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Selective Strict Scrutiny – A New Way to Use Suspect Classifications

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SELECTIVE STRICT SCRUTINY – A NEW WAY TO USE SUSPECT CLASSIFICATIONS

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THE PREMISE

As described herein, strict scrutiny is the Supreme Court's tool to evaluate certain claims under the Equal Protection Clause of the Fourteenth Amendment. Building upon a concept of limited judicial intervention to protect politically powerless groups, the Court has intervened to make the political process more effective for the disadvantaged discrete group.

Strict scrutiny is thus applied when governmental actions disfavor suspect groups or impair the full exercise of fundamental rights. Of course, these terms are not self-defining, but only mean something in the context of a specific governmental action directed toward the disfavored group or right. As the doctrine developed, classifications based upon race - normally the African-American race - which served to disfavor African-Americans, were struck down. Thus, the use of the racial classification in the context of treating the African-American racial minority unfairly triggered the salutary use of strict scrutiny. It was not race, *per se*, that was the problem, but that the racial classification of disadvantaged African-Americans in all aspects of their daily intercourse.

Race, whether adverse or beneficial, has essentially become a non-permitted classifier. This development has turned the

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* Professor of Law, Ohio Northern University, Ada, Ohio. Much of the author's thinking regarding the structuring this framework [of who votes on what] should be the democratic principle of vesting citizens most interested in governmental decisions with the authority to make them has been influenced by my colleague, George D. Vaubel. Although his insights are in the context of municipal home rule, the principle by analogy fits here as well. George D. Vaubel, Democratic Government and Municipal Home Rule, 19 STETSON L. REV. 813, 813 (1990). The excellent research and analytical assistance of Stuart B. Chesky, R. Lee Grant, C. Shawn Kim, and Robin Lilley are noted with appreciation. The excellent staff support and editorial care of Shirley Steele are noted with appreciation.

inherent logic and profound political insight of how strict scrutiny began - political powerlessness - on its head. African-Americans, having successfully benefited at the hands of the political majority through enactments like the Civil Rights Act of 1964 and the Voting Rights Act of 1975 with their various amendments, now find that the Supreme Court has rewritten the racial classification doctrine, again to the detriment of African-Americans.

Perhaps, the problem is that race is such a sensitive political issue at the turn of the century that the judicial reaction was inevitable. It may be that the broad use of suspect classifications and the resultant strict scrutiny appear to infect so many legislative matters that an overreaction was to be expected.

This article sets forth a modest, perhaps compromised, proposal to retain the true vision of why strict scrutiny is appropriate in some discrete situations, while at the same time relying generally upon the impulses and operation of the majority political process. For example, it may well be that African-Americans can protect themselves politically in jurisdictions wherein they constitute a significant political presence; in other settings, it may be that scrutiny of a law hostile to African-American interests would properly be evaluated under the stricter standard. Similarly, the fact that persons with developmental disabilities and their political allies might be able to obtain favorable national legislation, would not preclude special treatment when it comes to locating a group home in Texas.

But first, back to the beginning.

EARLY DEVELOPMENTS

April 25, 1938, the day on which the Supreme Court announced its opinion and judgment in *United States v. Carolene Products, Co.*[1] was an otherwise unremarkable day. No other decisions of the Court were rendered that day and little was made of the decision immediately after its rendering.

The federal law prohibiting the shipment in "interstate

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[1] 304 U.S. 144 (1938).

commerce of skimmed milk compounded with any fat or oil other than milk fat so as to resemble milk or cream . . ."[2] was assailed as transcending the power of the Congress under the Commerce Clause and the Fifth Amendment. Short shrift was made of the Commerce Clause challenge.[3] The rationality of the congressional action was described as follows:

> [T]he existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.[4]

It is as a footnote to the prior statement that the Court pens its famous "footnote 4," worthy of recapitulation in its slightly modified form: "[t]here may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the fourteenth."[5]

Further, "[i]t is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny

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2 304 U.S. at 146 (describing the Filled Milk Act, 21 U.S.C. §§ 61-63 (1938)).

3 *Id.* at 147.

4 *Id.* at 152.

5 *See* Stromberg v. California, 283 U.S. 359, 369-370 (1931); Lovell v. Griffin, 303 U.S. 444 (1938).

under the general prohibitions of the Fourteenth Amendment than are most other types of legislation."[6] Such restrictions include restrictions on the right to vote,[7] restraints on the dissemination of information,[8] interferences with political organizations,[9] prohibition of peaceable assembly,[10] review of statutes directed at particular religious groups[11] and review of statutes directed at racial minorities.[12]

"[P]rejudice 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."[13] It is interesting that the above footnote was not accepted by Justice Black because of the reasoning of the textual material.[14] Justices Cardozo and Reed took no part in the consideration of the case.[15] Justice Butler concurred in the result and did not comment upon the footnote.[16] Justice McReynolds dissented.[17] Thus, no more than four Justices agreed

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6 *See* Nixon v. Herndon, 273 U.S. 536 (1927); Nixon v. Condon, 286 U.S. 73 (1932).

7 *See Herndon*, 273 U.S. at 536; s*ee Condon*, 286 U.S. at 73.

8 *See* Near v. Minnesota, 283 U.S. 697, 713B714, 718-720, 722 (1931); Grosjean v. American Press Co., 297 U.S. 233 (1936); *Lovell*, 303 U.S. at 444.

9 *See Stromberg*, 283 U.S. at 369; Fiske v. Kansas, 274 U.S. 380 (1927); Whitney v. California, 274 U.S. 357, 373-378 (1927); Herndon v. Lowry, 301 U.S. 242 (1937); Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J.).

10 *See* De Jonge v. Oregon, 299 U.S. 353, 365 (1937).

11 Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923); Bartels v. Iowa, 262 U.S. 404 (1935); Farrington v. Tokushige, 273 U.S. 284 (1927).

12 *Herndon*, 273 U.S. at 536; *Condon*, 286 U.S. at 73.

13 *Compare* McCulloch v. Maryland, 4 Wheat. 316, 428 (1819), *with* South Carolina State Highway Dep' t v. Barnwell Bros., 303 U.S. 177 (1938).

14 304 U.S. at 155.

15 *Id.*

16 *Id.*

17 *Id.*

with the footnote.

The profound insight articulated in the footnote identified circumstances where a narrower scope for operation of the presumption of constitutionality would apply."[18] What follows for authority is introduced by the weakest of symbols - "*see*"[19] and concludes, as would be appropriate, with the famous *dicta* of 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."[20] This thought, coming almost as a partial repudiation of the Court's then recent decisions repudiating the *Lochner* era,[21] was to herald a new look at governmental action that interfered with the normal workings of the political process.

The Court itself may have been unaware of the far reaching potential consequences of its *dicta* in the detailed footnote. For the next time that *Carolene Products* was cited, it followed the unremarkable statement that A[t]he determination of the legislature is presumed to be supported by facts known it, unless facts judicially known or proved preclude that possibility."[22] *Carolene Products* was merely part of a string citation stating the new standard of rationality and differential review.

When the Court next considered the *Carolene Products*

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18 *Id.*

19 "'*See*' is used instead of '[no signal]' when the proposition is not directly stated by the cited authority but obviously follows from it: there is an inferential step between the authority cited and the proposition it supports." THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (COLUM. L. REV. Ass'n et al. eds., 17th ed. 2000).

20 304 U.S. at 152.

21 Nebbis v. New York, 291 U.S. 502 (1934) & West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) *repudiating analytical basis of* Lochner v. New York, 198 U.S. 45 (1905).

22 Clark v. Gray, 306 U.S. 583, 594 (1939); *see also* Sage Stores Co. v. Kansas, 323 U.S. 32, 35 (1944).

footnote, it was not in the context of a successful Equal Protection Clause challenge to the Oklahoma Habitual Criminal Sterilization Act in *Skinner v. Oklahoma*.[23] Rather, it was in the concurring opinion of now elevated Chief Justice Stone that the footnote was revisited as it applies to the presumption of constitutionality of certain legislative acts on Due Process Clause grounds.[24] Chief Justice Stone focuses upon the liberty of the person . . . concerned."[25] Justice Jackson concurs in finding that both equal protection and due process protection are implicated, by concluding, "there are limits to the extent to which a legislatively represented majority may conduct biological experiments at the expense of the dignity and personality and natural powers of a minority . . ."[26]

The stage was set for the broader protection of "minorities," on either due process or equal protection grounds.[27] Ironically, the *Carolene Product'* s footnote was used by Justice Black (who did not agree to it in *Carolene Products*)[28] in his dissenting opinion in *West Virginia State Board of Education v. Barnette*,[29] where the Court held the state flag salute statute unconstitutional as applied to Jehovah's Witnesses.[30]

Finally, if the *Carolene Products* footnote was to have meaning, the internment of Japanese-American citizens would

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23 316 U.S. 535 (1942).

24 *Id.* at 544-45 (Stone, C.J. concurring).

25 *Id.*

26 *Id.* at 546-47 (Jackson, J. concurring).

27 Of course, a significant problem exists in finding equal protection safeguards within the Fifth Amendment, the prong under which the plurality was writing in *Carolene Products*. The Court would hold in Bolling v. Sharpe, 347 U.S. 497 (1954), the companion case to Brown v. Bd. of Educ., 347 U.S. 483 (1954), that an implicit equal protection component of the Due Process Clause of the Fifth Amendment existed to hold unconstitutional the Act of Congress racially segregating the public schools of the District of Columbia.

28 *Stromberg*, 283 U.S. at 359; *Lovell*, 303 U.S. at 444.

29 319 U.S. 624, 648 (1943) (Black, J. dissenting); *see also* Yakus v. United States, 321 U.S. 414, 484 (1944) (Rutledge, J. dissenting).

30 *Id.*

seem to have been the ideal case for development of the failure of the political processes to protect such persons, even though citizens of nationalities of other Axis powers (e.g., German, Italian) were treated as if they were presumptively loyal. Nowhere in any of the Court's opinions had any mention been made of the now famous footnote.[31]

THE DEVELOPMENT OF STRICT SCRUTINY OF SUSPECT CLASSIFICATIONS BY THE COURT

From this modest beginning, the Court modified and developed its theoretical underpinnings of strict scrutiny of a growing, but modest, list of suspect classifications.

Classifications must be viewed in their elastic historical relation to legislative, judicial and social morals of the United States. These changes have altered how governments operate in relation to providing all classes of persons' fundamental rights and access to those rights, while concurrently not denying persons of equal protection of all laws based upon classifications.[32]

In addition to the race-based classifications already discussed, alienage,[33] illegitimacy,[34] gender,[35] and, when coupled

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31 Korematsu v. United States, 323 U.S. 214 (1944).

32 Surprisingly, in a recent case calling for the application of strict scrutiny, the Supreme Court retreated to an unusual use of mere rationality of a state constitutional ballot initiative designed to reduce political rights of gay citizens. Romer v. Evans, 517 U.S. 620 (1995). Compare the decision in the case below where the Supreme Court of Colorado relied explicitly upon strict scrutiny analysis. Romer v. Evans, 882 P.2d 1335 (Colo. 1994).

33 Graham v. Richardson, 403 U.S. 365 (1971) (welfare benefits may not be denied to aliens), relying upon *Carolene Products* and Takahashi v. Fish and Game Comm'n, 334 U.S. 410 (1948). Later cases seem to have focused more directly on a Supremacy Clause rather than the Equal Protection Clause analysis. Toll v. Moreno, 458 U.S. 1 (1982) (holding that state law denying in-state tuition and fees to non-immigrant aliens was preempted by Congress violated the Supremacy Clause).

with some other constitutional right which could not be enjoyed, indigency might be considered suspect as well.[36] Mental retardation has been considered a quasi-suspect classification, not rising to warrant full protection from the Court.[37] Many other groups have cried out, unsuccessfully, for attention.[38]

It is significant that in this process of classification, once

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34 Levy v. Louisiana, 391 U.S. 68 (1968).

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

36 Indigency has been coupled normally with criminal defendant's rights under the Fifth and Sixth Amendments. Robinson v. Henderson, 316 F. Supp. 1241 (1970). Similarly, court issues have emphasized state monopolies affecting fundamental rights, such as the right to obtain a divorce. Boddie v. Connecticut, 401 U.S. 371 (1971). Ironically, such solicitous treatment of criminal defendants' rights has not been made for poor women's fundamental rights to reproductive choice and abortion. Maher v. Roe, 432 U.S. 464 (1977).

37 City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985).

38 *See generally* Martinez v. Bynum, 461 U.S. 321 (1983) (residency); Harris v. McRae, 448 U.S. 297 (1980) (indigency alone is insufficient); Massachusetts Bd. of Ret. v. Murgia, 427 U.S. 307 (1976) (age); Marshall v. United States, 414 U.S. 417 (1974) (repeat offenders or drug addicts demanding treatments); Nat'l Gay Task Force v. Bd. of Educ. of Oklahoma City, 729 F.2d 1270 (10th Cir. 1984) (sexual partners). *See* Johnson v. Robison, 415 U.S. 361 (1974) (conscientious objectors); Villanueva v. Carere, 85 F.3d 481 (10th Cir. 1996) (culture); Smallwood v. Johnson , 73 F.3d 1343 (5th Cir. 1996) (theft offenders); Nickens v. Melton, 38 F.3d 183 (5th Cir. 1994) (in forma pauperis litigants); Beauchamp v. Murphy, 37 F.3d 700 (1st Cir. 1994) (prison escapees versus other fugitives); Kreimer v. Bureau of Police, 958 F.2d 1242 (3d Cir. 1992) (homelessness); Lupert v. California State Bar, 71 F.2d 1325 (9th Cir. 1985) (students of unaccredited law schools); Jones v. Reagan, 748 F.2d 1331 (9th Cir. 1984) (seamen); Baldwin v. City of Winston-Salem, 710 F.2d 132 (4th Cir. 1983) (annexation and taxes); Ybarra v. City of Los Altos Hills, 503 F.2d 250 (9th Cir. 1974) (wealth); Vance v. United States, 434 F. Supp. 826 (N.D. Tex. 1977) (weight and military caste); Schultz v. New York State Executive, 960 F. Supp. 568 (N.D.N.Y. 1997) (non-framers); Boyd v. Bulala, 751 F.Supp. 576 (W.D. Va. 1990) (medical malpractice cap); United States *ex rel.* Martin v. Strasburg, 513 F. Supp. 691 (S.D.N.Y. 1981) (juvenile delinquency); Baehr v. Lewin, 852 P.2d 44 (Haw. 1993) (holding there is no compelling state interest requiring heterosexual marriage).

the classifier is accepted as suspect, it appears suspect for all purposes. Race is the prime culprit. While the early cases may be excused from discussing race in a general sort of way, such as in the context of a Virginia statute proscribing certain (but not all) mixed-race marriages, the true import of such a case is that the majority white race was interested in maintaining its alleged racial purity.[39] Such a state law had to have an impact upon whites because it was only the sexual union of a white and black that was of concern.

This sloppy analysis would ultimately sound the doom of racially-motivated beneficial programs for African-Americans except under the most trying and exacting circumstances.[40] Eventually, some federal courts of appeals ended racial preferences in educational admissions policies.[41] Similarly, racial gerrymandering in electoral districts subject to the Voting Rights Act is now being routinely rejected if the racial motivation predominates.[42] Not surprisingly, given our history with regard to African-Americans, we find once again that success within the political process to obtain a beneficial federal voting statute is now not permitted. This is somewhat anomalous given that districts are approved routinely, wherein entrenched or challenging (depending what political party is in charge of reapportionment) Italian, Irish, Jewish, or other constituencies are protected.

What all of this suggests is the need for a new model, a model which is moored in the political insight of the *Carolene*

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39 Loving v. Virginia, 388 U.S. 1 (1967); *see also* McLaughlin v. Florida, 379 U.S. 184 (1964).

40 Trace the development of cases from Regents of Univ. of California v. Bakke, 438 U.S. 265 (1978), through Fullilove v. Klutznick, 448 U.S. 448 (1980) and Richmond v. J.A. Croson Co. 488 U.S. 469 (1989), to Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

41 Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996).

42 Shaw v. Reno, 509 U.S. 630 (1993); Bush v. Vera, 517 U.S. 952 (1996); Reno v. Bossier Parish Sch. Bd., 528 U.S. 320 (2000).

Products Court and uses that insight in discrete, concrete circumstances. The model should be designed to afford relief to burdensome and onerous political discrimination to a discrete group, unable to mobilize over time the political process for its own ends.

SELECTIVE SUSPECT CLASSIFICATIONS AND THE MODEL

As can be seen from the examples set forth above, strict scrutiny need not be a universal model for all issues involving groups that might *sometimes* qualify as suspect classes. Developmentally disabled or mentally retarded persons might never have the opportunity to locate a group home in some communities, but could work successfully with other members of a coalition at the national level. Thus, within the context of national politics, the normal rules of sometimes winning and sometimes losing would apply. Systemic institutional limitations upon access of certain groups to participate might suggest that heightened scrutiny would be appropriate. If structural barriers were few or did not exist, though, then one should rely upon the impulses of the majority in political process in a constitutional democracy.

The Court already embraced part of this concept when it struck down initiatives, usually ballot-box voter initiatives, that tended to reorganize the political process to the detriment of successful minority group efforts at different levels of government. Zoning[43] and targeted changes in the authority of local boards of education are prime examples.[44]

These cases give us the kernel of a modest proposal of moving forward with this new, limited concept. One key ingredient is the change of a governmental power at one level that has the effect of reburdening or disadvantaging the discrete group. This is important because under equal protection analysis, we can usually

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

44 Washington v. Seattle Sch. Dist., 458 U.S. 457 (1982); *see also* Reitman v. Mulkey, 387 U.S. 369 (1967).

rely upon the self-interests of the political majority to protect itself at all levels of government. That protection might then translate into an equal protection right for all citizens who "tag along" with the majority's self-interested enactments. Changing the school boards' powers in Washington, but only with regard to busing to achieve racial balance, is the prime example of an event which might trigger strict scrutiny. Another factor to consider is that some discrete groups, perhaps not presently thought to be in a suspect class, cannot act to protect their interests. In close electoral matters, one might conclude from an analysis of the numbers that the participation of the group would have had the effect of changing the political system's decision; certainly a group cannot be isolated and removed when the political majority does not care for the group's views. The disparate impact of Title VII[45] addresses conditions that should protect those individuals affected by decisions of the political majority and/or decisions of the government that may violate the rights of those minorities.[46]

APPLICATION OF THE MODEL

While many examples exist, perhaps a specific illustration of how this process might work would be helpful. The Department of Justice has published statistics showing the percentage by race or gender of those who might expect to spend time in prison.[47]

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45 Firefighters Inc. for Racial Equal. v. Bach, 611 F. Supp. 166 (Colo. 1985).

46 Griggs v. Duke Power Co., 401 U.S. 424, 429 (1971).

47 Research, Development and Statistics Dictorate, *Statistics on Race and the Criminal Justice System* (1999), *at* http://www.homeoffice.gov.uk/rds/pdfs/s95race99.pdf.#

Black men	28.5
Latino men	16.0
White men	4.0
All women	1.0
All men	9.0

Similarly, for the year 1990, the Sentencing Project determined that on any given day, 32.2 percent of all African-American males in the 20-29 age bracket were under criminal justice supervision (prison, jail, probation or parole). In 1993, African-Americans constituted 13 percent of all monthly drug users, 35 percent of those arrested for drug possession, 55 percent of convictions, and 74 percent of prison sentences.[48]

The data of Ohio, a representative state, reflects similar information in an illustrative year:

[48] Marc Mauer & Tracy Huling, The Sentencing Project, Young Black Americans and the Criminal Justice System: Five Years Later, *in* THE SENTENCING PROJECT 1,12 (Oct. 1995).

Ohio Department of Rehabilitation and Correction
Facts, Figures and Statistics:
Profile of Ohio Prisoners[49]

Inmate Commitments during FY 1996 (Source: Fiscal Year 1996 Commitment Report)	**19,556**	**Inmate Population on 7/1/96 (Source: 7/1/96 Census Report)**	**45,167**
Sex		**Sex**	
Males:	17,038	Males:	42,357
Females:	2,518	Females:	2,810
Race		**Race**	
Black:	10,765	Black:	24,514
White:	8,318	White:	19,621
White Hispanic:	205	White Hispanic:	560
Black Hispanic:	31	Black Hispanic:	172
Native American:	18	Native American:	41
Asian:	10	Asian:	27
Other:	209	Other:	232

How does this translate into voting? One in seven (14 percent) African-American males are either currently or

[49] U.S. CENSUS BUREAU REP. (1996), Profile of Ohio Prisoners.

permanently disenfranchised from voting as a result of a felony conviction. Fox Butterfield of the New York Times News Service has noted that the huge number of black men disenfranchised by a felony conviction "clearly diminishes black influence politically" and may contribute to the fact that black voter turnout is 10 to 20 percent lower than white turnout.[50]

The illustrative data set forth above demonstrates the significant impact of the loss of voting rights by a sizeable African-American male populace. While the African-American population votes at a lower rate than the majority population,[51] the incremental presence of this voting block may well have profound political consequences on issues that are important to that constituency.

Similarly, African-American voters in the District of Columbia, evaluated as a center of crime, voted to retain the law abolishing the death penalty.[52] Notwithstanding that judgment, Congress, in the exercise of its plenary authority over the District of Columbia, was determined to enact capital punishment for the District of Columbia. That is, in spite of the overwhelming response of the constituents, Congress elected to maintain the death penalty, thereby refusing to follow the voice of the electorate, further alienating the people from their leadership.[53]

Another example is the attempt by the Council of the District of Columbia in 1963 to repeal the criminalization of consensual sodomy, only to have its efforts turned back by Congress exercising its plenary authority over the nation's capital.[54] The national policy process allowed members of

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50 Fox Butterfield, *Many Black Men Are Barred from Voting*, N.Y. Times, Jan. 30, 1997, at A12.

51 Tony Hill, *Where Do We Go from Here? The Politics of Black Education 1780-1980*, 6 B. REV. 11, 11-13 (1981).

52 William Schneider, *Political Pulse: Growing Doubt about the Death Penalty*, The Atlantic Online (June 14, 2000), *at* http://www.theatlantic.com/politics/pj/scheider2000-06-14.htm.

53 *Id.*

54 Amending Dist. of Columbia's Charitable Solicitation Act: Hearings Before Subcomm. on the Dist. of Columbia House of Rep., 88th Cong. 22-

Congress to oppose the local citizenry's sense of priorities while catering to their own constituents, who would never have to bear the brunt of their representatives' policies for the District of Columbia.[55]

A further example of an area where selective strict scrutiny may be beneficial is in evaluating the outcome of a racially close election. The Supreme Court has held that a state can disenfranchise persons convicted of a felony.[56] The convicted felons in that racial group have been disenfranchised and thus barred from the electoral pool.[57]

This disenfranchisement is a direct dilution of the voting pool.[58] The likelihood of a shift in the outcome of an election because of voter disenfranchisement is due to the dilution of minority voting strength.[59] The assumption is, however, that these felons would have voted if given the opportunity.[60] This also presumes that disenfranchisement of the voting privilege is weighed more heavily on one racial group compared to another.[61]

Lower socioeconomic groups have been evaluated as having a higher percentage of convicted felons,[62] and these felons may have otherwise voted but for their disenfranchisement.[63] The disenfranchisement thus becomes a culling process of otherwise legitimate voters and thereby dilutes the voter pool.[64]

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93 (1963) (statement of Dr. Franklin E. Kameny).

55 Modernization of Antigay Attitudes in Repeal of Sodomy Law, 103d Cong. (1993).

56 Richardson v. Ramirez, 418 U.S.24 (1974).

57 *See* Butterfield, *supra* note 50.

58 *See* Allen v. State Bd. of Elections, 393 U.S. 544 (1969).

59 *Id.*

60 *See* Richardson, *supra* note 56.

61 *Cf.* Thornburg v. Gingles, 478 U.S. 30, 38 (1986).

62 *See* Mauer, *supra* note 48, at 3.

63 Wesley v. Collins, 605 F. Supp. 802, 807 (1985).

64 *Id.*

If racial minorities are considered a suspect group, this disenfranchisement then places a disproportionately negative impact on the suspect group.[65] This occurs without overt discriminatory intent; however, the disproportionate racial impact could establish a violation of Title VII of the 1964 Civil Rights Act.[66]

Purposeful discrimination against minorities, especially blacks, to dilute the voting pool establishes that "blacks have less opportunity to participate in the political process and to elect candidates of their choice."[67] This is further compounded by the voting disenfranchisement of the felons which effectively decreases the blacks' opportunities to participate in the election process and may shift the outcome of an election.[68]

"Disproportionate racial impact of felon disenfranchisement on a minority voting population does not establish a violation of the Voting Rights Act absent other reasons to find discrimination."[69] While disenfranchisement may not discriminate in the specific context of overt racial basis, there is an element of "inten[t] to discriminate on the basis of race and other suspect criteria. [S]tatutes that deny felons the right to vote are not subject to strict scrutiny."[70]

We have established that dilution of the voting pool may be an insidious form of discrimination[71] and this is particularly important in elections that are racially polarized.[72] One can analogize the significance of this dilution when considering issues of concern to disenfranchised felons, such as the application of the

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65 *Cf.* Mauer, *supra* note 48.

66 *Griggs*, 401 U.S. at 430-431.

67 Rogers v. Lodge, 458 U.S. 623, 624 (1982).

68 Farrakhan v. Locke, 987 F. Supp. 1304, 1313 (E.D. Wa. 1997).

69 Baker v. Cuomo, 842 F. Supp. 718, 722 (S.D.N.Y. 1993).

70 Richardson, 418 U.S. at 54-56.

71 *See, e.g., Allen*, 393 U.S. 544.

72 *Farrakhan*, 987 F. Supp. at 1312.

death penalty.[73]

CONCLUSION

In this article I have attempted to set forth an alternative approach to using suspect classifications. The approach proposed seems to be truer to the profound insight of the *Carolene Products'* authors to balance, from time to time, the imperfections in the majority political process towards discrete minorities. Judicial intervention is never perfect, but, on occasion, it serves as an effective counterweight to the majority's discriminatory impulses. Perhaps this modest approach will allow reliance upon the political process, other than on occasional moments when the political process causes constituencies not to be breached.

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[73] *See* Hill, *supra* note 51.

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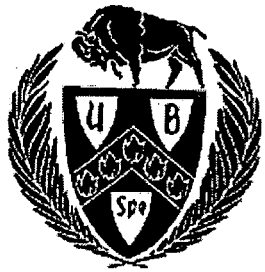

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