all and should instead shift its support to vertical (caregiving) ones.¹⁵¹⁰

Lesbian people's longstanding constitutional demand for the removal of state refusals to recognize same-sex marriages has produced a rich critical literature in opposition. The feminist and queer theory critiques of same-sex marriage rely on several kinds of critical arguments broadly applicable to other legal issues. Just as women have not flourished in the institution of different-sex marriage, Nitya Duclos argues that the costs of marriage will exceed its benefits for many same-sex couples.¹⁵¹¹ Even more skeptical of same-sex marriage are Paula Ettelbrick and Nancy Polikoff, who argue that lesbian efforts to join in marriage are not only misguided but coercive. That is, state recognition of same-sex marriage would be a state signal valorizing only those kinds of relationships among gay people, thereby further marginalizing lesbian couples who disapprove of the institution's patriarchal past, gay men who prefer multiple partners, and lesbian people who for whatever reason are not coupled.¹⁵¹² This is tragic, the critics maintain: gay liberation started out as a powerful normative critique of sex negativity and traditional gender roles, a critique that

1509. See ALLEN M. PARKMAN, NO-FAULT DIVORCE: WHAT WENT WRONG? 71-109 (1992); LENORE L. WEITZMAN, THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA (1985).

1510. MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES 228-33 (1995); accord RUTHANN ROBSON, SAPPHO GOES TO LAW SCHOOL 153-70 (1998).

1511. Nitya Duclos, *Some Complicating Thoughts on Same-Sex Marriage*, 1 LAW & SEXUALITY 31, 52-55 (1991); see David L. Chambers, *What If? The Legal Consequences of Same-Sex Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447 (1996). I have suggested that the same-sex marriage movement ought to be most attentive to Duclos's critique and remain open to pressing for a menu of new institutions and not just entry of same-sex couples into existing institutions. ESKRIDGE, EQUALITY PRACTICE, *supra* note 626, at 225-29; see *id.* at 83-126 (comparative law survey of new state institutions for recognition of romantic relationships all over the world).

1512. See Paula Ettelbrick, *Since When Is Marriage a Path to Liberation?*, OUT/LOOK, Fall 1989, at 1-2, reprinted in ESKRIDGE & HUNTER, SEXUALITY, *supra* note 420, at 817-18; Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage,"* 79 VA. L. REV. 1535 (1993).

would be blunted or even inverted if the product of that movement is adding recruits to patriarchal marriage!¹⁵¹³

A critical analysis of same-sex marriage, therefore, is that it would benefit a small number of the lesbian community, would positively harm others, and would represent a sacrifice of the radical, transformative goals of the early movement. One can make the same kinds of criticisms of the lawyer-driven politics of other social movements. Once abortion rights became tied to a "right to privacy," rather than antidiscrimination jurisprudence, critics argue that it has been easier for the state to refuse funding needed by poor and working class women and to allow parental control of minor women's exercise of the right.¹⁵¹⁴ Also, critics suggest it has been an uphill battle to persuade people that abortion rights are essential to *women's* citizenship in perhaps the same degree that men enjoy presumptive rights not to be imprisoned by the state. Likewise, critical race theorists point out that school desegregation has inured to the benefit of only some African and Hispanic Americans and has done no good, and perhaps much ill, for the majority of the black and latino population. Even when there has actually been integration, it has typically been on white terms: black and latino children are assimilated into white schools teaching white culture — and then are immediately tracked into separate programs that stigmatize them as less educable. Although *Brown II* and, especially, *Swann* have been the occasion for creative educational reforms, critics argue that this has been the exception and not the rule.

Note the tension between the two critiques of the politics of remediation. On the one hand, courts do not go far enough to remedy a bad situation; on the other hand, movement lawyers have not asked for enough change in the status quo. My study of IBSMs suggests that critical scholars have not sufficiently learned the lesson of post-1968 America: its citizens are strongly resistant to any significant reallocation of economic or even dignitary entitlements, especially when accomplished by unelected Justices. If the NAACP or the ACLU had laid out a radical agenda of reparations for black people and the abolition of marriage for women, they would have been laughed out of court and the legislative process, even in the 1960s. Asking for far-out

1513. *But see* Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 *LAW & SEXUALITY* 9 (1991) (asserting that same-sex marriage would be a continuing deconstruction of traditional gender roles).

1514. *See* Catharine A. MacKinnon, *Reflections on Sex Equality Under the Law*, 100 *YALE L.J.* 1281 (1991); Robin West, *The Supreme Court, 1989 Term — Foreword: Taking Freedom Seriously*, 104 *HARV. L. REV.* 43, 79-85 (1990); Joan Williams, *Gender Wars: Selfless Women in the Republic of Choice* 66 *N.Y.U. L. REV.* 1559, 1584 (1991). For a most thoughtful response, see Anita L. Allen, *The Proposed Equal Protection Fix for Abortion Law: Reflections on Citizenship, Gender, and the Constitution*, 18 *HARV J.L. & PUB. POL'Y* 419 (1995).

remedies would have discredited progressives' appeal for their moderate demands and might have yielded even more of a backlash than the IBSMs already faced. In the early 1990s, same-sex marriage — as assimilationist and conservative a request as one can imagine — was not only deemed unacceptably radical, but it triggered the greatest antigay legal backlash of the twentieth century. Radical change does not come in the United States except on little cat's feet, softly and incrementally.

A third, and most interesting, line of critique stands outside the foregoing dilemma. This critique maintains that a lawyer-led politics that yields formal recognition without meaningful remediation is not only empty and fraudulent, but also counterproductive. By invalidating apartheid and other open forms of race-based discrimination, but refusing to extend *Brown* to de facto school segregation, state policies impacting severely on communities of color and indifferent to their plight, or even the obvious-to-everyone racist operation of the death penalty in this country, the Supreme Court has arguably legitimated those practices — allowing white America to think that it has done something about the “race problem,” and does not have to be concerned with “lawful” practices that are just as subordinating as those struck down.¹⁵¹⁵

The critics are right that victory in court does not assure an IBSM that its normative agenda will be advanced.¹⁵¹⁶ The abortion rights movement did not triumph after *Roe v. Wade*; in the wake of a tremendous pro-life countermovement after *Roe*, even many pro-choice now concede that abortion itself is a terrible thing. Conversely, defeat in court may be energizing for the social movement. The gay rights movement was invigorated by *Bowers v. Hardwick*. Far from shaming lesbian people and legitimating police arrests of “homosexuals” for “sodomy,” the Supreme Court's clumsy opinion brought thousands of lesbian attorneys out of their closets and galvanized a determined campaign that is nullifying those laws state-by-state. Although most perceptive, these critics (like Bickel before them) seem to overstate the legitimating impact of Supreme Court decisions. I should need a lot more proof to believe that *Brown* and *Loving* significantly contributed to the legitimacy of policies with ongoing race-based effects. Be-

1515. Louis Michael Seidman, *Brown and Miranda*, 80 CAL. L. REV. 673 (1992) (arguing that IBSM “victories” in *Brown* and *Miranda* were empty legal triumphs that actually set back progressive politics); see Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: School Segregation Law: Promise, Contradiction, Rationalization*, in SHADES OF BROWN: NEW PERSPECTIVES ON SCHOOL DESEGREGATION 71, 86 (Derrick Bell, Jr. ed., 1980); Alan David Freeman, *A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978). For a very strongly worded statement of this perspective, see Sidney Wilhelm, *The Supreme Court: A Citadel for White Supremacy*, 79 MICH. L. REV. 847 (1981) (book review).

1516. See ROSENBERG, *supra* note 91; MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).

fore *Brown* and *Loving*, there was no discourse at all about the legitimacy of policies having race-based effects.

One lesson of my current study is that it is only the great success of the civil rights and women's politics of recognition that has made possible serious debate, and squabbling, about the remediation project. Unfortunately, my study also suggests a final, and highly ambiguous, perspective on the politics of remediation. An important effect of integrationist victories is that they create deeper divisions within the minority group: some will benefit greatly from integration and will tend to assimilate into mainstream culture; others will remain marginalized, perhaps re-viewing themselves along new axes (such as class or dress code rather than sexual orientation, for example); some will be even worse off than they were before. Ultimately, a successful politics of recognition would mean the melting away of the minority's trait as a culturally significant marker, with new traits replacing the old ones as stigmatizing. That "problem," if problem it be, is a long way off, however.

3. *A Deeper Politics of Protection: Court-Based Constitutionalism as an Impediment to Combating Private Violence Against Minorities*

From a social movement perspective, the most troubling critique of the politics of recognition is that it has not gotten to the bottom of the deep problems faced by people of color, women, and lesbians. Constitutional equal protection has trimmed away state laws and policies that are openly racist or sexist and a few that are antigay, but has done too little to attack the root problem: people are still racist, sexist, and homophobic in their prejudiced feelings and (to a lesser extent) their stereotypical cognitions, and a lot of such people act on those feelings and cognitions, to the detriment not only of minorities but of all Americans. As Kim Crenshaw puts it, "[w]hite race consciousness, in a new [post-*Brown*] form but still virulent, plays an important, perhaps crucial, role in the new regime that has legitimated the deteriorating day-to-day material conditions of a majority of Blacks."¹⁵¹⁷

The U.S. Supreme Court has not a lot to say about that in its constitutional decisions. Such silence is hardly inevitable. Although most of the Constitution addresses only "state action," there is ample precedent for considering many exercises of hegemonic private power as state action.¹⁵¹⁸ And the Thirteenth Amendment, which reaches pri-

1517. Kimberlé Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1378-79 (1988).

1518. See *supra* Section II.E.2. For a simple example, there is no logical reason that *Shelley v. Kraemer* cannot stand for the proposition that the state is involved whenever the exercise of private prejudice depends upon the availability of courts or the police to enforce

vate actors, can be interpreted much more broadly than the Court has done. Robin West has argued from the text and history of the Fourteenth Amendment that its Equal Protection Clause obliges the state to *protect* women and minorities against private violence.¹⁵¹⁹ The formal successes of a minority's politics of recognition cast in bold relief the work needed for a genuine politics of protection as part of the remedial process. Most of that work has to be accomplished by legislation. If this obligation were taken seriously, as it sometimes is at the behest of identity groups, the legislative agenda would include not just antidiscrimination laws, but also laws providing extra penalties for hate crimes and regulating hate speech, aggressively pursuing harassment in schools and workplaces, and attacking violence within the home. Progressives have done their homework, justifying these kinds of measures and getting many enacted.

To their shock, the Supreme Court now stands as an impediment to legislative efforts to protect women and minorities against private violence. A Court packed with neo-federalists, libertarians, and representatives of traditionalist countermovements is, not surprisingly, a Court willing to curtail the operation of antidiscrimination laws. Thus, under the First Amendment, the Supreme Court has invalidated the Dworkin-MacKinnon ordinance providing victims of pornography with a claim for relief;¹⁵²⁰ barred the application of sexual orientation antidiscrimination laws to parades and associations excluding openly lesbian participants;¹⁵²¹ invalidated a hate crime law targeting race-, gender-, and sexuality-oriented violence;¹⁵²² and partly overturned an injunction protecting women seeking to avoid pro-life harassment when they seek assistance from abortion clinics.¹⁵²³ The same Justices have construed the same First Amendment to allow the state to censor federally funded doctors from informing their female patients about abortions that they need,¹⁵²⁴ women expressing themselves through exotic dancing,¹⁵²⁵ and school newspapers from informing high school students about the facts of pregnancy.¹⁵²⁶ Few believe that a Court that

its authority to discriminate. See Mark Tushnet, *Shelley v. Kraemer and Theories of Equality*, 33 N.Y. L. SCH. L. REV. 383 (1988).

1519. See ROBIN WEST, *PROGRESSIVE CONSTITUTIONALISM* 125-27 (1994).

1520. *Am. Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986).

1521. *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000); *Hurley v. GLIB*, 515 U.S. 557 (1995).

1522. *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

1523. *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753 (1994).

1524. *Rust v. Sullivan*, 500 U.S. 173 (1991).

1525. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991).

1526. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

assures traditionalists the right to trumpet homophobic messages would protect gay people speaking about their identity in the armed forces. From a progressive point of view, the imperial First Amendment is part of a colonizing Constitution.

The federalism decisions are also regressive from a progressive point of view. Minority groups have successfully petitioned Congress to deliver on West's conception of equal protection, but many of the federal antidiscrimination laws have been trimmed back or nullified on grounds of federalism. The most famous casualty is the Violence Against Women Act, which fell under the Court's newly restrictive understanding of Congress's Commerce Clause and Fourteenth Amendment remedial powers. That feminists had massively documented the economic effects of violence against women and the failure of states to protect against gender-motivated violence did not seem to matter to the Court majority, making *Morrison* (potentially) as much of a dignitary shock to the women's movement that *Hardwick* was to gay rights. In a similar manner, the Court carved the states out of the remedial scheme of the Americans with Disabilities Act,¹⁵²⁷ and would presumably do the same to the proposed Employment Nondiscrimination Act protecting against sexual orientation discrimination in the workplace. There may be votes on the Court for exempting states from coverage under Title VII.¹⁵²⁸ Even the Equal Protection Clause has been turned against progressive remedial ventures in the affirmative action cases.

The progressive project of deploying the state to oppose and penalize private racism, sexism, and homophobia is deeply at odds with the Constitution as the Supreme Court has conceived it, especially since the appointment of Justice Rehnquist (1971). "[T]he Constitution not only fails to protect against [race, sex, and sexual orientation] subordination, but it also fails to exhibit neutrality toward it: it nurtures precisely those patterns and practices that are most injurious to the economic opportunities, the individual freedoms, the intimacies, and the fragile communities of those persons already most deprived in the unequal and unfree social world in which we live."¹⁵²⁹ This tension between progressive constitutionalism and Supreme Court constitutionalism is not going to go away and may well get worse as the Court's personnel changes. What should progressives and critical thinkers be pressing for? This is a genuine dilemma, the most serious one facing IBSMs in the new millennium.

1527. *Bd. of Trustees v. Garrett*, 531 U.S. 356 (2001).

1528. The current nine Justices are unlikely to find a majority for this position, but shifts in personnel (replacing Justices Stevens or Ginsburg with a countermovement conservative) could change this calculus overnight.

1529. West, *Constitutional Skepticism*, *supra* note 7, at 777.

Giving up on the Constitution — becoming constitutional law drop-outs — is an unattractive option, because court-driven constitutionalism can thwart legislation and community action that progressives favor.¹⁵³⁰ Continuing to engage in the various constitutional politics progressives favor (especially the deeper politics of protecting against private prejudice and violence and of transforming public and private institutions) seems unrealistic with the current crop of Justices and their likely replacements.¹⁵³¹ These unappealing options have given rise to progressive support for various forms of “popular constitutionalism,” whereby constitutional law is taken away from the courts and returned to the people.¹⁵³² The project of this Article has been to suggest that the various constitutional politics engaged in by identity-based social movements and their countermovements are a form of popular constitutionalism — albeit unsatisfactory from a progressive point of view.

More popular constitutionalism may be a good idea but is hardly a progressive panacea. The history of antigay initiatives is instructive. In the 1970s and 1980s, the voters approved a large majority of them, usually after campaigns openly appealing to antigay prejudices and stereotypes.¹⁵³³ Although *Evans* holds that there are limits on how far the electorate can go in excluding lesbian people from normal politics, lower courts have applied the Court’s decision leniently.¹⁵³⁴ The effect of these defeats was not to squash gay rights activism. Gay people redoubled their efforts, and their fundraising. Between 1977 and 1993, antigay initiatives were accepted by voters seventy-seven percent of the time; since 1993, a majority of such initiatives have been defeated.¹⁵³⁵ They were defeated in large part because progay alliances persuaded most voters that lesbian people were relatively normal, or

1530. This is something like the attitude of scholars West calls *constitutional skeptics*. *Id.* at 765-66.

1531. In 1992, West described the *constitutional faithful* as engaged in a project that is “utterly futile, deeply utopian, absolutely necessary, terribly risky, and one of the most imaginative, fecund, and important, and shared enterprises presently ongoing in the legal academy.” *Id.* at 798. Only the importance of the enterprise seems to have changed ten years later.

1532. See, e.g., RICHARD PARKER, “HERE, THE PEOPLE RULE”: A CONSTITUTIONAL POPULIST MANIFESTO (1994); TUSHNET, *supra* note 1516; Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633 (2000) (urging more plebiscitary constitutionalism).

1533. See text accompanying notes 636-646 (discussing antigay initiatives, including the one invalidated in *Evans*).

1534. E.g., *Equality Found. of Greater Cincinnati v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997), *cert. denied*, 525 U.S. 943 (1998).

1535. My estimate for post-1993 initiatives comes from Hans Johnson, the gay rights activist who engineered defeats for them in Idaho (1994) and Kalamazoo, Michigan (2000). The 1977-93 figures are from Gamble, *supra* note 600, at 251, 258.

at least no threat to the polity. But the process of persuasion relied heavily on “we are just like you” tropes. In my view, popular constitutionalism can indeed contribute to the evolution of antidiscriminatory social norms — but it will decidedly not be an instrument for radical social change that helps minority groups. In most instances, I should expect popular constitutionalism to be more (rather than less) assimilationist than court-oriented constitutionalism.

A further caution regarding popular constitutionalism is the final lesson I shall draw from my lengthy study. It is fashionable on both the Left and Right to denigrate judges as biased, imperial, or impotent. This impulse has been an inevitable backlash against lawyers’ and law professors’ excessive enthusiasm for judges as heroes. They are not heroes. But judges, especially those on the nation’s highest court, bring to identity issues the virtues of intelligence, procedural wisdom, and as much impartiality as life tenure can give a human being. In reading thousands of pages of oral arguments, internal memoranda, and conference notes for the Supreme Court in IBSM cases, I was most impressed by all the Justices’ seriousness and the ability of most of them to grow beyond the perspectives they brought to the Court. William Brennan, for example, arrived at the Court with prudish views about sexuality and probably negative ones regarding homosexuality; by the time he retired, he had learned a lot about sexuality in America and was the Justice gay people feel best understood their grievances. I saw different kinds of thoughtful maturation in the attitudes of Oliver Wendell Holmes, Jr., Charles Evans Hughes, Felix Frankfurter, Robert Jackson, John Harlan, Potter Stewart, Harry Blackmun, Lewis Powell, John Paul Stevens, and Sandra Day O’Connor, to name only those Justices whose evolution struck me the most.¹⁵³⁶

To be sure, the responsibility for changing social norms regarding racial, sex and gender, and sexual variation in the United States does not lie with judges; it lies with the people energized by one or more identity-based social movements. Within that huge limiting principle, however, there is every reason to expect that thoughtful judges will continue to contribute, episodically and generally, to the possibility of a progressive constitutionalism. Judges can contribute to that project by protecting certain fundamental liberties of all people under the Due Process Clause; ensuring the conditions for a robust politics of recognition and remediation, under the auspices of the First Amendment; and channeling inter-group conflict through the assimilative discourse of the Equal Protection Clause. No one can predict the

1536. Unfortunately, the attitudes of other Justices seemed to harden during their service on the Court. I am thinking of the later Hugo Black, Tom Clark, Byron White, and Warren Burger. At least one Justice, Charles Whittaker, broke down from judicial service on the Court.

contours of identity politics, or even the identity categories that will become significant, in this new century. I can only predict that identity-based social movements and their countermovements will continue to feed the Supreme Court interesting cases that will drive constitutional doctrine into new and unexpected directions.