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CHARLES E. DAYE*†

It is propitious that today we discuss the question of equal protection, for we do so at a time of dangerous undercurrents in the continuing ebb and flow of America's relationship with its black constituency. We dedicate today a new structure that symbolizes this institution—an institution whose roots run deep into the tortured past, an institution which was conceived in a dark era of the struggle of black Americans to achieve equality.[1]

When I was honored by being asked to prepare remarks for this occasion and chose Justice White as the subject of discussion, I was humbled in the knowledge that scholars devote years, even lifetimes, to such pursuits. After I commenced my study, I thought that I might have respectfully declined the honor and opportunity if only I had exhibited less courage, or possessed more sense. It is difficult, if not impossible, to know the mind of a man; I deal with his work.[2] It is difficult, if not impossible, to know the extent to which an opinion by a Justice of the Supreme Court represents his personal views or represents a compromise and consensus among the Justices.[3] Nevertheless, I take Justice White's opinions at face value.

I do not, however, take a fragmented view of Justice White's work as a Supreme Court Justice. I see his opinions in a holistic context, as part of the ongoing work of the Supreme Court, and I see the work of the

* Professor of Law, University of North Carolina at Chapel Hill; Visiting Professor of Law, North Carolina Central University, 1980-81; B.A., North Carolina Central University, 1966; J.D., Columbia University, 1969.

† Shortly before this volume went to press, Professor Daye was named Dean of the North Carolina Central University Law School.

1. North Carolina Central University School of Law was founded in 1939, but today, as in the past, we perceive that this law school is imperiled. As this institution tries to ward off the forces that would take away the opportunity it offers to the sons and daughters of slave ancestors and attempts to assuage those people who wrongly expect instant miracles, the question of equal protection is especially poignant. The plight of this institution mirrors the plight of black Americans at large. It symbolizes the continuing struggle in a concrete way.

2. And that only in a very limited sense. Justice White is a man of varied background and experience. He is clearly blessed with a keen, if not indeed a brilliant mind, as evidenced by his biographical sketch. His record is replete with intellectual and physicial excellence. *See generally* C. BARNES, MEN OF THE SUPREME COURT: PROFILES OF THE JUSTICES (1978); Israel, *Byron R. White*, in IV THE JUSTICES OF THE UNITED STATES SUPREME COURT, 1789-1969, at 2951 (L. Friedman & F. Israel eds. 1969). Moreover, this discussion encompasses the narrow range of his opinions dealing with equal protection and race.

3. *See, e.g.*, R. KLUGER, SIMPLE JUSTICE 657-99 (1976).

Supreme Court itself as part of the multi-textured mosaic of the nation's whole socio-political montage. The work of any particular Justice must be understood to be part of a larger whole that helps shape the evolution of the Supreme Court as it undertakes its proper role in our governmental system.

There are four strands of thought which converge in these views. First, I examine several paradoxes and ironies that I perceive. Second, I emphasize that the quest for equality by black Americans is ongoing because it remains unreached. Third, as the first two strands of analysis proceed, I analyze Justice White's views as expresed in his opinions. Fourth, I note the implications for the future that I believe flow from this analysis and suggest issues which I think provide grist for future advocates and analysts.

The Constitutional Premises

Justice Holmes observed that "[t]he life of the law has not been logic: it has been experience."[4] This idea of an experientially grounded jurisprudence of the Constitution might best explain the Supreme Court's acceptance of social scientists' data as one of the premises which underlies the great decision of *Brown v. Board of Education*.[5] The data presented in *Brown* demonstrated that the "equal" part of the "separate but equal" theorem of *Plessy v. Ferguson*[6] was unrealized. After decades of legal and social struggle, *Plessy*'s "equal" thrust had proven impossible to implement. The result was a socially mean and degrading system for black Americans that demeaned the spirit of the American social experiment.[7]

We who applauded the *Brown* decision should nevertheless be cautioned. Professor Wechsler, in his insightful analysis, searches the *Brown* decision in vain for "neutral principles" of constitutional pol-

4. O.W. HOLMES, THE COMMON LAW 1 (1881).

5. 347 U.S. 483 (1954). "We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives those plaintiffs of equal protection of the laws." *Id.* at 492-93.

6. 163 U.S. 537 (1896). " 'When the government, therefore, has secured to each of its citizens equal rights before the law and equal opportunities for improvement and progress, it has accomplished the end for which it was organized and performed all of the functions respecting social advantages with which it is endowed.' " *Id.* at 551, (quoting People v. Gallagher, 93 N.Y. 438, 448 (1885)).

7. The American social experiment can best be characterized as that great exchange which takes place among the many diverse cultures of this melting pot we call a nation. Many people from many different countries had come together as one, but the black man was not to share in this exchange. This injustice remained evident after the unsuccessful implementation of *Plessy*'s "separate but equal" standard. For an excellent examination of the historical developments that followed *Plessy* and led up to *Brown*, see R. KLUGER, *supra* note 3.

icy-making.[8] Professor Wechsler is assuredly correct in his view that constitutional analysts should not be willing to discard the noble theory of a "government of laws, and not of men"[9] in pursuit of an unprincipled, result-directed jurisprudence. Thus, we search for principles in the hope that they will serve as a constitutional anchor; otherwise we drift on the vast sea of equal protection, subject to the tides of the latest opinion polls and the cross-currents of whimsical individualistic notions.

We acknowledge, of course, that each Supreme Court Justice, even *within* the range of principled anchorage, holds a powerful oar with which to steer a broad course, chartered according to personal political, economic, social, governmental, and philosophical compasses. We rest easier if we believe that the personal predilection of a Justice is constrained by some decisional principle. The constraint, however, may be subject—in practical terms, perhaps—only to a Justice's intellectual honesty, strength of conscience, or urge to candor. Lawyers do not customarily argue at the bar, "Your Honors may do with this case whatever you please."[10] The custom is to argue, "The principle announced in the *Doe v. Roe* case controls the decision" or "is applicable in this case." Lawyers draw analogies and synthesize principles favorable to their cause from prior cases, and distinguish contrary principles. By hypothesis, if we jettison all principles, we also must cast overboard our capacity to predict, to analyze, or even to argue great constitutional cases.

The foundation of *Brown* may rest on a mutable principle—such as the preponderance of the evidence arising out of sociological data showing *Plessy*'s debilitating effect for the nation and its injurious effects on blacks who were segregated by laws enacted by a racist white power structure.[11] If so, then we can see that *Brown*'s premise will begin to erode the very moment that *Brown itself* is perceived to produce debilitating effects in the nation.[12] This would occur when some blacks agitate for "community control" of schools; when other blacks view even all-black schools as preferable to cross-town busing of black chil-

8. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

9. Justice Marshall sought to preserve this "high appellation" in Marbury v. Madison, 5 U.S. (1 CRANCH) 137, 163 (1803).

10. This is true notwithstanding that *privately* a lawyer might express an ironic, but realistically-based acknowledgement of the nearly final power of the Court. *See* R. KLUGER, *supra* note 3, at 643, attributing to then civil rights lawyer Thurgood Marshall this comment on the Supreme Court's lack of decisional constraints: "White bosses, you can do any thing you want, 'cause you got de power!' "

11. *E.g.*, J. WILKINSON III, FROM BROWN TO BAKKE, THE SUPREME COURT AND SCHOOL INTEGRATION: 1954-1978, at 4 (1979).

12. For an overview treatment of resistance to *Brown* and the nearly insurmountable problems of implementing the decision, *see* J. WILKINSON, *supra* note 11.

dren to isolated majority white schools;[13] or when apostles of "black pride" disdain integration as such, and seek instead to draw together in black self-uplift.[14] In such circumstances as these, the desire for black separation could not be viewed as one imposed by a dominant white society, which might be seen—erroneously, I submit—as the evil inherent in the segregation *Brown* declared unlawful.

Happily, this scenario remains a mere hypothesis,[15] but there is reason to be troubled about *Brown*. This is not because its result was wrong, but because as a basis for future decision-making, its principles were then unclear, and remain unclear.[16] The ghost of *Brown*'s inadequate rationale stalks the corridors of the Supreme Court building each time the Court confronts the contemporary issue of race. It roams through the briefs of today's equal protection advocates. Stealthily, it makes mischief with decisions on racial equal protection and confounds our attempts to analyze, to distinguish, and to synthesize the cases on race and equal protection.[17]

The first question today concerns this paradox: *Brown* created a "right" result on a flimsy, even "unprincipled" basis, while in other cases a doctrinally neat, "neutrally principled" approach has spawned wrong, even bizarre results.[18] Justice White himself wrote one of these major cases[19] and nurtured bad progeny.

The second question today focuses on the irony that the contemporary manifestation of the great "color question" is not pushed by the advocates of a newer or more expansive equal protection. Yesterday's theorists of an expansive equal protection today are on the defensive. They have bunkered down to hold the line against a wave of neoconservatives who ride under the unfurled banner of "reverse discrimination" and who would push the line backwards. It reaches ineffable

13. Bell, *Waiting on the Promise of Brown*, 39 LAW AND CONTEMP. PROB. 341 (1975), notes the various positions of blacks who question integration-oriented assumptions.

14. *See* J. WILKINSON, *supra* note 11, at 45-49.

15. *See, e.g.*, Stell v. Savannah-Chatham Bd. of Educ., 333 F.2d 55 (5th Cir. 1964), *rev'g* 220 F. Supp. 667 (S.D. Ga. 1963). This case clearly shows the judiciary's conviction in effectuating the purpose of *Brown*.

16. *See* Wechsler, *supra* note 8, at 22 n.72, citing post-*Brown* cases decided per curiam that applied *Brown* in non-school contexts without articulating a rationale.

17. The question is not whether *Brown*'s rationale is unclear, nor whether the remedy in the subsequent case of Brown v. Bd. of Educ., 349 U.S. 294 (1955), was wise and justifiable or has been proved by subsequent history to have been more in the way of "deliberate" than in "speed." *See, e.g.*, R. WILKINSON, *supra* note 11, at 61-77.

18. *See* text accompanying notes 60-63 *infra* for a discussion of Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977), a case with a "principled" approach but a bizarre result.

19. Washington v. Davis, 426 U.S. 229 (1976). *See* text accompanying notes 56-59 *infra* for a discussion of this case.

irony that *DeFunis*,[20] *Bakke*,[21] and "sons of *Bakke*"—*Weber*[22] and *Fullilove*[23]—now seek to hammer the shields of "equal protection" into swords to cut off the descendants of slave plowmen from the "protection" that originally must have been intended to shelter the former slaves from racist subjugation.[24] One does not need to be a very thoughtful person to ponder how this spectre now comes to haunt us.

It might be argued that the Bakkes of America are reacting naturally to over reaching by black Americans in their quest for equality. On the contrary, I submit that the plant that grows today in the hands of the *DeFunis/Bakke/Weber/Fullilove* unholy[25] quartet was planted at the inception of the Supreme Court's treatment of the equal protection clause. The seed was germinated (assuredly unwittingly) by the first Justice Harlan in his classic and eloquent dissent in *Plessy v. Ferguson*.[26] It found nurture and comfort in *Brown*, and grew to a fledgling plant in *Keyes v. School District No. 1*.[27] By the pen of Justice White it was fertilized and watered.[28]

The Historical Premise

What Congress meant when it framed the equal protection clause will perhaps never be settled, and I do not pretend to add to the knowledge in that area. Suffice it to say that whatever Congress intended, the Supreme Court set about rendering the equal protection clause—indeed the entire fourteenth amendment—practically meaningless insofar as blacks could rely on it to achieve any real measures of equality. In the *Civil Rights Cases*,[29] the Court said that Congress lacked power

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20. Defunis v. Odegaard, 82 Wash. 2d 11, 507 P.2d 1169 (1973), *appeal dismissed as moot*, 416 U.S. 312 (1974).

21. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

22. United Steelworkers v. Weber, 443 U.S. 193 (1979).

23. Fullilove v. Klutznick, 448 U.S. 448 (1980).

24. *See, e.g.*, Civil Rights Cases, 109 U.S. 3 (1883), for the Court's early discussion of the original intent of the framers of the fourteenth amendment. *See also* Frank & Munro, *The Original Understanding of "Equal Protection of the Laws,"* 1972 WASH. U.L.Q. 421.

25. These cases have a debilitating effect on the scope and purpose of the equal protection clause, which is to provide every person an opportunity to be dealt with equally in the eye of the law.

26. 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). *See* quote accompanying note 31 *infra*.

27. 413 U.S. 189 (1973). *See* text accompanying note 38 *infra*.

28. *See* text accompanying notes 56-59 *infra*.

29. 109 U.S. 3, 11 (1883).

> [The fourteenth amendment] does not invest Congress with power to legislate upon subjects which are within the domain of State legislation; but to provide modes of relief against State legislation, or State action [which impairs the privileges and immunities of citizens of the United States]. It does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of State laws, and the action of State officers executive or judicial, when these are subversive of the fundamental rights specified in the amendment.

Id. at 11.

to enact general laws to protect black citizens from racial discrimination. It would seem, *a fortiori*, that if the equal protection clause did not give Congress the power to protect against private acts of subjugation, whereby blacks might *on their own* achieve some measure of equality, then the post-Reconstruction Court must have perceived that Congress could have no role in advancing equality for the black race by positive legislative thrusts.[30] It must follow, then, that the "equal" part of the equal protection clause must have been understood to mean something other than "equal" from the very beginning.

Justice John Marshall Harlan explained how things can be equal but yet not equal. Dissenting in *Plessy*, he casually blended his views against state-imposed racial segregation with notions reflecting unadulterated white supremacy:

> The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty. But in the view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens . . . . Our Constitution is color-blind . . . .[31]

Thus, even the black man's most ardent friend on the Court at that time, less than a generation after the end of slavery, was willing to blink the deprivations slavery had visited upon the black race, and to conditionally envision the black man's perpetual degradation and inferiority. He did so by erecting a clear dichotomy between equality in fact and a constitutionally sufficient equality. In other words, the Constitution was to be "color-blind," notwithstanding that slavery and segregation were pre-eminently color-sighted. In his historical context, mortals may be inclined to exonerate Justice Harlan, but enduring moral and ethical judgments do not show such charity.

In this context we have no trouble recognizing the unspeakable dilemma that confronted the *Brown* Court. Given the potential explosion in reaction to a decision for the black plaintiffs in *Brown* and given the real or perceived dangers to the Court as an institution,[32] it is understandable that the Court did not explain the result on any principled or doctrinally neat ethical or moral ground. The clearest principle

30. The idea of "general equality" as used here bridges the rather curious distinctions that might be suggested between "political," "social," and even "civil" equality. For further discussion, see Frank & Munro, *supra* note 23, at 448-51.

31. 163 U.S. 537, 559 (1896).

32. *See* J. WILKINSON, *supra* note 11, at 29-34, 51-52, 72-77. It was perceived that the South might rebel against or completely disregard the decision of the Court, or rebel against the black plaintiffs in the case by methods which the Court could not control. Either of these reactions was perceived as potentially fatal to the Court's credibility as an institution which has the power to "interpret the law" and apply it in *all* states of the United States.

would have been to declare that equal protection required equality in fact in the educational opportunity afforded to black children—not because separate was unequal, but because unequal was unjust and immoral. Undoubtedly, that was unthinkable because no such egalitarian ideal was manifested on the Court or in whatever may have been the intention of the framers of the equal protection clause.

Brown's rationale was murky. It spoke of state-imposed unequal segregation itself as the evil. This rationale pushes rather inexorably to the logical conclusion that there is a constitutional value in going to integrated schools; that is, that there exists a constitutional value in mixing the races in the schools. It is doubtful that there was, or is, any serious proponent of that point of view.[33] If there had been some practical way to implement the "equal" part of *Plessy*, history shows quite clearly that the thrust toward an attack on segregation itself would likely have been forestalled,[34] and *Brown* might never have arisen. Thus, the attack on segregation itself became a last ditch, and somewhat desperately chosen surrogate for a thrust toward equal education in terms of material and human resources. The logic was that the ingenuity of white supremacists in forestalling equality in fact between black and white schools was so inexhaustible that the only real answer was for blacks to go to the same schools; that is, to go to school with white supremacists' children. That the Court's doctrine even suggested that the sociological data and the social scientists' dolls were relevant to the true issues in the case[35] strikes us today as unusual and contrived and, especially with hindsight, as a curious constitutional decision-making methodology.[36]

Consistency in the Denial of Equality in Fact and Principles of Morality

Brown at least said that segregated schools were "inherently unequal."[37] Why is that not an affirmation of the egalitarian ideal of equality? The answer lies in the nature of the issues framed in *Brown*. In truth, mere segregation was never at issue. The issue before the Court was whether the states' intentional imposition of unequal education on the basis of race violated the equal protection clause. The issue

33. Perhaps the closest approximation of that idea is the so-called "diversity" criterion cited by Justice Powell in *Bakke*, but he cites diversity for its educational value and not for its intrinsic or constitutional significance. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 311-19 (1978).

34. *See generally* R. KLUGER, *supra* note 3.

35. Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954).

36. Absolutely no disparagement of the work of the social scientists, especially that of Dr. Kenneth B. Clark, is intended. That work was rendered essential because of the Court's limited doctrinal development. The point is that the Court's doctrine should never have made such data necessary or relevant.

37. 347 U.S. at 495.

thus had three distinct elements. First, the segregation was intentional. Second, it was unequal. Third, it was premised on race. Thus, the issue of unequal education in the absence of intentional state conduct was not presented. Nor was the issue of educational quality *qua* quality raised. Finally, the question of unequal education, even if intentionally imposed, but on some basis other than race—such as geography or family income—was not raised.

In all the cases that I can find in which the Court has addressed education, but in which all three *Brown* elements were not present, the Court has refused to find a violation of equal protection. For example, under *Keyes v. School District No. 1*,[38] there is no right to a nonsegregated education, but merely the more limited right to an education that the state has not intentionally caused to be unequal and segregated on the basis of race. This is the difference between de jure[39] and de facto[40] segregation. Only the former violates equal protection.[41] Justice White did not participate in *Keyes* although he evidenced his approval of the result in subsequent opinions.[42] There is also no constitutional right to equal education independent of one's economic status. This was made clear in *San Antonio Independent School District v. Rodriguez*.[43] Justice White, joined by Justices Douglas and Brennan, dissented because he was unable to find a rational basis in the intentional tax scheme for school funding that the State of Texas had established, and called the scheme "invidious" discrimination.[44] This was unquestionably one of his finer hours. But he had to make no major departure from the overall analytical construct to reach his conclusion. He stopped far short of the egalitarian ideal of equality in fact—that is, equality apart from conduct intentionally creating the inequality.

Thus it seems clear that under the present state of the law there is no constitutional right to equal education nor to desegregated education where the inequality or segregation is perceived to flow from geo-

38. 413 U.S. 189 (1973).

39. De jure segregation refers to segregation intended or mandated by law or by official action through race classifications.

40. De facto segregation refers to segregation that is a result of social, economic, or other determinants, and includes all but segregation that is de jure.

41. *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Alexander v. Holmes County Bd. of Educ., 396 U.S. 19 (1969); Green v. County School Bd., 391 U.S. 430 (1968).

42. *See, e.g.*, Washington v. Davis, 426 U.S. 229 (1976) (White, J., majority opinion); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) (White, J., joining J. Stewart's majority opinion).

43. 411 U.S. 1 (1973).

44. *Id.* at 68. According to Justice White, "Requiring the State to establish only that unequal treatment is in furtherance of a permissible goal, without also requiring the State to show that the means chosen to effectuate that goal are rationally related to its achievement, makes equal protection analysis an empty gesture." *Id.*

graphic living patterns, even those which are intentionally caused or used by the states or their political subdivisions. A synthesis of *Rodriguez* and *Keyes* forces this conclusion. Finally, segregated education is not unconstitutional where the racial segregation results from separate actions of independent local political jurisdictions, if those jurisdictions have not acted with the provable intention of causing the unequal segregation. This is the essence of *Milliken v. Bradley*.[45]

Justice White dissented in *Milliken*, albeit on a narrow ground: the proven "deliberate acts" of racial segregation in one political subdivision would go unremedied unless other political subdivisions were encompassed within the scope of the remedy ordered.[46] He did not broach, nor did he need to broach, the egalitarian issue of a right to a desegregated education independent of any "deliberate acts" of the state that caused the unequal segregation. He made no hint that the unequal quality of education in the City of Detroit could itself raise an issue of equal protection, although he recognized the State of Michigan's ultimate responsibility for education and its responsibility under the fourteenth amendment. His views were premised on an acceptance of the *Keys* de jure/de facto distinction,[47] and he seemed untroubled that equal education as a right independent of intentional racial segregation did not raise equal protection issues.

The education and equal protection cases are, I think, the paradigm cases that could have raised the egalitarian principle of a moral and ethical basis for constitutional policy-making. Yet, even these cases have not raised the issue of equality *qua* equality to a level of constitutional consciousness warranting express discussion by the Court. The true egalitarian idea must not have even crossed the judicial mind.

The equal protection clause is the one clause in the Constitution upon which the egalitarian principle most logically can be founded. The Court's refusal to erect such a principle has been consistent and clear, however. Having refused to do so in the education cases, it is not surprising that the Court has rejected the equality principle in other areas. In *Lindsey v. Normet*[48] the Court was called upon to strike down the imposition of differential burdens premised on one's housing status. Although race was not involved, the Court declined to declare housing a fundamental right that could not be burdened by limitations that

45. 418 U.S. 717 (1974).

46. *Id.* at 780. Justice White supported the multi-district remedy ordered by the district court judge. *Id.* at 780.

47. *See* notes 39-40 *supra*.

48. 405 U.S. 56 (1972). In *Normet*, when the city declared rental property unfit for habitation, the owner refused to make specified repairs. When the lessee then refused to pay rent, the owner threatened eviction. The lessee then sought a declaratory judgment that the Oregon Forcible Entry and Wrongful Detainer statute was unconstitutional.

were not also applied to other kinds of interests. Justice White, writing for the Court, pointed out emphatically and cryptically:

> We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality . . . .[49]

In announcing that view, Justice White strayed at large and far beyond the issue presented in the case. The issue was a narrow one which, when reduced to its essence, was whether, under the equal protection clause, state-imposed burdens affecting a person's interest in not being evicted from housing should be weighed on the same judicial analytical scale as those burdens, for example, that were placed on supermarkets which offered trading stamps.[50]

That Justice White did not stop with the issue of the case is significant. In suggesting that there are no constitutional remedies for all "social and economic ills," the Justices echoed the distinction made by Justice Harlan in his dissent in *Plessy*: there is a difference between equal protection and equality in fact. And even that was an echo of the *Civil Rights Cases*[51] of 1883. The Justices seemed to be warning litigants, somewhat gratuitously, to stop pushing. But they would not stop.

The Coming of Doctrinal Neutrality and the Death of the Egalitarian Notion

The notion that the Constitution should protect an egalitarian ideal has not died an easy death. Indeed, the ghost of *Brown* continues to roam at large, and in the shadows of *Brown*'s penumbra, it is easy to mistake mirages for images of egalitarianism. The words "segregated schools are inherently unequal" are so evocative that it is easy to forget that *Brown* was premised on the concurrent existence of three elements: state intent, racial segregation, and inequality.

Like a drowning person in *Brown*'s muddled sea, we grabbed at straws. *Griggs v. Duke Power Co.*[52] floated into our grasp. There, we perceived, was the case that could be used to undergird *Brown* with the egalitarian principle. Did *Griggs* not hold that a device which adversely affects a disproportionate number of minorities is unlawful, at

49. *Id.* at 74.

50. *See* Rast v. Van Deman & Lewis, 240 U.S. 342 (1916) (special license tax on merchants using profit sharing coupons and trading stamps withstood equal protection challenge on the basis that "facts reasonably can be conceived" to sustain the distinction between merchants that used the coupons and those that did not).

51. 109 U.S. 3, 13 (1883).

52. 401 U.S. 424 (1971).

least unless it is shown that the device is demonstrably necessary?[53] Although *Griggs* permitted inequalities caused by "necessary" disqualification devices, and although purists were quick to perceive that imperfection in the *Griggs* principle from an egalitarian standpoint, practical analysts could see a measured step in the right direction.[54] Practicality—which might pejoratively be described as expediency—suggests that one must use what is available, and *Griggs*, at least, was available. Less optimistic souls recognized that *Griggs* was based on the congressional policy found in Title VII of the Civil Rights Act of 1964.[55] But, the hope was that the Court would read this contemporary pronouncement into the equal protection clause.

Justice White demonstrated how wrong that idea was in *Washington v. Davis*.[56] He clarified what *Brown* arguably had left unclear, and now it was painfully clear. Equality had no constitutional place in and of itself. Equal protection for blacks is a more limited right—a right not to be caused to be unequal *only* by state conduct taken for the purpose of causing blacks to be unequal.

The conduct may be intentional. That is of no moment. Presumably the making of the employment test in *Washington v. Davis* could not have been other than intentional: it was not inadvertent; it was not fortuitious; it was not accidental that the test was developed.

The result may be unequal. That, too, is of no moment. The evidence of the disproportionate disqualification in *Washington v. Davis*[57] was not challenged. Even intentional conduct which produces inequality is not subject to the prohibition of the equal protection clause. Plainly, the intent with which the Court is concerned must be of a very specific variety bespeaking animus and motivation against blacks.

The true egalitarian principle was buried by *Washington v. Davis* and Justice White was clear about that matter: "[W]e have difficulty understanding how a law establishing a racially neutral qualification . . . is nevertheless racially discriminatory and denies 'any person . . . equal protection of the laws' simply because a greater proportion of Negroes fail to qualify . . . ."[58] To put it another way, Justice White is telling us that mere inequality is of no constitutional significance. He has told us we may not cite mere equality as a constitutional right. We must press our cases by urging that racial inequality was the intent or the purpose of the state's action in undertaking the challenged conduct.

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53. *Id.* at 431.

54. *See generally* Lerner, *Employment Discrimination: Adverse Impact, Validity and Equality*, 1979 SUP. CT. REV. 17.

55. *See* 42 U.S.C. §§ 1971-1974 (1976).

56. 426 U.S. 229 (1976).

57. *Id.* at 242.

58. *Id.* at 245.

The principle of *Washington v. Davis* is clear. It is a neutral principle. It requires no sociological data as its base. It is not mutable. The principle is independent of any facts appearing in the record. The Court does not have to find any constitutional facts to announce the principle. Only racial inequality caused by conduct intended to produce that inequality is violative of equal protection. That at least is a firmer principle than *Brown* enunciated.

It is also a principle which is unworkable. It shields vast areas of conduct, not because the purpose of the conduct is innocent, but because in reality plaintiffs are unable to prove that illicit intent or purpose.

Justice White, however, was not unmindful that his principle presented practical difficulties. He pointed out: "Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact . . . that the law bears more heavily on one race than the other."[59]

The hope that this statement raised, however, was dashed by the Court in *Village of Arlington Heights v. Metropolitan Housing Development Corp*.[60] In that case the Court found that intent or purpose failed of proof, notwithstanding that plaintiffs proved intentional conduct (zoning) which did "arguably bear more heavily on racial minorities."[61] The proof of disproportionate impact was examined to determine whether such impact raised an inference of intent or purpose to cause the inequality, because, as demonstrated, inequality alone was not constitutionally significant.[62]

Applying the intent or purpose test laid down by Justice White in *Washington v. Davis*, the Court in *Arlington* utterly ignored that the zoning had been intentionally undertaken and that it would inevitably result in a disproportionate exclusion of blacks. The Court also ignored the widespread existence of racial inequality and exclusion throughout suburban America. It held that discriminatory intent or purpose had not been even inferentially shown.[63] This is a description of a result that might well be called bizarre. But even if the result may not be so described, the fact that the proof of constitutional rights depends upon the dunderheadedness with which the inequality is caused is assuredly a bizarre constitutional decisional methodology. It is bizarre because only the more neanderthal defendants are likely to leave the telltale evidence necessary to prove intent or purpose. It is bizarre

59. *Id.* at 242.
60. 429 U.S. 252 (1977).
61. *Id.* at 269.
62. It should be noted that Justice White dissented in *Arlington* on an procedural ground not pertinent to this discussion. *Id.* at 272.
63. *Id.* at 270.

because the realistic process of vindicating a constitutional right correlates inversely with the degree of sophistication practiced by the person denying that right. In other words, the methodology puts a premium on sophisticated conduct designed to discriminate.

Thus, although *Brown* was flimsily rationalized, it produced the ethically and morally correct result on its facts and left alive at least the possibility of arguing the egalitarian principle. But *Washington v. Davis*, with its constitutionally neat principle, produced the wrong result on its facts, is practically unworkable, and leaves no possibility of arguing the egalitarian notion.

The Contemporary Great Constitutional Issue of Race: Sustaining Legislative Equality Thrusts

The times have always been hard for black Americans. Throughout the years powerful forces in the nation have begrudged each and every incremental advance toward the realization of the egalitarian ideal. When the legislatures made even small responses, as with the Reconstruction laws, the Court has undone the effort. We are fearful that when legislatures respond today to the insistent demand for protection and take some small measure to enhance the egalitarian thrust, the Court may again undo them at the instance of "reverse discrimination" litigation. Indeed, the great contemporary issue of race is not how to thrust *toward* the egalitarian ideal (which, as already demonstrated, was never a true egalitarian thrust); the great issue on the contemporary stage is how to hold the line. As with the post-Reconstruction legislation, we may yet endure another hundred-year setback and be forced to start again at the bottom of the climb toward the egalitarian summit. We must resist this attempt to make us the modern day Sisyphus.

The literature abounds on this issue. The press and scholarly journals are full of it.[64] Blacks and their diminishing rank of friends[65] today confront a compounded irony: first, energies must be waged fending off this rearguard assault instead of advancing on the egalitarian front; second, notions somehow got afoot that inspired this assault and provided the implements to the DeFunis-Bakke-Weber-Fullilove crew.

Think of Justice Harlan's "color-blind" Constitution as something of

64. For one collection of references to both sources, *see* J. WILKINSON *supra* note 11.

65. Of those who filed amici curiae briefs urging affirmance in *Bakke*, some had helped previously make up the rank and file in support of the black man's fight for civil rights in the 1960's. These included the American Federation of Teachers, the American Jewish Committee, the Anti-Defamation League of B'nai Brith, and the Queens Jewish Community Council. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 269 (1978).

a doctrinal starting point. If we add to that both a racism-tainted legacy and the doctrinal tools developed to deal with it, the manner in which this double irony arose may become clearer.

If one examines almost any of the de jure school desegregation decisions (or for that matter the pre-*Defunis* racial equal protection cases),[66] one sees that the racial animus inherent in segregation was clearly designed to perpetuate the subjugation of black Americans. It seems rather natural, therefore, to view racial classifications as odious, suspicious, and mean. In that context, the doctrine that racial classifications are suspect seems beneficial and helpful. It is not surprising, therefore, that equal protection advocates for black advancement could applaud Justice White's opinion in 1965 in *McLaughlin v. Florida*,[67] which applied what had by then become established constitutional doctrine: racial classifications were "constitutionally suspect" and "in most circumstances irrelevant."[68] In *McLaughlin* the Court struck down a state statute that placed higher criminal penalties on interracial fornication than on fornication generally. So, too, in 1967 we could applaud when, in *Reitman v. Mulkey*,[69] the Court affirmed the decision of the California Supreme Court that struck down Proposition 14,[70] which had repealed antidiscrimination laws and had prohibited the state from enacting any law outlawing racial discrimination in real property transactions. We were not troubled when Justice White, writing for the Court, said that "the purpose, scope and operative effect"[71] of the law should be examined, nor were we troubled when he approved the California court's examination of the "intent" of Proposition 14. We may also have applauded Justice White's opinion for the Court in *Hunter v. Erickson*,[72] which reiterated the "race as a suspect classification" approach in striking down a mandatory referendum requirement for any ordinance dealing with, among other things, racial discrimination in housing.[73]

Against the evils the Court then confronted, these views seemed ethically principled and morally sound. How could we have anticipated

66. Loving v. Virginia, 388 U.S. 1 (1967); Harper v. Virginia Bd. of Educ., 383 U.S. 663 (1966); Anderson v. Martin, 375 U.S. 399 (1964).

67. 379 U.S. 184 (1964).

68. *Id.* at 192.

69. 387 U.S. 369 (1967).

70. As it appeared in the state-wide ballot, Proposition 14 read, in part:

> Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.

Proposition 14 became Art. I, § 26 of the state constitution. 387 U.S. at 370-71.

71. 387 U.S. at 374.

72. 393 U.S. 385 (1969).

73. *Id.* at 391-93.

that in the hands of a DeFunis, a Bakke, or a Fullilove they could be turned against a thrust toward an egalitarian ideal when legislatures enacted laws or states or their agencies undertook small, incremental measures to foster some small measure of equality in fact?

First, we must remember that the federal and state governments provide "preferences" to all sorts of people and interests. They enact tax benefits and loopholes; they provide subsidies to businesses, professions, and industries. Educational institutions "discriminate" in favor of children from wealthy families (in the hope of present or future gifts); they discriminate in favor of athletes and children of alumni, and on the basis of geography. Yet the contemporary issue of "reverse discrimination" arises only when a state or state educational institution makes a preference for the black race. Only then do we hear the anguished cry. The DeFunises and Bakkes of America have not raised the awful cry against the smorgasbord of preferences served up in academia. No. They decry race, and that alone. The Webers and the Fullilove do not challenge accelerated business tax write-offs; they do not assail the preferences represented in the subsidies to trucking companies, banks, railroads, and conglomerates. The Webers and Fullilove have not raised the awful cry against the cafeteria of governmental preferences. No. They decry race, and that alone.

There are, I submit, at least three reasons for challenging preferences for blacks. First, too many segments of white America are motivated by an anti-black animus.[74] Second, if whites tried to litigate any of the above nonracial preferences and discriminations as violating the equal protection clause, they would be sent packing on the strength of a quick "rational basis" analysis.[75]

The third reason is more complex, and constitutes the ultimate irony. In developing the analytical methodology for employing the equal protection clause as a shield to guard blacks against racist subjugation, the Court has provided handy tools to neoconservatives, reactionaries, and racists with which they can assault any egalitarian measures that blacks might be able to extract from the political process.

It is curious beyond expression that the Bakkes find the tools to attack the meager legislative and political progess that blacks are making toward the egalitarian ideal in the very *same* laws, and interpretations of those laws, that were enacted to protect the black citizens of this country from racist subjugation. Is it not ironic that Bakke could use

74. *See, e.g.*, NAT'L COMM'N ON CIVIL DISORDERS, REPORT (1968). *See also* Kushner, *Apartheid in America: An Historical and Legal Analysis of Contemporary Racial Residential Segregation in the United States*, 22 HOW. L.J. 545 (1979).

75. For a discussion of the "rational basis" decisional methodology, see Gunther, *Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

the equal protection clause and the Civil Rights Act of 1964 to fashion his sword to cut back the entry of a paltry sixteen blacks to the medical school at the University of California? Is it not, but for its seriousness, so ironic as to be laughable[76] that Fullilove could use the equal protection clause as his sword to try to slice away the ten percent minority enterprise set-aside in the four billion dollar Public Works Employment Act of 1977?[77]

In order to sustain the race-conscious measures under attack, in both *Bakke* and *Fullilove* the Court had to retreat from Justice John Marshall Harlan's eloquent idea that the Constitution was color-blind.[78] Justice White concurred in *Bakke* with Justices Brennan, Marshall, and Blackmun that the Constitution was not color-blind.[79] But the idea did not die an easy death. Justice Powell, the "swing man," held fast, and cited Justice White's decision in *McLaughlin v. Florida*[80] for support of the proposition that any race classification was a "suspect classification."[81] Justice Blackmun agreed too that any race was a suspect classification and offered his hope that the affirmative action programs he apparently reluctantly voted to sustain would be necessary for only "a decade at most."[82] If he honestly believes that three centuries of degradation will be wiped away in a decade, Justice Blackmun must be the most optimistic man on the face of the earth.

In *Fullilove*, Justices Burger, White, and Powell flatly rejected the contention that the Constitution was color-blind.[83] That it took seven Justices in two opinions to put an idea that was never the law in its grave, bespeaks its vitality. Whether its ghost will come back to haunt us cannot be determined.

But the problems are not difficult to imagine. Color-blindness is a neutral ideal. Without a legacy of racism and white supremacy in America, it would serve as a solid and strong anchor against the riptides of reaction and personal judicial whim. But in casting adrift from the color-blindness ideal are we left with any strong neutral principles by which to steer? If not, what ideal shall we use to argue the great cases that may arise if the neoconservative onslaught, although having lost four rounds in the *DeFunis*, *Bakke*, *Weber*, and *Fullilove* quartet,

76. Here I do not invoke "one of the sovereign perogatives of philosophers—that of laughter," Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 424 (1960), not because I deny the prerogative to philosophers, but because I think any advocate of a broader equality could appreciate the humor if not overawed by its grave implications.

77. 42 U.S.C. §§ 6701-6735 (1976 & Supp. III 1979).

78. Plessy v. Ferguson, 163 U.S. 537, 559 (1895) (Harlan J., dissenting).

79. 438 U.S. 265, 369 (1977).

80. 379 U.S. 184 (1964).

81. 438 U.S. 265, 306-08 (1978).

82. *Id.* at 403.

83. Fullilove v. Klutznick 448 U.S. 448 (1981).

takes to the political process and starts to undo the legislative and political thrusts blacks have made toward the egalitarian ideal in the affirmative action programs?[84]

The practical dilemmas we shall face are these: First, if we seek to use *DeFunis*, in which the Washington Supreme Court employed the traditional suspect classifications analytical methodology, how long can we sustain the burden of proving that it constitutes a "compelling state interest" to upgrade the black race against a continually receding history of de jure discrimination? How long can we hurdle the high wall of "strict scrutiny"—which was erected, ironically, to protect us from subjugation—when the question becomes our own alleged unfair advantage? How long can we meet the burden of pursuing egalitarianism in a nation that has never constitutionally committed itself to that ideal?

Second, if we seek to use the *Bakke/Fullilove* analysis, I fear we shall find them based on mutable principles, not "neutral" ones. In critical ways they are premised on factual findings which seem to have independent constitutional significance. Each is premised on data which is changeable and shifting in the degree to which prior discrimination has disadvantaged the black race in America. It is not unforeseeable that reactionary studies in the future will assert that disadvantages we blacks then claim are attributable to our own personal follies, individually or collectively, or to our own innate inferiority, and not to any prior discrimination against us.

Third, we can take no comfort at all in *Weber* because it was premised on the legislative intent in Title VII. By hypothesis, we will have lost the legislative and political battle before the onslaught can begin in earnest.

Should this scenario come to pass, we will have come full circle, and we will stare the ghost of *Brown* in the eye: the ghost of unprincipled constitutional policy-making. It will haunt us and our quest for equality once again.

The Challenging Prospects for the Future

If there is any clear way to avoid the paradoxes and ironies that attend constitutional policy-making while we try to advance the cause of equality, it is not readily apparent. That, then, is the challenging prospect: to seek, to discover, and to develop workable constitutional prin-

84. Absent some principle, the argument largely resolves to a less weighty one of sheer need or desire, or group advantage. That has neither much ethical force nor moral bearing. Indeed, absent principle, Professor Wechsler is right: one is essentially addressing a political or power question. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 14 (1959).

ciples that can be used to advance the egalitarian ideal, without at the same time forging handy tools for reactionaries to use against that ideal. That is the ultimate, great challenge that history grants us.

In the interim we must, again, use what we have available to hold the line. The prospect is not utterly bleak, but it is mighty dark. Among the hopeful sparks I discern are these:

First, we may yet convince the Court, at another time, with different Justices, that the fact of inequality itself raises an equal protection issue. Tirelessly, we should attempt to analyze, to synthesize, and to distinguish cases in search of clear and persuasive ideas that, pieced together, suggest the egalitarian principle.

Second, the purpose and intent analysis of Justice White in *Washington v. Davis*, which seems so problematic today, may be capable of being pressed into service, at least to ward off the onslaught. There are inklings to be found in the cases that suggest this possibility.[85] I refer, for example, to Justice White's opinion in *United Jewish Organizations v. Carey*[86] upholding race conscious redistricting.

Third, Justice White's opinion in *Reitman v. Mulkey*[87] may be useful in holding off a complete undoing of affirmative action that is already in place. The notion that laws may not be repealed if to do so would encourage discrimination may be developed to hold back the conservatives' urge to abort the affirmative action thrust.

Fourth, Justice White's opinions in the *Dayton/Columbus* school cases[88] suggest a basis to argue (at least where evidence shows that prior intentional segregation has not fully run its course) that there remains a continuing constitutional duty to dismantle the remaining discriminatory effect. How these school cases can be applied in other contexts is far from clear, but, as noted,[89] in ways never explained, *Brown* was applied to restaurants and buses and a host of non-school contexts. In addition, there may be grist in a temporally longitudinal analysis of continuing effects.[90]

Undoubtedly there are as yet unknown and presently unknowable arguments and strategies that continued in-depth analyses, critical syntheses, astute distinctions, and insightful analogies may yield. The ultimate challenge is to devise a principled basis for the pursuit of the egalitarian *result*.

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85. Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979); Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979).

86. 430 U.S. 114 (1977).

87. 387 U.S. 369 (1967).

88. Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979); Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979).

89. *See* note 50 & accompanying text *supra*.

90. *See generally* J. WILKINSON, *supra* note 11, at 39.

The one lesson that history assuredly teaches is this: the quest for the egalitarian ideal is long and hard. Our pursuit of that ideal has been relentless and untiring. It must continue to be. This is the only thing we blacks can do, for within the black race in America, the hope of equality still lives. The dream will never die.