3-1-2011

Justice Stevens and Constitutional Adjudication: The Law Beyond the Rules

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This Article considers Justice Stevens' approach to equal protection and free speech cases. It contrasts his longstanding attempts to pierce through mediating doctrinal rules in these areas and apply true constitutional meaning ("the law beyond the rules") with the more rule-bound approach exemplified by Chief Justice Roberts and other members of the Court's conservative bloc. While appreciating Justice Stevens' efforts in this regard, this Article also recognizes some of the problems he encountered in his quest. However, it also notes that the more rule-bound approach suffers from flaws of its own, even when judged against the criteria more rule-friendly justices offer to evaluate a given method of constitutional adjudication. Thus, whatever one might think of the ultimate success of Justice Stevens' project, it is surely the case that the more rule-bound approach has not proven its clear superiority.

∗ Professor of Law, Brooklyn Law School. This Article is dedicated to the late David Leonard, Professor of Law at Loyola Law School Los Angeles, who played a major role in my entering the legal academy and thus making it possible for me to develop whatever knowledge and insight is reflected here.

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INTRODUCTION

The October 2009 term of the Supreme Court marked both the fifth anniversary of the Roberts Court and the last term served by Justice John Paul Stevens. These dual occasions provide an opportunity to reconsider the longstanding debate over the relative desirability of rigid doctrinal rules and more flexible standards in constitutional adjudication. Justice Stevens was a well-known skeptic of rigid rules in equal protection and First Amendment law, among other subjects.[1] As an alternative, he offered an approach that sought to decide cases based on principles that he viewed as more directly grounded in the underlying constitutional guarantee. In his last term on the Court, he wrote a dissent in the blockbuster case of the year—*Citizens United v. Federal Election Commission*[2]—that constituted a full-throated attack on what he described as the "glittering generalit[ies]" relied on by the majority.[3] Less famously, in that same term (indeed, in one of the final constitutional cases of the term, and thus, of his career), he voted in a way that departed from the standard liberal-conservative divide and aligned himself with an opinion that adopted a much more context-specific approach to the First Amendment issue at stake.[4]

The five-year anniversary of the Roberts Court provides a fitting minor key for this investigation of the rules-standards debate. As is well known, Chief Justice Roberts came into office promising humility—most notably through his analogy between judging and baseball umpiring. This promise to act like a judge by following the law (as in simply calling balls and strikes) has a strong connection to a judicial approach that emphasizes rules. The connection is not a logical necessity: one can act like a judge while still adopting an approach like Justice Stevens'. Indeed, Justice Stevens has suggested

1. *See, e.g.*, Norman Dorsen, *John Paul Stevens*, 1992 ANN. SURV. AM. L. at xxv, xxvi (1992) ("[Justice Stevens] eschews bright-line rules in favor of standards that permit judges adequate discretion to tailor results to nuanced evaluation of facts and circumstances."); Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 121 (1992) (describing Justice Stevens as a "justice of standards" as opposed to a "justice of rules"); Kathryn Watts, *From* Chevron *to* Massachusetts*: Justice Stevens' Approach to Securing the Public Interest*, 43 U.C. DAVIS L. REV. 1021, 1044 (2010) (describing Justice Stevens as "a fan of flexible standards rather than rigid rules").

2. 130 S. Ct. 876 (2010).

3. *Id.* at 929.

4. *See* Holder v. Humanitarian Law Project, 130 S. Ct. 2705 (2010).

that a judge performs her role better by paying careful attention to facts and context, as opposed to unthinkingly applying rigid legal rules.[5] But, at least on one theory, the rule of law is, in fact, a law of rules.[6] On this theory, humble judging requires strict adherence to rigid doctrinal formulas in order to cabin judicial adventurism or good faith but unwitting importation of the judge's own personal preferences into the law.[7] The well-known debate over substantive due process has made this argument clear enough.[8] Thus, one can understand Chief Justice Roberts' commitment to humility as a counterpoint to Justice Stevens' allegedly more freewheeling decisional approach.[9]

The debate over rules and standards implicates an additional issue in the particular context of equal protection and First Amendment jurisprudence. Both the equal protection clause and the First Amendment are exceptionally vague texts. The former's command that states not deprive persons of "the equal protection of the laws,"[10] to the extent it is read as a general command of equal treatment,[11] begs the question of what "equal treatment" requires.[12] The latter's command that Congress shall make "no law . . .

5. *See* John Paul Stevens, *The Freedom of Speech*, 102 YALE L.J. 1293, 1300 (1992); *see also* Dorsen, *supra* note 1, at xxv (noting Justice Stevens' "relentless insistence that issues be examined 'context by context'" and "campaigns against the 'artificiality of black-letter constitutional law'").

6. *See generally* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989) (defending a judicial approach marked by rules rather than discretion-conferring standards).

7. *See, e.g.*, *id.* at 1179–80.

8. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 511 (1964) (Black, J., dissenting) (arguing that the concurring justices' use of substantive due process to strike down the Connecticut contraceptive statute "claim[s] for this Court and the federal judiciary power to invalidate any legislative act which the judges find irrational, unreasonable or offensive"). Indeed, in another major constitutional case from Justice Stevens' last term, he and Justice Scalia dueled over whether their respective due process methodologies appropriately cabined judicial discretion. *Compare* McDonald v. City of Chi., 130 S. Ct. 3020, 3050 (2010) (Scalia, J., concurring) *with id.* at 3088 (Stevens, J., dissenting).

9. *But see McDonald*, 130 S. Ct. at 3088, 3099–103 (Stevens, J., dissenting) (explaining how his approach to due process adjudication provides adequate limits on judicial discretion).

10. U.S. CONST. amend. XIV, § 1.

11. *Cf.* William D. Araiza, *New Groups and Old Doctrine: Rethinking Congressional Power to Enforce the Equal Protection Clause*, 37 FLA. ST. U. L. REV. 451, 492–93 (2010) (explaining how other, competing understandings of equal protection might have led the clause to be read in more determinate ways).

12. Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).

abridging the freedom of speech"[13] similarly fails to provide determinate answers. The most ardent textualist application of the First Amendment—Justice Black's insistence that "no law means no law"[14]—ultimately collided with the reality that some limits on the freedom of speech were necessary to the government's basic operations[15] and, indeed, to the nation's survival.[16]

The vagueness of these commands has led the Court to adopt mediating rules to decide cases. Such rules govern a case's decision but are not themselves of constitutional stature.[17] Rather, they are thought likely to yield the results that the underlying constitutional command would require. Such mediating rules are adopted in response to the epistemic difficulty courts face in applying the underlying constitutional command. The clearest example of such a rule is the tiered scrutiny structure of the equal protection doctrine as originally enunciated in footnote four of *United States v. Carolene Products*.[18] By presuming that non-discrete and insular groups not suffering prejudice can generally use the political process to insure against inappropriate singling out—and therefore subjecting classifications burdening them to only rational basis scrutiny—footnote four sought to replicate the results that an omniscient court would reach after applying equal protection's underlying command that government treat individuals equally.[19]

The mediating nature of such rules—that is, their character as imperfect reflections rather than direct instantiations of the underlying constitutional command—implicates the rules-standards debate. An important impetus for judges adopting mediating rules is

13. U.S. CONST. amend. I.

14. *See, e.g.*, Beauharnais v. Illinois, 343 U.S. 250, 275 (1952) (Black, J., dissenting).

15. *See, e.g.*, Adderley v. Florida, 385 U.S. 39 (1966) (rejecting the claim that protesters had a First Amendment right to speak on the grounds of a jailhouse); *see also* Burson v. Freeman, 504 U.S. 191 (1992) (upholding a state law restricting political speech near polling places as a legitimate attempt to prevent voter intimidation).

16. *See, e.g.*, Near v. Minnesota, 283 U.S. 697 (1930) (announcing a strong presumption against prior restraints, but suggesting their constitutionality in certain very limited circumstances, such as those surrounding the publication of the sailing dates of troop ships in a time of war).

17. The concept of mediating or decision rules has been widely discussed in legal scholarship. For one explanation of such rules, see Mitchell Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1 (2004).

18. 304 U.S. 144, 152 n.4 (1937).

19. *See* Araiza, *supra* note 11, at 481–82 (explaining the concept of mediating rules).

that they feel themselves incapable of distilling a sufficiently precise legal rule from the constitutional text itself. This concern might reasonably lead a judge to embrace more rigid, concrete—and thus judicially accessible—rules, as second-order rules of decision capable of providing an answer to the case before her. By contrast, Justice Stevens' more contextual and nuance-rich approach appeals to judges' aspirations to apply the underlying constitutional command directly, without reliance on such intervening rules. For example, as Andrew Siegel labeled it, Justice Stevens' equal protection jurisprudence constituted equal protection "unmodified."[20]

These observations provide several prisms through which we can view Justice Stevens' distinctive approach to equal protection and the First Amendment. First, his approach requires us to consider the usefulness of rigid rules in constraining judicial discretion. Justice Souter memorably wrote that reviewing free speech cases under "fairly strict categorical rules keeps the starch in the standards for those moments when the daily politics cries loudest for limiting what may be said."[21] Justice Scalia has made the same basic point with regard to rigid rules more generally.[22] Justice Stevens' contrary approach puts these claims to the test.

Second, Justice Stevens' approach allows us to consider the merits of a judicial method that decides cases based on direct applications of vague constitutional text. Justice Stevens' approach to equal protection eschews standard tiered scrutiny analysis. His well-known phrase "There is only one Equal Protection Clause"[23] can be read as a direct attack not just on rigid doctrinal rules per se but on their status as rules that mediate between the Constitution's underlying commands and judicial decisions in actual cases. His approach to equal protection—and, to a lesser degree, the First Amendment—aspires to decide cases based on principles that flow directly from the text. It therefore allows us to consider whether such unmediated constitutional review can satisfy basic judicial criteria of objectivity, consistency, and predictability. Of special importance in

20. *See* Andrew M. Siegel, *Equal Protection Unmodified: Justice John Paul Stevens and the Case for Unmediated Constitutional Interpretation*, 74 FORDHAM L. REV. 2339 (2006).

21. Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 774 (1996) (Souter, J., concurring).

22. *See* Scalia, *supra* note 6, at 1178–79.

23. Craig v. Boren, 429 U.S. 190, 211 (1976) (Stevens, J., concurring).

the context of a Supreme Court justice, Justice Stevens' approach also allows us to consider whether this method gives adequate guidance to lower court judges.

Finally, the contrast between the Court's approach to equal protection and First Amendment issues and Justice Stevens' approach allows us to consider the role of humility in judging. Do rigid, mediating rules really reflect judicial humility in the face of epistemic uncertainty and judges' all-too-human temptation to vote their preferences when confronted with vaguely worded constitutional commands? Or do such rules break down and create an even worse situation: courts pretending to apply rigid, neutral rules but actually voting their preferences *sub silentio*?[24] Does Justice Stevens' approach reflect authentic judging—that is, a careful weighing of facts and context against a legal rule that in many cases cannot be stated with precision? Or does it cause constitutional law to become completely unpredictable, since judges tasked with applying this method would likely decide the same case differently, based on subtle differences in how they perceive the facts and context to relate to the general principle governing the case?[25]

This Article considers Justice Stevens' constitutional jurisprudence through the prism of his skepticism about mediating standards. It will focus on his opinions in equal protection and free speech cases—subjects in which the vagueness of the constitutional text is especially pronounced and in which mediating doctrinal tests are therefore both especially important and, to Justice Stevens, especially likely to lead the Court into misapplying the relevant constitutional command. Part I considers Justice Stevens' approach to mediating doctrines in equal protection and free speech.

Part II considers two First Amendment cases decided during the October 2009 term—*Citizens United v. Federal Election Commission* and *Holder v. Humanitarian Law Project*[26]—that speak to the question of mediating standards. Justice Stevens wrote separately in only one of these cases—his now-famous dissent in *Citizens United*. However, his decision to break with the liberal bloc

24. *See, e.g.*, McDonald v. City of Chi., 130 S. Ct. 3020, 3088, 3118 (2010) (Stevens, J., dissenting) (critiquing Justice Scalia's due process approach as lacking transparency).

25. *Cf.* Siegel, *supra* note 20, at 2341 (suggesting this risk from Justice Stevens' approach to equal protection law).

26. 130 S. Ct. 2705 (2010).

and join Chief Justice Roberts' majority opinion in *Humanitarian Law Project* reflects his approach in *Citizens United*, by evincing an aversion to rigid rules and an adherence to underlying constitutional principles that necessarily require more fine-grained and contextual analysis.

Part III evaluates the legacy of Justice Stevens' adherence to such contextual analysis. It considers the advantages of Justice Stevens' approach. It then considers the other side of the ledger, in particular, the question whether rigid rules constrain judicial discretion. Part III expresses doubt that these rules really do succeed in constraining judicial discretion, at least in the hardest of cases. Thus, while Justice Stevens' approach is surely subject to fair criticism, it is not at all clear that the alternative approach offered by the Court better performs the tasks we ask of a court of final resort.

I. JUSTICE STEVENS AND UNMEDIATED CONSTITUTIONAL INTERPRETATION

This part examines how Justice Stevens' equal protection and free speech jurisprudence eschewed mediating rules in favor of more direct investigation of constitutional meaning. It illustrates his skepticism of such rules and considers both his own approach and the challenges that his approach raises.

A. Equal Protection

As is well known, modern equal protection doctrine relies heavily on the three-tiered scrutiny structure ultimately grounded in footnote four of *United States v. Carolene Products*[27] and worked out more fully in the 1960s and 1970s. Justice Stevens repeatedly expressed his dissatisfaction with this structure. In its place, he analyzed equal protection claims by considering whether the challenged law reflected impartial governance by the sovereign.[28] As explained below, his equal protection methodology has roots in antebellum thinking about equality.[29] More importantly for our purposes, his approach aspires to decide cases by reference to the

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

28. *See* U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 180–81 (1980) (Stevens, J., concurring in the judgment).

29. *See infra* text accompanying note 73.

direct meaning of the equal protection clause rather than through the mediating rules of *Carolene*'s tiered scrutiny structure. However, this aspiration comes at a cost. As illustrated below, Justice Stevens' methodology requires a judge to make highly contextualized decisions that arguably give her a significant degree of discretion and risk thus creating unpredictability in the law.

1. Rational Basis Review

Most fundamentally, Justice Stevens has expressed discomfort with the rational basis standard that, under standard black-letter law, constitutes the default for equal protection analysis. Justice Stevens wrote a number of separate opinions—often joined by no other justice—critiquing the majority's application of rational basis review.[30] Most importantly, Justice Stevens criticized the presumptions and other analytical tools that comprise standard rational basis review. Consider *U.S. Railroad Retirement Board v. Fritz*.[31] In that case a seven-justice majority (including Justice Stevens) upheld a federal[32] statute that altered the retirement benefits of different classes of railroad employees, and that separated the employees into classes for purposes of eligibility for those benefits based in part on the length and recency of their railroad service.

While Justice Stevens agreed with the majority's result, he wrote separately to express his sharp disagreement with its approach to rational basis review. Then–Justice Rehnquist's analysis for six justices applied an exceptionally deferential version of rational basis review. Most notably, the majority concluded that "the plain language of [the statute] mark[ed] the beginning and end[ing]" of its inquiry into statutory purpose.[33] Justice Stevens, agreeing with Justice Brennan's dissent, criticized this approach. He made the

30. *See, e.g.*, Nordlinger v. Hahn, 505 U.S. 1, 28–41 (1993) (Stevens, J., dissenting); FCC v. Beach Comm'n, Inc., 508 U.S. 307, 320–23 (1992) (Stevens, J., concurring); G.D. Searle & Co. v. Cohn, 455 U.S. 404, 420–21 (1982) (Stevens, J., dissenting); Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 477–89 (1981); *see also* W. & S. Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 674 (1981) (Stevens, J., joined by Blackmun, J., dissenting).

31. 449 U.S. 166 (1980).

32. Because it was a federal action, technically the claim was of a violation of the Fifth Amendment's due process clause, which has been interpreted to include the same restrictions on unequal treatment as the Fourteenth Amendment's equal protection clause. *See, e.g.*, Bolling v. Sharpe, 347 U.S. 497 (1954) (striking down race segregation in federally operated schools as violating the equality requirement inherent in the Fifth Amendment's due process clause).

33. *Fritz*, 449 U.S. at 176.

obvious point that discerning the statute's purpose from the text of its operative provisions converted equal protection review into a tautology, whereby a reviewing court could always conclude that the legislature intended to do exactly what it did, thus creating a perfect fit between the statute and its "purpose."[34] Rejecting this method of review entailed rejecting the logical conclusion of standard rational basis doctrine since that doctrine allows the court to hypothesize any legitimate purpose for purposes of performing the "fit" portion of the test. Such hypothesizing presumably authorizes the reviewing court to hypothesize the purpose that fits most closely with the classification—that the legislature set out to do exactly what the statute did.[35]

Despite his disagreement with the majority's methodology, Justice Stevens nevertheless agreed that the classification was constitutional. He did not adopt Justice Brennan's argument that the Court should determine the *actual* purpose that Congress had in altering railroad workers' retirement benefits and then test the classification against that purpose. Justice Stevens observed that inquiries into actual legislative purpose are hazardous as empirical matters. He also noted the practical problem that a purpose inquiry "may result in identically worded statutes being held valid in one State and invalid in a neighboring State."[36] Instead, Justice Stevens offered the following approach to deciding the issue:

> I therefore believe that we must discover a correlation between the classification and either the actual purpose of the statute or a legitimate purpose that we may reasonably presume to have motivated an impartial legislature. If the adverse impact on the disfavored class is an apparent aim of

34. *See id.* at 180 (Stevens, J., concurring in the judgment); *id.* at 182, 186–87 (Brennan, J., dissenting).

35. To be sure, Justices Stevens and Brennan's criticism of the majority is at least slightly unfair. The majority's allegedly circular approach to legislative purpose still requires that the purpose indicated by the statutory classification have been achieved in a legitimate way. For example, the *Fritz* Court, "beginning and end[ing]," *id.* at 176, with the statute's "plain language," understood Congress's purpose to have been phasing out "windfall" retirement benefits for certain classes of employees. But immediately upon concluding that that was the purpose, the Court then considered "whether Congress achieved its purpose in a patently arbitrary or irrational way." *Id.* at 177. This requirement, at least in theory, acts as an external check on what would otherwise be the complete circularity of defining the legislature's purpose by examining what the legislature actually did.

36. *Id.* at 180 (Stevens, J., concurring).

> the legislature, its impartiality would be suspect. If, however, the adverse impact may reasonably be viewed as an acceptable cost of achieving a larger goal, an impartial lawmaker could rationally decide that the cost should be incurred.[37]

It is not completely clear, at least from *Fritz* itself, whether Justice Stevens' approach realistically mitigates any circularity concern. Recall that Justice Stevens called for an approach asking whether there is "a correlation between the classification and either the actual purpose of the statute or a legitimate purpose that we may reasonably presume to have motivated an impartial legislature."[38] Leaving aside the actual purpose of a statute, how similar is a court's search for "a legitimate purpose that [it] may reasonably presume to have motivated an impartial legislature" and a search, conducted as part of standard rational basis review, for any hypothetical legitimate purpose?[39] Neither one has to be the actual purpose, but both have to be legitimate. Is any analytical work done by the qualifier, "that we may reasonably presume to have motivated an impartial legislature?" Does Justice Stevens' formulation imply a closer look at legislative purpose, perhaps requiring that the purpose must have some closer connection to the actual historical context in which the legislature acted? We do not get the answer in *Fritz* because Justice Stevens could rely on Congress's *actual* legislative purpose, which he found legitimate and closely enough connected to the statute's classifications to allow him to agree with the majority in upholding the statute.

Part of the answer to this question can be found in Justice Stevens' classic dissent in *Nordlinger v. Hahn*.[40] *Nordlinger* upheld California's Proposition 13 property tax scheme, which assessed property values for taxation purposes based on the property's acquisition value. This scheme, as all members of the Court agreed,

37. *Id.* at 180–81 (Stevens, J., concurring).

38. *Id.* 181 (Stevens, J., concurring).

39. *See, e.g.*, Nguyen v. Immigration & Naturalization Serv., 533 U.S. 53, 76–77 (2001) (O'Connor, J., dissenting) (contrasting heightened review from rational basis review by explaining that the latter allows courts to hypothesize government interests supporting the challenged classification).

40. *See* Nordlinger v. Hahn, 505 U.S. 1, 28 (1992) (Stevens, J., dissenting).

led to wide variations in property tax liabilities for owners of comparable properties, depending on when they were acquired.[41]

Despite this inequality, eight justices voted to uphold Proposition 13 against an equal protection challenge. Justice Blackmun wrote an opinion for seven justices employing traditional rational basis review. He concluded that Proposition 13 was rationally related to government interests in neighborhood stability and in protecting what he called the "reliance interests" of owners who purchased their properties before they had appreciated, carrying with that appreciation a higher tax burden.[42] Justice Thomas concurred in part[43] but argued that the Court's analysis was inconsistent with a case from three years earlier, *Allegheny Pittsburgh Coal Co. v. County Commission of Webster County*.[44]

Justice Stevens dissented alone, and his analysis revealed much about his somewhat cryptic analysis in *Fritz*. Tellingly, he began his opinion by describing the challenged law as "establish[ing] a privilege of a medieval character."[45] This description calls to mind the anti–class legislation tone implied by Justice Stevens' understanding of equal protection as a fundamental requirement of impartial governance.[46]

Moving beyond rhetoric, Justice Stevens explained his vision of the equal protection clause. His explanation of what constitutes a "legitimate" government interest reflected his early opinions' focus on impartiality. Repeating his analysis from *Fritz*, he explained that a statute "must have a purpose or goal independent of the direct effect of the legislation and one 'that we may reasonably presume to have motivated an impartial legislature.'"[47] Importantly, he explained that such a legitimate government interest "must encompass the interests

41. *Id.* at 6, 19, 29 (describing the unequal tax burdens carried by the plaintiff and her neighbors, who owned comparable homes).

42. *Id.* at 17.

43. *Id.* at 18 (Thomas, J., concurring in part and dissenting in part).

44. *Id.* at 18 (Thomas, J., concurring); *see* Allegheny Pittsburgh Coal Co. v. Cnty. Comm'n. of Webster Cnty., 488 U.S. 336 (1989). *Allegheny Pittsburgh* was a case in which the Court had struck down an acquisition value tax scheme that had been imposed not by law, such as Proposition 13, but by a county tax assessor in contravention of state law that mandated a market value valuation approach.

45. *Nordlinger*, 505 U.S. at 30 (Stevens, J., dissenting).

46. *See infra* text accompanying note 73.

47. *Nordlinger*, 505 U.S. at 34 (Stevens, J., dissenting) (quoting City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 452 n.4 (1985) (Stevens, J., concurring)).

of members of the disadvantaged class and the community at large, as well as the direct interests of the members of the favored class."[48]

This description set up his critique of the Court's rational basis analysis of Proposition 13, which he characterized as "largely a restatement of the benefits that accrue to long-time property owners."[49] Thus, he criticized the majority's acceptance of a government interest in preserving long-standing property owners' favorable tax treatment, which the majority had described as an interest in protecting those owners' "reliance interests," as simply restating Proposition 13's effects.[50] He concluded that the majority's analysis had not adequately demanded the sort of impartial justification that equal protection required.[51] Thus, *Nordlinger* adds to the analysis the idea that, for Justice Stevens, a legitimate government interest is one that does not simply benefit one class of persons but can be understood as benefitting all. Dressing up purely private gains in the language of legitimate protection of owners' "reliance interests" will not do.

A further refinement of Justice Stevens' approach can be found in his short concurrence in *FCC v. Beach Communications*.[52] In *Beach Communications*, the Court unanimously upheld a provision of federal communications law exempting private satellite TV antennas from local government franchising requirements.[53] Justice Stevens agreed with that result but expressed skepticism about the rationales embraced by the majority as part of its highly deferential rational basis review.[54] Instead, he concluded that "it is reasonable to presume that Congress was motivated by an interest in allowing property owners to exercise freedom in the use of their own

48. *Id.*

49. *Id.* at 30.

50. *Id.*

51. *Id.* at 38–41. He also criticized the majority's acceptance of the state's interest in neighborhood stability as having too tenuous a fit with Proposition 13's effects. *See id.* at 35–39.

52. 508 U.S. 307, 320 (1993) (Stevens, J., concurring).

53. *See id.* at 313 (majority opinion).

54. *Id*. at 322, 322 nn.1–2 (Stevens, J., concurring) (expressing doubt that the rationales embraced by the majority were either the actual purposes motivating Congress or made logical sense).

property."[55] He then concluded that "[l]egislation so motivated surely does not violate the sovereign's duty to govern impartially."[56]

In a footnote he appended to this discussion, he cited his discussion in *Fritz* of his approach to equal protection issues. Notably, he italicized the term "reasonably presume" in his formula requiring "a legitimate purpose that we may *reasonably presume* to have motivated an impartial legislature."[57] His discussion of the property rights rationale seems to have been a conscious illustration of what he meant by that formula. This explanation is borne out by the first paragraph of his concurring opinion:

> Freedom is a blessing. Regulation is sometimes necessary, but it is always burdensome. A decision *not to regulate* the way in which an owner chooses to enjoy the benefits of an improvement to his own property is adequately justified by a presumption in favor of freedom.[58]

Justice Stevens then distinguished a property owner's use of his own property—here, to place a satellite television system—from his decision to enter "an already regulated market"[59]—here, to sell satellite television services to separately owned or managed buildings. He concluded that

> the presumption that an owner of property should be allowed to use an improvement on his own property as he sees fit unless there is a sufficient public interest in denying him that right simply does not apply to the situation in which the improvement—here, the satellite antenna—is being used to distribute signals to subscribers on *other people's property*.[60]

Why not? Because, for Justice Stevens, the justification for non-regulation—the right to use one's property as one wishes—dissipates when one's activities cross onto other people's property. For Justice Stevens, this difference justified the different regulatory treatment.

This rationale builds on Justice Stevens' insistence in

55. *Id.* at 323.
56. *Id.*
57. *Id*. at 323 n.3.
58. *Id.* at 320.
59. *Id.* at 321.
60. *Id.* at 322.

Nordlinger that the statute's purpose not be derived simply from the statute's effects. This implied that the statute's purpose must be external to the statute. In *Beach Communications* the presumption of liberty to use one's own property as one wished, a presumption that pre-dated the statute, furnished the external standard against which the classification could be tested.

So understood, Justice Stevens' analysis recalled Justice Jackson's equal protection argument in *Railway Express Agency v. City of New York*[61] that the challenged ordinance's classification between truck owners who advertised their own businesses on their trucks and owners who rented their truck panels for other businesses' advertising was justified by what he called "the real difference between doing something for self-interest and something for hire."[62] In both cases the difference distinguishing the burdened class from the benefitted class was well established in preexisting law (the right to use one's property as one wishes, in *Beach Communications*, and the additional burdens the law allowed to be imposed on hired carriers, in *Railway Express*).[63] Indeed, it is not coincidental that in this same discussion Justice Jackson rejected an approach to equal protection that allowed government to classify based on any conceivable difference between the two classes.[64]

These cases make clear that Justice Stevens envisioned more careful judicial review under equal protection than is suggested by the traditional rational basis standard. More importantly, for our purposes, they reveal dissatisfaction with the presumptions and extreme hypothesizing allowed under that standard.[65] Such presumptions and hypothesizing are not direct instantiations of equal protection's core command to treat likes alike.[66] Rather, they reflect

61. 336 U.S. 106 (1949).

62. *Id.* at 116 (Jackson, J., concurring).

63. *See id.* at 116–17 (noting the differences in legal treatment courts had allowed based on this distinction).

64. *See id.* at 115; *see also* Fullilove v. Klutznick, 448 U.S. 448, 533 n.3 (1980) (Stevens, J., dissenting) (quoting Justice Jackson's opinion for the proposition that government action cannot be upheld simply by reference to "any conceivable" difference between the classes).

65. *See Ry. Express Agency, Inc.*, 336 U.S. at 115 (Jackson, J., concurring) (critiquing the proposition that classifications do not satisfy equal protection if they respond to "any conceivable" differences between the two groups).

66. *See, e.g.*, Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 539–48 (1982) (discussing the fundamental nature of the idea that equality consists of treating likes alike).

courts' forthright recognition of their own inability to implement that core command. By performing such deferential review when the burdened group is presumed capable of fully participating in the political process, courts assume that the likely result of that review—a decision upholding the classification—reflects the likely result that would have flowed from an omniscient court's application of the core command of equal treatment.

By contrast, Justice Stevens' brand of "rationality"[67] review appears to aim for equal protection scrutiny unmediated by any such tools of judicial review. By rejecting the tautological analysis the majority embraced in *Fritz*, he expressed his insistence that judicial review be more than a formality. By rejecting the *Nordlinger* majority's embrace of the property owners' reliance justification for Proposition 13, he took the next analytical step by defining a legitimate government interest as an interest distinct from both the text of the statute and its effects. Finally, by casting doubt on the interests the *Beach Communications* majority embraced as sufficient to uphold the statute and offering his alternative justification, he aligned himself with Justice Jackson's approach in *Railway Express*, which searched for a justification that was both more than hypothetical and external to the statute.

Each of these steps builds on the one before it. Together, they paint a picture in which equal protection review insists on an interest that is consistent with impartial government—not, for example, an interest extracted either from the text[68] or the effects[69] of the challenged statute itself. The review is still deferential. Note that Justice Stevens rejected Justice Brennan's call in *Fritz* that courts test the statute against the *actual* legislative purpose.[70] In addition, he made it clear that the fit need not be perfect; in *Beach Communications*, for example, he did not insist on perfect legislative line-drawing with regard to those who enjoy exemption from regulation.

67. *See* Siegel, *supra* note 20, at 2353.

68. *See* U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. at 180 (Stevens, J., concurring in the judgment) (critiquing what he called the majority's tautological approach).

69. *See Nordlinger*, 505 U.S. at 38–41 (Stevens, J., dissenting) (critiquing the majority's embrace of the "reliance interest" justification for Proposition 13).

70. *See Fritz*, 449 U.S. at 180 (Stevens, J., concurring in the judgment).

But the deference reflected in Justice Stevens' approach is not the abdication that traces its lineage back to *Carolene Products*. *Carolene Products*–style deference is largely grounded in the Court's sense of its inability to review government line-drawing, and its willingness to presume that the political process adequately takes into account the interests and arguments of politically powerful groups.[71] By contrast, Justice Stevens' deference rests on the recognition that, in our system, legislatures have the authority to make policy—which is what they do when they create classes at one place rather than another. As long as such policymaking reflects good faith, impartial government aiming at the public good—as opposed to singling out groups for burdens and benefits simply for the sake of helping one class and harming another—he would uphold government classifications against equal protection challenges.[72]

In adopting this unmediated approach to equal protection, one that aspires to defer to good faith classifications while performing more than a formal exercise of judicial review, Justice Stevens provided a faint echo of the class legislation concept that informed American thinking about equality in the decades both immediately before and after the ratification of the Fourteenth Amendment.[73] Embraced long before mediating principles such as those derived from *Carolene Products*, this approach reflects one of the authentic strands of equal protection doctrine. More importantly, for our purposes, Justice Stevens' echoing of that approach illustrated his search for the real meaning of equal protection and for a theory of judicial review that implements that understanding.

Admirable as it is, however, Justice Stevens' approach raises its own problems. His distinction between a court's search for any legitimate government interest it could hypothesize and an interest that would motivate an impartial legislature is surely not self-evident.

71. *See, e.g.*, William D. Araiza, *The Section 5 Power and the Rational Basis Standard of Equal Protection*, 79 TUL. L. REV. 519, 532–41 (2005).

72. *See Nordlinger*, 505 U.S. at 34 (Stevens, J., dissenting) ("A *legitimate* state interest must encompass the interests of members of the disadvantaged class and the community at large, as well as the direct interests of the members of the favored class.").

73. *See* Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245, 251–68 (1997); Mark G. Yudof, *Equal Protection, Class Legislation, and Sex Discrimination: One Small Cheer for Mr. Herbert Spencer's* Social Statics, 88 MICH. L. REV. 1366, 1375 (1990) (reviewing WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE (1988)).

Consider the *Nordlinger* majority's argument that Proposition 13 protected longtime property owners' reliance interests. Presumably, an argument could be made that protecting one class of owners' reliance interests inured to the benefit of society more generally. Perhaps protecting such interests encouraged others to invest in real estate, or to emigrate to California. Surely those are interests that might motivate an impartial legislature, even if the immediate benefits of Proposition 13 were concentrated in the class of "squires."[74] How, then, could Justice Stevens distinguish between "illegitimate" favoritism for one class of persons and "legitimate" benefitting of one class in the service of conferring more general social benefits? Similarly, in *Beach Communications* his principle presumptively favoring non-regulation is couched at such a high level of generality that it comes close to being a makeweight.[75] Given these obvious questions, one might well ask whether Justice Stevens' principles cabin judicial discretion to any degree at all.

2. Discriminatory Intent

One of the first important equal protection issues confronting Justice Stevens after his elevation to the Court concerned whether discriminatory intent was necessary to a finding of discrimination reviewable under equal protection. Before 1976, the Court had issued equivocal statements on the intent question. In the First Amendment context, it had explicitly criticized reliance on legislative purpose as sanctioning an inquiry into something fundamentally unknowable.[76] In some race discrimination cases the Court had focused on the effects of the challenged action. For example, in *Gomillion v. Lightfoot*,[77] the Court struck down, as a violation of the Fifteenth Amendment, a decision by the City of Tuskegee, Alabama, to change its municipal boundaries in a way that excluded almost all African American residents while excluding no whites. While the Court was not clear on the point, its rhetoric strongly suggested that it relied

74. *Nordlinger*, 505 U.S. at 29 (Stevens, J., dissenting).

75. It should be noted, however, that at least one commentator has suggested that the Court's most recent major statement on substantive due process embraces a similar presumption. *See generally* Randy E. Barnett, *Justice Kennedy's Libertarian Revolution: Lawrence v. Texas* (Bos. Univ. Sch. of Law Working Paper No. 03-13), *available at* http://papers.ssrn.com/abstract=422564.

76. *See* United States v. O'Brien, 391 U.S. at 383–84 (1968).

77. 364 U.S. 339 (1960).

heavily on the challenged action's effects.[78] On the other hand, in *Keyes v. School District No. 1, Denver, Colorado*,[79] the Court required the plaintiffs to prove discriminatory intent in their allegation of school segregation where segregation was not official policy.

In 1976 the Court directly confronted the intent question. Writing for a seven-justice majority in *Washington v. Davis*,[80] Justice White held that plaintiffs alleging equal protection claims had to prove discriminatory intent—that is, purposeful government discrimination on a ground (for example, race) that the plaintiff alleged to be unconstitutional. This has since remained a foundational rule of equal protection law.

While not as clear a mediating rule as *Carolene Products*' tiered scrutiny structure, the intent requirement nevertheless serves as a gatekeeper, keeping the courts out of the business of scrutinizing government action solely on the ground that it burdens a particular group (for example, women) more heavily than another group.[81] Indeed, the role it plays in keeping courts out of difficult policy decisions is suggested by the last portion of Justice White's opinion in *Davis*, which explicitly noted the wide-ranging nature of judicial inquiry that would follow from rejecting an intent requirement.[82] Justice White's explicit statement that, given the consequences of rejecting an intent requirement,[83] displacement of the requirement "should await legislative prescription"[84] further suggests the intent

78. *See, e.g.*, *id.* at 347 ("[T]he inescapable human effect of [the city's action] . . . is to despoil colored citizens, and only colored citizens, of their theretofore enjoyed voting rights.").

79. 413 U.S. 189 (1973).

80. 426 U.S. 229 (1976). Justice Stewart joined the relevant part of the majority opinion. *Id.* at 252. Justice Stevens indicated agreement with the "general rule" stated in the majority opinion. *Id.* at 254 (Stevens, J., concurring). Justice Brennan, joined by Justice Marshall, dissented. *Id.* at 256 (Brennan, J., dissenting).

81. *See* Pers. Adm'r v. Feeney, 442 U.S. 256 (1979) (applying the intent requirement to sex discrimination claims).

82. *See Davis*, 426 U.S. at 248 ("A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.").

83. *See id.*

84. *Id.* It is likely that the "legislative prescription" Justice White had in mind was federal legislation enforcing the equal protection clause. The rest of the sentence quoted in the text explicitly referenced "public employment" as an example of an area where Congress had in fact done away with the intent requirement. Such legislation had already been upheld as appropriate

requirement is a mediating rule and not a core requirement of equal protection.

Compared to his colleagues, Justice Stevens has taken a much less rigid approach to equal protection, even accounting for the fact that since 1976 the full Court has also softened the requirement's hard edges.[85] In *Davis*, Justice Stevens indicated agreement with "the statement of the general rule in the Court's opinion."[86] However, he coupled this acceptance with a much more nuanced understanding of the rule's real-world impact:

> The requirement of purposeful discrimination is a common thread running through the cases [relied on by Justice White] . . . Frequently, the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor . . . . This is particularly true in the case of governmental action which is frequently the product of compromise, of collective decision making, and of mixed motivation . . . . My point . . . is to suggest that the line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps not quite as critical, as the reader of the Court's opinion might assume. I agree, of course, that a constitutional issue does not arise every time some disproportionate impact is shown. On the other hand, when the disproportion is . . . dramatic . . . it really does not matter whether the standard is phrased in terms of purpose or effect. Therefore, although I accept the statement of the

legislation enforcing the equal protection clause. *See* Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). Moreover, any sense that Justice White had the commerce clause in mind as a source of authority for such "legislative prescription" runs into the fact that *National League of Cities v. Usery*, 426 U.S. 833 (1976), which severely limited congressional power under the commerce clause to enforce federal labor law on states, was just two weeks away from being announced when *Davis* was announced. *Compare Nat'l League of Cities*, 426 U.S. at 833 (decided June 24, 1976), *with Davis*, 426 U.S. at 229 (decided June 7, 1976). Because Justice White's seven-justice majority included all five of the justices in the *National League* majority, it is most unlikely that they would have understood Justice White's reference to congressional power to dispense with the intent requirement in the context of state labor relations as a reference to the interstate commerce power those five justices were primed to limit in exactly that way.

85. *See, e.g.*, Shaw v. Reno, 509 U.S. 630, 644 (1993) (concluding that the bizarre shape of a congressional district may by itself be proof of the discriminatory intent underlying it); Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977) (recognizing that the extent of a government action's disparate impact is relevant to the intent determination).

86. *Davis*, 426 U.S. at 254 (Stevens, J., concurring).

> general rule in the Court's opinion, I am not yet prepared to indicate how that standard should be applied in the many cases which have formulated the governing standard in different language.[87]

As with his critique of rational basis review, here too Justice Stevens aspired to cut through a mediating standard (here, the intent requirement) to decide cases based on an interpretation of the actual equal protection command. For Justice Stevens, intent was not itself a constitutional requirement: "[W]hen the disproportion is . . . dramatic . . . it really does not matter whether the standard is phrased in terms of purpose or effect."[88]

Later cases illustrated how Justice Stevens saw the intent rule as an analytical tool rather than a constitutional requirement in itself. For example, in *Personnel Administrator v. Feeney*,[89] the Court applied *Davis*' intent requirement to a case of sex discrimination.[90] The Court concluded that a state civil service veteran's preference did not constitute sex discrimination because it was not enacted with the requisite intent to classify against women.[91] Justice Stevens' very short concurring opinion is reprinted in full here:

> While I concur in the Court's opinion, I confess that I am not at all sure that there is any difference between the two questions posed *ante* [whether the classification itself is overtly or covertly gender-based, and, if not, whether the adverse effects themselves reflect invidious discrimination]. If a classification is not overtly based on gender, I am inclined to believe the question whether it is covertly gender based is the same as the question whether its adverse effects reflect invidious gender-based discrimination. However the question is phrased, for me the answer is largely provided by the fact that the number of males disadvantaged by Massachusetts' veterans' preference (1,867,000) is sufficiently large—and sufficiently close to the number of disadvantaged females (2,954,000)—to

87. *Id.* at 253–54.

88. *Id.*

89. 442 U.S. 256 (1979).

90. *Id.* at 274–80.

91. *Id.* at 279–81.

> refute the claim that the rule was intended to benefit males as a class over females as a class.[92]

In one sense, Justice Stevens was simply restating good black-letter law from the follow-up case to *Davis*, in which the Court identified the extent of the disparate impact as a factor in determining discriminatory intent.[93] However, his concurrence posed much more starkly the question whether the concept of discriminatory intent possesses any independent constitutional relevance. In particular, his equation of a statute's "covert" gender basis with the question whether the discriminatory effects reflect invidious sex discrimination suggests that he is boring past mediating concepts such as intent into the core equal protection inquiry: whether the government is engaging in invidious discrimination.

Justice Stevens agreed with the majority result in *Feeney*.[94] Twelve years later, in *Hernandez v. New York*,[95] the Court's rigid distinction between intent and effects led Justice Stevens to dissent.[96] His dissenting opinion revealed more about his approach to the intent issue, and to equal protection more generally. *Hernandez* considered a criminal defendant's claim, under *Batson v. Kentucky*,[97] that the prosecutor had engaged in discrimination against Latino jurors by using his peremptory challenges to strike several Spanish-speaking members of the venire.[98] When challenged, the prosecutor argued that the members he had struck had hesitated when asked whether they could accept the translator's translation of witness testimony from Spanish to English.[99]

Following the procedural sequence set forth in *Batson*, the Court first recognized that the defendant had made out a prima facie case of

92. *Id.* at 281 (Stevens, J., concurring).

93. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977) (recognizing that the extent of a government action's disparate impact is relevant to the intent determination).

94. 442 U.S. at 281 (Stevens, J., concurring).

95. 500 U.S. 352 (1991).

96. *Id.* at 375–79 (Stevens, J., dissenting).

97. 476 U.S. 79 (1986).

98. *Hernandez*, 500 U.S. at 355 (plurality opinion). While *Batson* mandates a specific inquiry distinct from the standard equal protection intent structure, the two inquiries are closely related. *See, e.g.*, *id.* at 372–75 (O'Connor, J., concurring) (explaining the connection between these two inquiries).

99. *Id.* at 356.

discrimination—a point the state did not dispute.[100] The Court,[101] continuing to apply *Batson*, then concluded that the prosecutor had offered "a race-neutral basis for [the] peremptory strikes"—his concern about the prospective jurors' willingness to accept the translator's version of the testimony.[102] More specifically, a majority found that the trial judge did not commit clear error when he believed the prosecutor's race-neutral explanation.[103] A four-justice plurality then found that the state court did not err in concluding that the prosecutor's explanation was not simply a pretext.[104] Based on that conclusion, it rejected Hernandez's claim.[105]

Justice O'Connor, joined by Justice Scalia, agreed that Hernandez's claim was meritless (thus creating a majority for that result).[106] However, she employed an even more rigid intent requirement.[107] She argued that the case was over once the Court did not reverse the trial judge's finding that believed the prosecutor's race-neutral explanation.[108] As she wrote at the end of her opinion, "*Batson* does not require . . . that the [prosecutor's] justification be unrelated to race. *Batson* requires only that the prosecutor's reason for striking a juror not *be* the juror's race."[109] In essence, then, she found the plurality's last step—its pretext examination—unnecessary, because the prosecutor's now-credited explanation was not *based* on race, but only *related* to race.[110]

Justice Stevens, joined by Justice Marshall, dissented.[111] He focused his objection on the Court's willingness to accept the prosecutor's justification for striking the bilingual members of the venire:

100. *Id.* at 359.

101. The Court majority in this case consisted of a plurality opinion of four justices, written by Justice Kennedy, and a concurrence in the judgment written by Justice O'Connor and joined by Justice Scalia.

102. *Hernandez*, 500 U.S. at 361 (plurality opinion); *id.* at 372, 375 (O'Connor, J., concurring in the judgment) (agreeing with this conclusion).

103. *Id.* at 369–70 (plurality opinion); *id.* at 372 (O'Connor, J., concurring in the judgment).

104. *Id.* at 369–70 (plurality opinion).

105. *Id.* at 372.

106. *Id.* at 372–75 (O'Connor, J., concurring in the judgment).

107. *See id.*

108. *Id.* at 375.

109. *Id.*

110. *Id.*

111. *Id.* at 375–79 (Stevens, J., dissenting).

> The Court mistakenly believes that it is compelled to reach this result because an equal protection violation requires discriminatory purpose. . . . The Court overlooks, however, the fact that the "discriminatory purpose" which characterizes violations of the Equal Protection Clause can sometimes be established by objective evidence that is consistent with a decisionmaker's honest belief that his motive was entirely benign. "Frequently the most probative evidence of intent will be objective evidence of what actually happened," *Washington v. Davis*, 426 U.S. at 253 (Stevens, J., concurring), including evidence of disparate impact.[112]

Justice Stevens assumed that the prosecutor's explanation "was advanced in good faith."[113] Nevertheless, he concluded that it failed to overcome Hernandez's prima facie case.[114] He offered three reasons for this conclusion.[115] First, he argued that acceptance of the prosecutor's explanation "would inevitably result in a disproportionate disqualification of Spanish-speaking venirepersons."[116] Second, he argued that "the prosecutor's concern could easily have been accommodated by less drastic means."[117] Third, he concluded that "if the prosecutor's concern was valid and substantiated by the record, it would have supported a challenge for cause."[118]

Two points bear noting. First, the disparate effects that resulted from the prosecutor's explanation helped convince Justice Stevens that that explanation "was insufficient to dispel the existing inference of racial animus"[119] raised by Hernandez's prima facie case. Second, the second and third reasons collapsed equal protection's standard "fit" analysis into the intent inquiry. Both of these points reveal a discomfort with step-by-step equal protection analysis, and a

112. *Id.* at 377.

113. *Id.* at 379.

114. *Id.* at 378–79.

115. *Id.* at 379.

116. *Id.*

117. *Id.*

118. *Id.* Justice Stevens conceded that none of these justifications, standing alone, might have sufficed to defeat the prosecutor's explanation. *See id.*

119. *Id.*

preference for considering all of those steps—most importantly, the intent inquiry and the resulting level of scrutiny—as part of a holistic analysis asking whether government has advanced merely a "frivolous or illegitimate"[120] justification for a pattern of discriminatory behavior. Consider the steps in a standard equal protection case. First, the plaintiff must prove some disparate impact from the government action.[121] Second, the plaintiff must show that the alleged intent (e.g., to classify based on race) made up at least some of the government's motivation.[122] Third, the government can rebut the plaintiff's case by proving that it would have made the same decision even had it lacked that alleged intent.[123] Finally, if intent is proven, the court applies the appropriate level of scrutiny.[124]

By contrast, Justice Stevens' approach in *Hernandez* collapsed all of those steps into one holistic inquiry—into disparate impact, intent, and narrow tailoring.[125] Given this preference for holistic review, it is not surprising that in *Hernandez* Justice Stevens criticized the Court for focusing on the trees, thus missing the forest: "The Court . . . errs in focusing the entire inquiry on the subjective state of mind of the prosecutor."[126] For Justice Stevens, such an inquiry—indeed, the entire inquiry into intent—became a distraction for the *Hernandez* Court: relevant, but merely evidentiary of the ultimate equal protection question.[127] Of course, sequential burden shifting of the sort mandated by *Batson* (and the Court's equal protection jurisprudence more generally)[128] is inherently mediating. Rather than an inquiry into ultimate constitutional meaning, it is, literally, a litigation mechanism. But that is why Justice Stevens attempted to cut through the rigidity of such burden-shifting rules to

120. *Id.* at 377.

121. Palmer v. Thompson, 403 U.S. 217, 224–26 (1971).

122. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265–66 (1977).

123. *Id.* at 270 n.21.

124. *See, e.g.*, Geduldig v. Aiello, 417 U.S. 484, 492–97 (1974) (concluding that a state employee health insurance plan not covering pregnancy health care did not discriminate against women, and thus applying only rational basis scrutiny to the plan).

125. *Hernandez*, 500 U.S. at 375–79 (Stevens, J., dissenting).

126. *Id.* at 378.

127. *Id.*

128. *See Vill. of Arlington Heights*, 429 U.S. at 264–68 (setting forth the steps in equal protection review); *see also Hernandez*, 500 U.S. 352, 376 (Stevens, J., dissenting) (noting the similarities between the *Batson* inquiry and equal protection scrutiny more generally).

ask a (relatively) straightforward question: Once the plaintiff has come forward with evidence that the government has acted in a way that affects one group differently than another, has the government provided an explanation that might "have motivated an impartial legislature"[129] and that was not unlikely, given the actual historical evidence?[130]

Thus, for Justice Stevens, the intent requirement, to the extent it has been understood as mandating an intermediate inquiry into a decision maker's subjective motivation, has distracted the Court's attention from the fundamental equal protection question. In his view, the intent rule, while a potentially useful tool, has hardened into a rigid doctrinal hurdle that has often hindered, rather than assisted, the Court's attempt to give meaning to equal protection's vague, though majestic, command.[131]

3. Heightened Scrutiny

It is the Court's use of heightened scrutiny that has occasioned the best-known expressions of Justice Stevens' dissatisfaction with the Court's equal protection jurisprudence. Indeed, Justice Stevens stated his famous (and succinct) critique of tiered scrutiny—"There is only one Equal Protection Clause"[132]—exclusively in cases where the Court applied some level of heightened scrutiny.[133] In *City of Cleburne v. Cleburne Living Center*[134] he elaborated on his critique

129. U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 181 (1980) (Stevens, J., concurring in the judgment).

130. *Cf.* FCC v. Beach Commc'ns Inc., 508 U.S. 307, 322–23 (1993) (Stevens, J., concurring in the judgment) (casting doubt on the empirical likelihood of the justifications embraced by the Court for the classification).

131. *Cf.* James E. Fleming, *"There Is Only One Equal Protection Clause": An Appreciation of Justice Stevens' Equal Protection Jurisprudence*, 74 FORDHAM L. REV. 2301, 2302 ("Stevens is worried that the Court is forgetting the Constitution and indulging the lawyerly yen to develop a complex doctrinal framework.").

132. Craig v. Boren, 429 U.S. 190, 211 (Stevens, J., concurring).

133. *See* Adarand Constructors v. Pena, 515 U.S. 200, 242–64 (1995) (Stevens, J., dissenting); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 511–18 (1989) (Stevens, J., concurring in part and concurring in the judgment); Karcher v. Daggett, 462 U.S. 725, 744–65 (1983) (Stevens, J., concurring); Craig v. Boren, 429 U.S. 190, 211–14 (1976) (Stevens, J., concurring). This fact is unsurprising, since Justice Stevens' preferred method of equal protection review—an inquiry into the rationality of the legislature's classification decision—is at least linguistically consistent with the Court's rational basis standard, even if in practice it is quite different; *see also supra* Part I.A.3 (discussing these differences).

134. 473 U.S. 432 (1985).

of heightened scrutiny.[135] In *Cleburne* Justice Stevens agreed with the Court in striking down a city's denial of a permit to an organization seeking to establish a group home for mentally retarded persons.[136] However, he rejected the majority's approach that first determined whether the mentally retarded were a suspect class, and then, after concluding that they were not, applied ostensibly rational basis scrutiny.[137] Instead, he offered this critique and alternative approach:

> I have never been persuaded that [the traditional three-tiered scrutiny structure] adequately explain[s] the [Court's] decisional process. . . .
>
> I am inclined to believe that what has become known as the [tiered] analysis of equal protection claims does not describe a completely logical method of deciding cases, but rather is a method the Court has employed to explain decisions that actually apply a single standard in a reasonably consistent fashion. . . . In my own approach to these cases, I have always asked myself whether I could find a "rational basis" for the classification at issue. The term "rational," of course, includes a requirement that an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class. Thus, the word "rational"—for me at least—includes elements of legitimacy and neutrality that must always characterize the performance of the sovereign's duty to govern impartially.[138]

Clearly, in this passage Justice Stevens was tying his review of "suspect" classifications to the general theory of equal protection review he sketched out in *Fritz*.[139] This is unsurprising: since he consistently argued that "there is only one Equal Protection Clause," it makes perfect sense that he would attempt to apply the same

135. *Id.* at 451–55 (Stevens, J., concurring).

136. *Id.*at 454–55.

137. *Id.* 451–54. The majority's deviation from traditional rational basis analysis is well known. *See, e.g.*, Araiza, *supra* note 71, at 539–41 (describing the majority's approach and noting its deviation from traditional rational basis review principles).

138. *Id.* at 451–52 (Stevens, J., concurring) (footnotes omitted) (first internal quotation marks omitted).

139. *See supra* text accompanying notes 27, 31, 34, 41–42, 51, 62, 64.

scrutiny to all classifications—"suspect" or otherwise. The interesting question is how his style of self-described rationality review played out in cases considering classifications the Court's majority called "suspect," and to which it applied heightened scrutiny.

An interesting initial observation is that Justice Stevens' votes in such cases are, at least at first blush, the least predictable of the justices' votes. For example, while liberal justices have consistently voted to strike down sex classifications and uphold race-based affirmative action plans, and conservative justices have consistently voted in the opposite way,[140] Justice Stevens has voted both ways. In considering race-based affirmative action, he has issued stinging critiques,[141] measured criticism,[142] and a welcoming embrace.[143] In considering sex discrimination claims, Justice Stevens has usually voted to strike down sex classifications but has at times deserted his

140. Of course, the idea of "consistency" needs to be approached with care. First, it is an overstatement to say that liberal and conservative justices *always* vote in the ways described in the text. For example, in *United States v. Virginia*, 518 U.S. 515 (1996), Justice Kennedy and Chief Justice Rehnquist joined with the Court's liberals to vote to strike down Virginia Military Institute's sex-discriminatory policy, although it should be noted that the chief justice did so via a separate, narrower opinion. *Id.* at 558–66. Moreover, the chief justice wrote the majority opinion in *Nevada Deptartment of Human Resources v. Hibbs*, 538 U.S. 721 (2003), upholding the Family and Medical Leave Act as appropriate legislation enforcing the sex equality guarantee of the equal protection clause. Second, "liberal" and "conservative" are themselves terms that are perhaps too imprecise to describe precisely the justices' views on sex equality. Most notably, Justice O'Connor, who was usually viewed as a member of the Court's conservative bloc, or at most a swing justice, was among the Court's staunchest advocates of a broad reading of the clause's sex equality guarantee. *See, e.g.*, Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982) (concluding, in an opinion by Justice O'Connor, that equal protection required that laws discriminating on the basis of sex had to show an "exceedingly persuasive justification"); Nguyen v. Immigration & Naturalization Serv., 533 U.S. 53 (2001) (O'Connor, J., dissenting) (criticizing the Court's decision to uphold a statutory preference for the foreign-born children of American-citizen mothers over foreign-born children of American-citizen fathers as inconsistent with the Court's sex equality precedents). Third, and perhaps most importantly, cases that reach the Supreme Court are usually the hardest cases; thus, some division of opinion on the Court is to be expected, and does not necessarily indicate simple dogmatism.

141. *See* Fullilove v. Klutznick, 448 U.S. 448, 534 n.5 (1980) (Stevens, J., dissenting) (comparing race-based set-aside law to Nazi racial purity laws).

142. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 511–12 (1989) (Stevens, J., concurring in part and concurring in the judgment) (explaining that racial set-asides may be appropriate in certain circumstances but not when inadequately justified and over-broad).

143. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 315 (Stevens, J., dissenting) (arguing that a lay-off priority rule preferential to minority teachers was adequately justified by a concern that students have racially diverse role models).

liberal colleagues to vote to uphold them.[144] These results suggest that he was applying a more context-specific approach to these issues—not surprisingly, given his rejection of across-the-board "heightened" scrutiny for entire types of classifications.

Justice Stevens' approach to race-based set-asides is instructive. His first major opinion on this topic, in *Regents of the University of California v. Bakke*,[145] avoided the constitutional issue by resting on his interpretation of Title VI of the Civil Rights Act of 1964.[146] His first major discussion of the constitutional issue came two years later in *Fullilove v. Klutnick*.[147] Tellingly, he began his opinion with the same sort of language about monopoly privileges that ran through his dissent in *Nordlinger*.[148] He then criticized the set-aside law for drawing blunt, purely race-based distinctions without any explanation as to why those distinctions were necessary.[149]

As strident as his criticism was—even to the point of suggesting that the government consult the Nazi race laws for guidance on how to draw the classifications created in the statute[150]—Justice Stevens was careful to note that he was not announcing a per se rule against governmental use of race.[151] He began his detailed analysis of the justifications for the law with the statement that "racial

144. *Compare, e.g.*, Miller v. Albright, 523 U.S. 420 (1998) (writing for the majority, joined by Chief Justice Rehnquist, and rejecting equal protection challenge to federal immigration law granting preference to foreign-born children of American-citizen mothers over foreign-born children of American-citizen fathers), *with id.* at 460–71 (Ginsburg, J., dissenting), *and id.* at 471–90 (Breyer, J., dissenting); *compare Nguyen*, 553 U.S. 53 (joining Justice Kennedy's majority opinion rejecting the equal protection claim the Court did not resolve on the merits in *Miller*), *with id.* at 74 (O'Connor, J., dissenting) (dissenting opinion joined by Justices Souter, Ginsburg, and Breyer); *compare* Lehr v. Robinson, 463 U.S. 248 (1983) (writing for the majority and rejecting equal protection and due process arguments that father of illegitimate child who has not established a relationship with his child should have the power to veto adoption of the child), *with id.* at 268–76 (White, J., dissenting) (disagreeing with the Court on the due process issue, and thus not reaching the equal protection question).

145. 438 U.S. 265 (1978).

146. *Id.* at 408–21 (Stevens, J., dissenting).

147. 448 U.S. 448 (1980).

148. *Compare id.* at 533 (Stevens, J., dissenting) (describing the statute as conferring "monopoly privileges" on the basis of characteristics acquired at birth), *with* Nordlinger v. Hahn, 505 U.S. 1, 29 (1992) (Stevens, J., dissenting) (describing the beneficiaries of Proposition 13 as "squires").

149. 448 U.S. at 533–36 (Stevens, J., dissenting).

150. *Id.* at 534 n.5.

151. *See id.* at 548 ("Unlike Mr. Justice Stewart and Mr. Justice Rehnquist, however, I am not convinced that the Clause contains an absolute prohibition against any statutory classification based on race.").

characteristics may serve to define a group of persons who have suffered a special wrong and who, therefore, are entitled to special reparations."[152] However, his analysis of the set-aside program led him to conclude that its delineation of beneficiaries was too approximate, in light of the program's justifications, to justify the use of race as a classifying tool.[153] In his review of the statute he focused not just on his own estimation of the poor fit between the program's use of race and any legitimate government interest but also on Congress's failure to demonstrate that race was in fact an appropriate classification tool in this context.[154] In examining Congress's actions in this way, he explicitly referred to and relied on the then-current notion of "due process of lawmaking,"[155] which he himself had embraced in an earlier opinion for the Court.[156]

Justice Stevens' opinion in *Fullilove* provides a prism through which we can view his subsequent opinions on racial set-asides and helps explain his otherwise seemingly inconsistent votes. First, his concern with the poor fit between the *Fullilove* statute's race classification and the government's justifications explains his concurrence in *City of Richmond v. J.A. Croson Co.*,[157] in which he agreed with the Court that Richmond's race-based set-aside program was insufficiently precisely drawn, both in terms of its beneficiaries and the parties it burdened.[158] But it also helps explain his otherwise-surprising defense of the federal contracting set-aside in *Adarand*

152. *Id.* at 537.

153. *See id.* at 537–48. Justice Stevens also rejected, as "plainly impermissible," a government interest in using race as a tool to ensure benefits to legislators' constituents. *See id.* at 541–42.

154. *See, e.g.*, *id.* at 538 (noting the lack of legislative history that each racially defined class of beneficiaries was equally entitled to "reparations" from the federal government); *id.* at 545 ("Unless Congress clearly articulates the need and basis for a racial classification, and also tailors the classification to its justification, the Court should not uphold this kind of statute."); *id.* at 548–54 (generally critiquing Congress's failure to deliberate carefully about the need for using a racial classification).

155. *See id.* at 549 n.24 (citing and quoting Hans Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 255 (1976)).

156. *See id.* at 548 n.23 (quoting Hampton v. Mow Sun Wong, 426 U.S. 88, 105 (1976) (concluding, in a majority opinion by Justice Stevens, that it was "appropriate to review the extent to which the [challenged administrative] policy has been given consideration by Congress or the President . . . .")).

157. 448 U.S. 469 (1989).

158. *See id.* at 514–16 (Stevens, J., concurring in part and concurring in the judgment).

Constructors v. Pena.[159] While he contended that the result in *Fullilove* should have led the Court to uphold the federal set-aside,[160] he also argued that the statute should have survived even under the views he expressed in his dissenting opinion.[161] On this latter point he noted that the set-aside challenged in *Adarand* made race neither "the sole criterion of eligibility,"[162] nor a "sufficient qualification."[163] Instead, he understood the statute challenged in *Adarand* as "designed to overcome the social and economic disadvantages that are often associated with racial characteristics."[164]

Justice Stevens' concern in *Fullilove* with the poor fit between the set-aside's racial classification and the government's remedial objectives influenced his subsequent thinking about affirmative action in a second way. In *Croson,* Justice Stevens took an even stronger position than the Court against race-based *legislative* action designed to achieve a remedial goal.[165] He based his position on a conviction that legislative action was likely to be a poor fit for a goal of both providing a remedy to the victims of discrimination and forcing wrongdoers to change their conduct.[166] On this point, he drew a sharp distinction between legislative and judicial action, arguing that the latter was more likely to reflect an appropriately fine-tuned action.[167]

159. 515 U.S. 200 (1995).

160. *Id.* at 259 (Stevens, J., dissenting).

161. *Id.* at 259–64.

162. *Id.* at 259.

163. *Id.* at 260.

164. *Id.* at 261. Further to this point, he observed that the scheme challenged in *Adarand*, unlike the one challenged in *Fullilove*, targeted subcontracts between private firms, which he described as more likely to be based on social relationships, and thus more likely to reflect social segregation. *Id.* By contrast, he observed that the prime, government-let contracts targeted by the *Fullilove* statute should be largely free of such taint. *See id.* ("The 1977 Act [challenged in *Fullilove*] applied entirely to the award of public contracts, an area of the economy in which social relationships should be irrelevant and in which proper supervision of government contracting officers should preclude any discrimination against particular bidders on account of their race."); *see also infra* text accompanying notes 172–76 (discussing Justice Stevens' reliance on the contracting-subcontracting distinction).

165. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 511 n.1 (1989) (Stevens, J., concurring in part and concurring in the judgment) ("In my view the Court's approach to this case gives unwarranted deference to race-based legislative action that purports to serve a purely remedial goal").

166. *See id.* at 511 n.1.

167. *See id.* ("Unless the legislature can identify both the particular victims and the particular perpetrators of past discrimination, which is precisely what a court does when it makes findings

This distinction explains Justice Stevens' otherwise surprising, broad validation of race-based *judicial* action imposed to remedy past discrimination in *United States v. Paradise*.[168] In that case, Justice Stevens based his analysis almost exclusively on *Swann v. Charlotte-Mecklenburg Board of Education*,[169] the seminal case in which the Court upheld broad judicial power to order desegregative remedies in response to proven constitutional violations,[170] citing previous racial set-aside cases only to explain why they were inapposite as precedents.[171]

Indeed, Justice Stevens' disfavoring of legislative remedial action helps explain his analytical approach in *Adarand*. At first blush, the set-aside challenged in *Adarand* would seem to fall on the wrong side of the line Justice Stevens drew between remedial action taken by a legislature and analogous action taken by a court. However, Justice Stevens argued in *Adarand* that the challenged set-aside, "if in part a remedy for past discrimination, is most importantly a forward-looking response to practical problems faced by minority subcontractors."[172] As support for this proposition he relied heavily on the distinction between the *Fullilove* statute's focus on set-asides for contractors dealing directly with the government and the *Adarand* statute's focus on *subcontractors* dealing with contractors.[173] Justice Stevens understood the *Adarand* statute to focus more closely than the *Fullilove* statute on ameliorating the problem of minority entrepreneurs not enjoying the informal

of fact and conclusions of law, a *remedial* justification for race-based legislation will almost certainly sweep too broadly.").

168. 480 U.S. 149, 189–95 (1987) (Stevens, J., concurring).

169. 402 U.S 1 (1971).

170. Of the seventeen paragraphs in Justice Stevens' *Paradise* concurrence, nine consisted of paragraph-long quotations from *Swann*. *See Paradise*, 480 U.S. at 190–94 (Stevens, J., concurring).

171. *See id.* at 193 (citing Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986); Fullilove v. Klutznick, 448 U.S. 448 (1980)). *Cf. Paradise*, 480 U.S. at 166 n.17 (plurality opinion) (citing *Wygant*, *Bakke*, and *Fullilove* as authority for the standard of review appropriate to be applied in *Paradise* itself); *id.* at 187 n.2 (Powell, J., concurring) (citing *Fullilove* as authority for the standard of review); *id.* at 196, 199 (O'Connor, J., dissenting) (citing *Wygant* and *Fullilove* as authority for the standard of review).

172. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 261–62 (1995) (Stevens, J., dissenting).

173. *See id.* at 261.

connections with established white-owned firms.[174] He thus concluded that the goal of encouraging contractors to go beyond their existing list of social and business contacts and to work with new subcontractors constituted not just "a remedy for past discrimination"[175] but "most importantly a forward-looking response to practical problems faced by minority contractors."[176]

One may reasonably wonder if the contractor-subcontractor distinction can bear the weight Justice Stevens placed on it, as relevant not just to the fit issue but also to the question of the nature of the government interests underlying the program. Regardless of one's views on that question, the larger point remains: Justice Stevens took great care to consider the particular government interest offered to justify the race-based action. In particular, he distinguished sharply between legislative uses of race designed to remedy past discrimination and legislative uses of race justified on other (especially future-oriented) grounds.[177] He did not do so simply as a reference point for a one-size-fits-all strict scrutiny review. While he consistently expressed concern about race-based classifications,[178] the different reception he accorded to the race-based actions in *Fullilove*, *Paradise*, *Croson*, and *Adarand* suggest a much more context-specific approach to his scrutiny of government use of race.

Two final examples reinforce this point. In *Wygant v. Jackson Board of Education*,[179] Justice Stevens dissented from the Court's decision striking down a school district's teacher-layoff plan that gave some measure of protection to minority teachers, even if that

174. *Id.* By contrast, he saw the government-contractor preference in *Fullilove* as acting in a situation—the relationship between contractors and the federal government—"in which social relationships should be irrelevant and in which proper supervision of government contracting officers should preclude any discrimination against particular bidders on account of their race." *Id.*

175. *Id.*

176. *Id.* at 261–62.

177. *See, e.g.*, Metro Broad., Inc. v. FCC, 497 U.S. 547, 601 (1990) (Stevens, J., concurring) ("Today the Court squarely rejects the proposition that a governmental decision that rests on a racial classification is never permissible except as a remedy for a past wrong. I endorse this focus on the future benefit, rather that the remedial justification, of such decisions.") (footnote omitted) (citation omitted).

178. *E.g.*, Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 319–20 (1986) (Stevens, J., dissenting) ("We should not lightly approve the government's use of a race-based distinction. History teaches the obvious dangers of such classifications.").

179. 476 U.S. 267 (1986).

meant overruling the results that would have obtained from applying the district's normal, seniority-based layoff plan.[180] Justice Stevens began his opinion with a straightforward statement that rather than relying on a retrospective goal of remedying past discrimination, the government's use of race should have first been tested against its future-regarding interest in educating children by providing them with role models of all races.[181] He called this goal "quite obvious,"[182] "completely sound,"[183] "rational and unquestionably legitimate,"[184] and "a valid public purpose."[185] However, he never called it "compelling," as one might have expected had he been performing traditional strict scrutiny review[186]—or indeed, if one had just read his *Fullilove* comparison of federal race set-aside contracting laws to the Nuremburg Laws.[187] Strikingly, he analogized the harm the white teachers suffered through this race-based layoff scheme to the harm teachers might suffer if the district protected from layoffs their colleagues who specialized in subjects that were in short supply,[188] thereby clearly suggesting, in this context, a constitutional equivalence between layoffs based on race and layoffs based on subject-matter expertise.

Second, in *Metro Broadcasting v. FCC*,[189] Justice Stevens joined the five-justice majority upholding the FCC's preferences for minority owners of radio or broadcast television stations. He also wrote a brief separate concurrence[190] that set forth his views on this issue. Most importantly for our purposes, his concurrence "endorse[d] [the Court's] focus on the future benefit, rather than the

180. *Id.* at 313 (Stevens, J., dissenting).

181. *Id.*

182. *Id.* at 315.

183. *Id.*

184. *Id.* at 315–16.

185. *Id.* at 320.

186. *Cf. id.* at 274, 278 (majority opinion) (using the word "compelling" to describe the interest that the government needs to have shown was furthered); *id.* at 285, 286, 288, 292 (O'Connor, J., concurring in part and concurring in the judgment) (same); *id.* at 296 (Marshall, J., dissenting) (noting the "compelling factual setting in which this case evidently has arisen").

187. *See* Fullilove v. Klutznick, 448 U.S. 448, 532–36 (Stevens, J., dissenting).

188. *See Wygant*, 476 U.S. at 319 (Stevens, J., dissenting).

189. 497 U.S. 547 (1990), *overruled by* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

190. *Id.* at 601–02 (Stevens, J., concurring).

remedial justifications," of government use of race.[191] He found the government's interest in broadcast diversity "unquestionably legitimate,"[192] and he compared it to other interests that he considered sufficient to justify government use of race: the interest in an "integrated police force" that he discussed in *Wygant*,[193] "diversity in the composition of a public school faculty—the subject of *Wygant*, in which he voted to uphold the government action,[194] or "diversity in the student body of a professional school," the issue in *Bakke*."[195] Here, too, as in *Wygant*, the government interest was important not simply as a reference point for the strict scrutiny inquiry, but also as meaningful support for the constitutionality of the government action considered against equal protection's core, unmediated command that government act only to further legitimate public interests.

In sum, then, the relatively more relaxed—though still vigilant[196]—review Justice Stevens performed in *Wygant* and (implicitly) in *Metro Broadcasting* stands in sharp contrast to his skepticism about race-based legislative action based on a remedial rationale.[197] It suggests that, for Justice Stevens, the government interest was much more than an input into a formal scrutiny standard. Rather, for him, the interest stood on its own as either inherently unlikely to provide a sufficiently tight fit with government use of race as a classifying tool or as an interest that justified any reasonable government use of race.[198]

This approach corresponds to what is probably most widely known about Justice Stevens' race jurisprudence: his willingness to

191. *Id.* at 601.

192. *Id.*

193. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 314 (1986) (Stevens, J., dissenting).

194. *Id.* at 313–20.

195. Here, in *Metro Broadcasting, Inc.*, Justice Stevens cited Justice Powell's opinion in *Bakke*. *See* Metro Broad., Inc. v. FCC, 497 U.S. 547, 602 n.6 (1990) (Stevens, J., concurring), *overruled by* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

196. *See Wygant*, 476 U.S. at 319–20 (Stevens, J., dissenting) ("We should not lightly approve the government's use of a race-based distinction. History teaches the obvious dangers of such classifications.").

197. *See* City of Richmond v. J. A. Croson Co., 488 U.S. 469, 511 n.1 (1989).

198. *E.g.*, *Adarand*, 515 U.S. at 261–62 (Stevens, J., dissenting) ("Given [the difficulties minority subcontractors might have in establishing informal connections with contracting firms], Congress could reasonably find that a minority subcontractor is less likely to receive favors from the entrenched businesspersons who award subcontracts only to people with whom . . . they have an existing relationship. This program, then, . . . is most importantly a forward-looking response to practical problems faced by minority subcontractors.").

distinguish between benign and invidious race classifications without the use of mediating tools such as strict scrutiny.[199] This willingness—indeed, the obligation—to engage in such an inquiry follows naturally from Justice Stevens' insistence that courts apply a single "reasonableness" standard to equal protection claims.[200] Such a unitary standard, unmediated by a particular tier of review, requires a judge to make explicitly substantive judgments about the invidiousness of classifications, as opposed to reaching such judgments as a conclusion to be drawn from the outcome of a particular level of tiered review.[201] This difference between the Court's standard approach to equal protection and Justice Stevens' approach is hidden in the rational basis cases, since both approaches ostensibly ask the same question—whether the classification is rational.[202] However, it is unmasked—"smoked out,"[203] if you will—in cases in which the Court employs heightened scrutiny. Ultimately, since Justice Stevens argued that there is one equal protection standard—rationality—he had to consider whether particular uses of race in the affirmative action cases were reasonable on their own merits, rather than separating the wheat from the chaff via the tool of strict scrutiny. In other words, he had to determine whether a

199. *Compare, e.g.*, *J.A. Croson Co.*, 488 U.S. at 493 ("Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool."), *with Adarand*, 515 U.S. at 245 (Stevens, J., dissenting) ("The consistency that the Court espouses [by requiring strict scrutiny of all government uses of race] would disregard the difference between a 'No Trespassing' sign and a welcome mat.").

200. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., Inc. 473 U.S. 432, 452 (Stevens, J., concurring) ("Thus, the word 'rational'—for me at least—includes elements of legitimacy and neutrality that must always characterize the performance of the sovereign's duty to govern impartially.").

201. *See, e.g.*, Fleming, *supra* note 131, at 2302 ("Stevens is admonishing that in elaborating complex doctrinal frameworks, the Supreme Court should not lose sight of its obligation to make normative judgments about the meaning of our constitutional commitments."). *But see J.A. Croson Co.*, 488 U.S. at 493 ("Indeed, the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen 'fit' this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.").

202. Of course, the way the two approaches get to that conclusion is quite different, as explained earlier in this Article, *supra* text accompanying notes 30–75.

203. *See J.A. Croson Co.*, 488 U.S. at 493.

particular use of race in fact constituted a "No Trespassing" sign or a welcome mat.[204]

This is no mean feat. In the race context, Justice Stevens himself recognized the price that affirmative action beneficiaries pay in terms of stigma.[205] When pressed on this point by Justice Thomas in *Adarand*, Justice Stevens was forced into conclusory assertions about the extent of stigma created by particular affirmative action programs.[206] In his defense, surely there is much common sense in his refusal "to equate the many well-meaning and intelligent lawmakers and their constituents—whether members of majority or minority races—who have supported affirmative action over the years, to segregationists and bigots."[207] Still, his approach's consistent demand for such substantive judgments by courts puts significant stress on their credibility as impartial arbiters of neutral constitutional commands, such as the command to govern impartially.

B. The First Amendment

Justice Stevens has expressed similar skepticism about rigid rules in the First Amendment area. First Amendment jurisprudence is largely a jurisprudence of rules. For example, court-made rules distinguish between speech as protected and unprotected;[208] laws as content-based and content-neutral;[209] forums as public, non-public,[210] and partially public; and libelous publications as addressing matters of public interest and matters of private concern.[211] These distinctions in turn yield doctrinal rules, such as the strict scrutiny required for content-based restrictions on speech made in a public forum;[212] the

204. *See Adarand*, 515 U.S. at 245 (Stevens, J., dissenting); *see also* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 316 (1986) (Stevens, J., dissenting) ("There is . . . a critical difference between a decision to *exclude* a member of a minority race because of his or her skin color and a decision to *include* more members of the minority in a school faculty for that reason.").

205. *See, e.g.*, Fullilove v. Klutznick, 448 U.S. 448, 547–48 (1980) (Stevens, J., dissenting).

206. *See Adarand,* 515 U.S. at 247 n.5 (Stevens, J., dissenting).

207. *Id.* at 248 n.5.

208. *E.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

209. *E.g.*, Hill v. Colorado, 530 U.S. 703 (2000).

210. *E.g.*, Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983).

211. *E.g.*, Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985).

212. *See, e.g.*, Burson v. Freeman, 504 U.S. 191 (1992) (plurality opinion) (upholding a state law limiting electioneering speech near polling places after concluding that the law satisfied strict scrutiny).

"time, place and manner" test for content-neutral restrictions on speech made in a public forum;[213] and the varying liability standards required for libel plaintiffs to recover, depending on the nature of the libelous speech, the type of party libeled, and the type of damages sought.[214]

These rules do not self-evidently turn on the language of the First Amendment. It is true enough that "the freedom of speech" the Amendment protects might be understood to refer to a particular set of immunities.[215] For example, Justice Thomas has argued that "the freedom of speech" was never understood to protect the speech of students in public schools.[216] Similarly, the famous *Chaplinsky v. New Hampshire*[217] categories of unprotected speech[218] can be understood as identifying "speech" that is not within the First Amendment's concept of "the freedom of speech." Thus, some of the rules identified above may, at least at the highest level of generality, be understandable as textually grounded, or otherwise grounded in the actual meaning of the constitutional text.[219] However, subsidiary rules—for example, the "actual malice" standard for public official libel plaintiffs alleging a libel on a matter of public interest—cannot be understood in such a way.[220] They are mediating rules, designed to provide decisional guideposts for judges to help them reach results

213. *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781 (1989) (upholding an ordinance requiring bands playing in a city-owned bandshell to allow city sound engineers to regulate volume levels).

214. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (distinguishing between public-figure and non-public-figure plaintiffs and between the type of damages sought, for purposes of libel liability standards required by the First Amendment).

215. *See, e.g.*, Stevens, *supra* note 5, at 1296 ("I emphasize the word 'the' as used in the term 'the freedom of speech' because the definite article suggests that the draftsmen intended to immunize a previously identified category or subset of speech.").

216. *See* Morse v. Frederick, 551 U.S. 393, 410, 410–11 (2007) (Thomas, J., concurring); *see also* Brown v. Entm't Merchs.' Ass'n, 131 S. Ct. 2729, 2751 (2011) (Thomas, J., dissenting) ("The practices and beliefs of the founding generation establish that 'the freedom of speech,' as originally understood, does not include a right to speak to minors (or a right of minors to access speech) without going through the minors' parents or guardians.").

217. 315 U.S. 568 72 (1942).

218. *Id.* at 571–72.

219. *But see* Stevens, *supra* note 5, at 1297 (stating that "[t]his interpretation, though perhaps plausible as an historical matter, cannot fully capture the meaning of the First Amendment read as a whole" and going on to identify several broader principles implicit in the First Amendment's protection of "the freedom of speech").

220. *See* Sullivan, *supra* note 1, at 76–77 (describing the difficulties of "originalism" when the Constitution's text is unclear on an issue).

consistent with the underlying constitutional command. In this sense, they can be understood as roughly analogous to the tiered scrutiny structure of equal protection law, with the caveat that they are less self-consciously created as mediating rules.[221]

1. Justice Stevens' Skepticism About First Amendment Rules

Justice Stevens has expressed dissatisfaction with many of these rules. Most fundamentally, he has also questioned the primacy of the content-neutrality requirement. In an address he stated that it is "beyond dispute" that "the Court routinely departs from the purported rule against content regulation."[222] In fairness to the Court, the "rule" against content-based regulation is not a per se rule[223] but rather a requirement that content-based speech restrictions must satisfy strict scrutiny in order to survive.[224] Still, his general point is well taken: loose, unexplained invocations of a presumption against content-based speech restrictions collide with the reality that First Amendment law allows many such restrictions. For example, the Court's First Amendment jurisprudence allows states to distinguish between liability standards for libel plaintiffs based on the speech's content as addressing a matter of public or private concern.[225] The Court also explicitly cast child pornography laws as valid content-

221. *See, e.g.*, Araiza, *supra* note 11, at 480–82 (explaining the mediating role played by the tiered scrutiny structure).

222. Stevens, *supra* note 5, at 1304; *see also* R.A.V. v. City of St. Paul, 505 U.S. 377, 420 (1992) (Stevens, J., concurring in the judgment) ("[C]ontent-based distinctions, far from being presumptively invalid, are an inevitable and indispensable aspect of a coherent understanding of the First Amendment.").

223. *But see* Simon & Schuster, Inc., v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 124–25 (1991) (Kennedy, J., concurring in the judgment) (expressing concern with the Court's use of strict scrutiny to evaluate content-based speech distinctions, and suggesting that they should be per se unconstitutional). *See also* Citizens United v. FEC, 130 S. Ct. 876, 898 (2010) (noting Justice Kennedy's view).

224. Indeed, one of the cases Justice Stevens cited as authority for his statement was one in which, at least for a plurality, the content-based restriction survived because it satisfied strict scrutiny. *See* Stevens, *supra* note 5, at 1304 (citing Burson v. Freeman, 504 U.S. 191 (1992) (upholding a state restriction on vote solicitation near polling places)).

225. *Compare* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 284–85 (1964) (establishing an actual malice First Amendment standard for public officials to recover damages for libel) *with* Dun & Bradstreet Inc., v. Greenmoss Builders Inc., 472 U.S. 749,760–64 (1985) (establishing lesser constitutional protection for libelous speech concerning private citizens and matters not of a public concern).

based restrictions on speech.[226] It is not difficult to find additional examples.[227]

Justice Stevens has also expressed concern about other First Amendment rules. He has critiqued other justices' characterizations of speech as being of one type or another.[228] He has also questioned the utility of the "public forum" label, contending that it often obfuscates rather than furthers First Amendment analysis and at any rate cannot account for the results the Court has reached.[229] He has explicitly embraced the proposition that the First Amendment creates a rough hierarchy of speech rather than a binary that rigidly classifies speech as either fully protected or lacking any First Amendment protection at all.[230]

226. *See, e.g.*, New York v. Ferber, 458 U.S. 747, 763 (1982) (noting libel law in the context of a discussion of content-based speech restrictions allowed by the Court); *see also* Stevens, *supra* note 5, at 1305 (noting libel law in the context of a discussion of content-based speech restrictions allowed by the Court). *But see* United States v. Stevens, 130 S. Ct. 1577, 1585–86 (2010) (explaining *Ferber* as resting on the ground that the production of child pornography was intimately related to the child abuse inherent in producing it). *But see id.* at 1592, 1599 (Alito, J., dissenting) (arguing that the low value of child pornography was part of the reason the *Ferber* Court upheld the state law banning it).

227. *See, e.g.*, *R.A.V.*, 505 U.S. at 420–22 (Stevens, J., concurring in the judgment) (providing examples).

228. *See, e.g.*, Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 579 (Stevens, J., concurring) (arguing that the speech at issue was not commercial speech, and thus the speech restriction at issue was inappropriately analyzed as a restriction on commercial speech).

229. *See* Stevens, *supra* note 5, at 1302–03.

230. *See* Young v. Am. Mini Theaters, Inc., 427 U.S. 50, 70 (1976) (plurality opinion) ("[E]ven 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 untrammeled political debate[.]"); *see also R.A.V.*, 505 U.S. at 422 (1992) (Stevens, J., concurring in the judgment) ("Our First Amendment decisions have created a rough hierarchy in the constitutional protection of speech. Core political speech occupies the highest, most protected position; commercial speech and non-obscene, sexually explicit speech are regarded as a sort of second-class expression; obscenity and fighting words receive the least protection of all."); FCC v. League of Women Voters of Cal., 468 U.S. 364, 412 n.4 (1984) (Stevens, J., dissenting) (describing as "obvious" the proposition "that some speech is more worthy than other speech"); FCC v. Pacifica Found., 438 U.S. 726, 746–48 (1978) (plurality opinion) (concluding that offensive speech, while protected speech, may nevertheless be entitled to less than full constitutional protection depending on the context in which it is made); Smith v. United States, 431 U.S. 291, 311–12 (1977) (Stevens, J., dissenting) (describing the erotic material whose distribution formed the basis for a federal obscenity prosecution as having "at least a modicum of First Amendment protection").

2. Justice Stevens' First Amendment Principles

If these rules do not provide a reliable guidance for courts, what does? In Justice Stevens' view, it is the First Amendment's underlying principles. He has praised cases that "depart from the prohibition on content-based regulation without undermining its central goals . . . by supplementing, if not replacing, the black-letter rule with a sensitivity to fact and context that allows for the advancement of the principles underlying the protection of free speech."[231]

For Justice Stevens, these principles include the idea that government may not suppress speech because it disagrees with or wishes to suppress the viewpoint that speech takes or because it wishes to keep the public uninformed.[232] Thus, for example, in *FCC v. Pacifica Foundation*,[233] he observed that the Constitution might have prohibited the FCC from penalizing the broadcaster for airing a comedy monologue that used offensive language if the agency had characterized the language as offensive because of its political or social commentary.[234] Conversely, Justice Stevens has argued that government has a strong First Amendment–based interest in restricting the speech of government-subsidized speakers in order to prevent the possibility that those subsidies to speakers will pressure them into serving as the government's propaganda mouthpieces.[235]

231. Stevens, *supra* note 5, at 1304–05; *see also, e.g.*, *Pacifica*, 438 U.S. at 748–51 (concluding that the particular circumstances of the broadcast medium justify heavier restrictions on the use of offensive language than might be the case in other contexts). In *Pacifica* Justice Stevens approved of the FCC's use of a nuisance rationale to justify penalizing the broadcaster for airing an offensive monologue during daylight hours when children might be listening. Quoting Justice Sutherland's 1926 opinion upholding zoning laws, he observed that "a 'nuisance may be merely a right thing in the wrong place,—like a pig in the parlor instead of the barnyard.'" *Id.* at 750 (quoting Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926)). By contrast, he made it clear that the constitutional issue would have been more troubling had the FCC sought to impose the fine because of disagreement with the broadcast's viewpoint about offensive speech. *See* Stevens, *supra* note 5, at 1303–04.

232. *See, e.g.*, *League of Women Voters*, 468 U.S. at 414 (Stevens, J., dissenting) (describing as "fundamental" the principle "that the citizen's right to speak may not be conditioned upon the sovereign's agreement with what the speaker intends to say").

233. *Pacifica*, 438 U.S. 726 (1978).

234. *Id.* at 745–46 (plurality opinion).

235. *See League of Women Voters*, 468 U.S. at 414–15 (Stevens, J., dissenting) ("The statute [prohibiting public broadcasters from editorializing] does not violate the fundamental principle that the citizen's right to speak may not be conditioned upon the sovereign's agreement with what the speaker intends to say. On the contrary, the statute was enacted in order to protect that very principle—to avoid the risk that some speakers will be rewarded or penalized for saying things

Similarly, in *44 Liquormart, Inc. v. Rhode Island*[236] his opinion distanced itself from a mechanical application of the test generally used to evaluate commercial speech claims from *Central Hudson Gas & Electric Corp. v. Public Service Commission*, in favor of an approach that rested on what he viewed as fundamental First Amendment principles. He started his analysis of commercial speech restrictions with the common law, drawing from it (as well as from early constitutional commercial speech cases) a principle that the doctrine's goal was to "serve[] the consumers' interest in the receipt of accurate information in the commercial market by prohibiting fraudulent and misleading advertising."[237] He read the Court's seminal commercial speech case, *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*,[238] as reflecting "the conclusion that the same interest that supports regulation of potentially misleading advertising, namely, the public's interest in receiving accurate commercial information, also supports an interpretation of the First Amendment that provides constitutional protection for the dissemination of accurate and non-misleading commercial messages."[239] Thus, Justice Stevens laid out the rationales for the Court's commercial speech doctrine in a way that explained both its strict limits on paternalistic speech regulation and its exception for restrictions on misleading speech.[240]

Justice Stevens' explanation of the Court's commercial speech doctrine distantly echoes his approach to race-based government action. In those equal protection cases he eschewed reliance on a rigid heightened standard of review in favor of applying a single equal protection standard to the various contexts. In particular, in

that appeal to—or are offensive to—the sovereign. The interests the statute is designed to protect are interests that underlie the First Amendment itself.")

236. 517 U.S. 484 (1996).

237. *Id.* at 496.

238. 425 U.S. 748 (1976).

239. *44 Liquormart*, 517 U.S. at 497.

240. *See also* United States v. Edge Broad. Co., 509 U.S. 418, 439 (1993) (Stevens, J., dissenting) ("*Bigelow* [*v. Virginia*, 421 U.S. 809 (1975), a precursor case to *Virginia Pharmacy*] . . . is about paternalism").

applying that single standard Justice Stevens considered carefully the rationales offered by the government.[241]

His approach in the commercial speech cases was analogous. While formal commercial speech doctrine—the *Central Hudson* test—builds in a distinction between restrictions on misleading speech and restrictions on other speech,[242] Justice Stevens did not simply apply the doctrinal test. Instead, he demonstrated how the doctrine was based on longstanding legal principles that harmonized both the doctrine's restrictions on government action and its exceptions. Indeed, in *44 Liquormart* he employed his anti-paternalism principle to ratchet up the scrutiny the Court gave to government restrictions on non-misleading commercial speech, a fact noted by other justices in that case.[243] Thus, in *44 Liquormart* Justice Stevens did not simply mechanically apply an established scrutiny standard. Rather, as with his approach to equal protection, he applied an approach animated by an underlying principle he perceived in the constitutional command.

In addition, as commentators have noted, Justice Stevens has viewed the First Amendment as a vehicle for ensuring that marginalized voices are not excluded from discourse.[244] In justifying the decision to accord full First Amendment protection to speech on the Internet in *Reno v. ACLU*,[245] he described that medium as a "vast democratic forum[]"[246] rather than simply concluding that, as a privately owned communications resource, it received full First Amendment protection. In *Watchtower Bible & Tract Society v. Village of Stratton*,[247] a case dealing with an ordinance restricting door-to-door communication, he led off not with a doctrinaire characterization of the forum or the ordinance's content neutrality

241. *See, e.g.*, *supra* text accompanying notes 172–76 (explaining how Justice Stevens distinguished between remedial and forward-looking goals in race-based affirmative action plans).

242. *See* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 566 (1980).

243. *See id.* at 528, 531–32 (O'Connor, J., concurring in the judgment); *see also id.* at 518 (Scalia, J. concurring in the judgment) (noting and expressing agreement with Justice Stevens' strong aversion to speech restrictions justified by government paternalism).

244. *See, e.g.*, Gregory Magarian, *The Pragmatic Populism of Justice Stevens' Free Speech Jurisprudence*, 74 FORDHAM L. REV. 2201, 2201–02 (2006).

245. Reno v. ACLU, 521 U.S. 844 (1997).

246. *Id.* at 868.

247. 536 U.S. 150 (2002).

but rather with a discussion of the cases from the 1930s and 1940s that protected Jehovah's Witnesses' speech rights.[248] While door-to-door communications may seem a century and a world away from speech on the Internet, they share the characteristic of allowing broad participation without regard to economic resources. Justice Stevens' protection of those speakers—and more importantly, the tenor of his justifications for that protection—illustrates yet another principle that is not easily encapsulated in rigid rules such as public forum doctrine[249] or the content-neutrality rule.[250]

Many of these themes came together in Justice Stevens' concurring opinion in *R.A.V. v. City of St. Paul*.[251] *R.A.V.* involved a St. Paul ordinance that criminalized the placement on public or private property of objects or symbols, including a burning cross, "which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender."[252] Several juveniles were charged with violating this provision when they placed a homemade cross in a black family's yard and lit it on fire.

The Court unanimously struck down the law, but divided badly in its reasoning. Justice Scalia, writing for five justices, condemned the law as a content- and viewpoint-based restriction on speech. He assumed that the law merely banned "fighting words," which enjoy no constitutional protection.[253] However, he concluded that even laws banning such unprotected speech were subject to the content-neutrality requirement.[254] Applying strict scrutiny, he concluded that the law had to be struck down.[255]

248. *Id.* at 160–64; *see also id.* at 161 ("Although our past cases involving Jehovah's Witnesses . . . do not directly control the question we confront today, they provide both a historical and analytical backdrop for consideration of petitioners' First Amendment claim.").

249. *See, e.g.*, United States Postal Serv. v. Council of Greenburg Civic Ass'ns, 453 U.S. 114, 152–55 (1981) (Stevens, J., dissenting) (eschewing reliance on the forum status of a mailbox when considering a federal law prohibiting the depositing of unstamped letters in mailboxes, and considering instead the extent to which the law served legitimate government interests and prevented low-cost communication between neighbors).

250. Professor Magarian has also explained how this same impulse has affected Justice Stevens' approach to minor parties' access to the ballot. *See* Magarian, *supra* note 244, at 2221–25.

251. 505 U.S. 377 (1992).

252. *Id.* at 380 (quoting St. Paul, Minn., Legis. Code § 292.02).

253. *Id.* at 391.

254. *Id.*

255. *Id.* at 394–96.

Justice White, writing for the remaining four justices (including Justice Stevens), agreed that the law was unconstitutional. But he based his decision on his conclusion that the law was overbroad because it criminalized not just fighting words but protected speech as well.[256] In a part of Justice White's opinion that Justice Stevens declined to join, Justice White criticized Justice Scalia's application of the content-neutrality requirement to government restriction of unprotected speech. In Justice White's view, the status of certain speech as outside the First Amendment's protection meant that government had a free hand in regulating it.[257]

Justice Stevens took issue with both approaches.[258] First, he criticized the rigidity of the majority's content-neutrality analysis. He argued that the presumptive ban on content-based speech restrictions did not reflect the reality of the Court's jurisprudence, which he characterized as reflecting widespread recognition that content is a valid basis for classifying speech restrictions as valid or invalid.[259]

However, at the same time he also took issue with Justice White's view that if the ordinance had banned only constitutionally unprotected "fighting words," the city would have enjoyed complete latitude to pick and choose which fighting words to ban.[260] In his view, Justice White's "categorical approach"[261] was just as inappropriately rigid as Justice Scalia's presumption of unconstitutionality for any content-based restriction. He summed up his disagreement as follows: "Unlike the Court, I do not believe that all content-based regulations are equally infirm and presumptively invalid; unlike Justice White, I do not believe that fighting words are wholly unprotected by the First Amendment."[262]

Thus, Justice Stevens agreed that fighting words enjoyed lesser constitutional protection but did so by placing them along a continuum of protection, rather than as part of a binary

256. *Id.* at 411, 414 (White, J., concurring).

257. *Id.* at 400, 403.

258. *Id.* at 417 (Stevens, J., concurring).

259. *Id.* at 419–22.

260. *Compare id.* at 426–28 (Justice Stevens' explanation of the shortfalls of the categorical approach), *with id.* at 400–01 (White, J., concurring) (Justice White's explanation of why the categorical approach should apply in this case).

261. *Id.* at 426 (Stevens, J., concurring).

262. *Id.* at 428.

distinguishing between fully protected and wholly unprotected speech. More generally, he argued that factors such as the content-based nature of the restriction, the forum in which the speech took place, and the definitions of certain types of speech (e.g., obscenity) were all sufficiently murky that a categorical approach based on those criteria "fits poorly with the complex reality of expression."[263]

In evaluating the claim before him, he found a number of factors to be relevant: the relatively unprotected nature of the speech,[264] its character as expressive conduct (cross-burning) rather than pure speech,[265] and the regulation's viewpoint-neutral character, which indicated that the ban did not reflect a government attempt to skew public debate.[266] In his view, these factors would have rendered the St. Paul ordinance constitutional had it in fact been confined to fighting words.[267] In its self-conscious consideration of a variety of factors and skepticism about categorical rules,[268] Justice Stevens' opinion in *R.A.V.* reflected his general approach to the First Amendment.

II. JUSTICE STEVENS' FINAL TERM: RULES AND STANDARDS IN THE FIRST AMENDMENT

Justice Stevens' last term on the Court gave him a final opportunity to reflect on the relative appropriateness of rules and standards in First Amendment law. In two cases, *Citizens United v. Federal Election Commission* and *Holder v. Humanitarian Law Project*, Justice Stevens demonstrated, through his votes as well as his pen, that he remained skeptical of rigid rules.

A. Citizens United v. FEC

In *Citizens United* the Court struck down the part of the Bipartisan Campaign Reform Act of 2002[269] (BCRA) that limited

263. *Id.* at 426.

264. *Id.* 432.

265. *Id.*

266. *Id.* at 434–35. Indeed, Justice Stevens argued that the St. Paul ordinance was not even content-based, as it targeted speech not based on its content, but on the harms it caused. *Id.* at 433–34.

267. *See id.* at 393–94 (majority opinion); *id.* at 411 (White, J., concurring); *id.* at 436 (Stevens, J., concurring).

268. *See id.* at 428 (Stevens, J., concurring).

269. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified in

corporations' and unions' rights to spend general treasury funds to pay for speech advocating a federal political candidate's election or defeat.[270] Justice Kennedy's opinion for the five-justice majority was bold and aggressive. He rejected the option of deciding in favor of the speaker on narrower grounds,[271] in favor of an approach that required him to revisit and overrule two cases partially or completely, including one decided just seven years before.[272] In evaluating the speaker's claim Justice Kennedy noted his own view that restrictions on political speech were per se unconstitutional before applying the more generally accepted rule that such content-based restrictions merit strict scrutiny.[273] He also noted that BCRA's singling out of corporations and unions constituted an identity-based restriction on speech, which he described as "prohibited," except in the limited case in which such restrictions were necessary to allow "governmental entities to perform their functions."[274]

Justice Kennedy's analysis thus reflected stringent, nearly categorical limits on government's ability to restrict speech. As I have elsewhere described his opinion, Justice Kennedy

> weaved his way through pre-*Buckley*[275] precedent that appeared to allow such identity-based restrictions,[276] explained away *Buckley*'s failure to strike down an identity-

scattered sections of 2, 18, 28, 36, and 47 U.S.C.).

270. *Citizens United*, 130 S. Ct. at 917. In particular, BCRA, 2 U.S.C. § 441(b) (2006), prohibited corporations and unions from using general treasury funds to air ads in the immediate pre-election period that either endorsed or attacked a particular candidate or constituted "electioneering communications." *Id.* at 887 (explaining BCRA's restrictions).

271. *See id.* at 888–92 (explaining the Court's rationale for refusing to consider the parties' arguments for deciding the case on narrow bases).

272. *Id.* at 896–914 (discussing and overruling, in whole or in part, previous Supreme Court cases *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) and *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003)).

273. *See id.* at 898 ("While it might be maintained that political speech simply cannot be banned or restricted as a categorical matter, see [Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 150, 124 (1991) (Kennedy, J., concurring in the judgment)], the quoted language from [*Wisconsin Right to Life v. Federal Election Commission*, 151 U.S. 449 (2007), requiring strict scrutiny of such restrictions] provides a sufficient framework for protecting the relevant First Amendment interests in this case. We shall employ it here.").

274. *Id.* at 899 (citing cases dealing with speech by students, prisoners, military personnel, and federal employees).

275. Buckley v. Valeo, 424 U.S. 1 (1976) (Supreme Court's first seminal case on campaign finance reform).

276. *See Citizens United*, 130 S. Ct. at 899–901 (discussing previous restrictions on corporate and union political contributions).

> based speech restriction in the law it otherwise exhaustively reviewed,[277] minimized or ignored cases between *Bellotti*[278] and *Austin*[279] that upheld identity-based restrictions on political speech,[280] severely criticized the rationales in *Austin* that implied the appropriateness of identity-based restrictions,[281] and rejected the argument that an interest in fighting government corruption or (in the case of corporate restrictions) protecting dissenting shareholders could justify limits on corporate or union speech.[282][283]

Justice Kennedy's skeptical attitude toward identity- and content-based discrimination also led him to refuse to defer to congressional determinations about the importance of these regulations in ensuring a corruption-free electoral system.[284] Such refusals to defer are part of the normal strict scrutiny standard. While at times the Court has conceded, even in the First Amendment area, that deference to Congress's predictive judgments is warranted in areas of complex policymaking,[285] this recognition has existed in substantial tension with the Court's repeated statements that protection of First Amendment rights requires careful scrutiny of the legislature's findings.[286]

277. *See id.* at 902 ("*Buckley* did not consider § 610's separate ban on corporate and union independent expenditures . . . . Had § 610 been challenged in the wake of *Buckley*, however, it could not have been squared with the reasoning and analysis of that precedent.").

278. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978).

279. Austin v. Mich. Chamber of Commerce, 494 U.S. 652 (1990).

280. *See Citizens United*, 130 S. Ct. at 903 (transitioning directly from *Bellotti* to *Austin*, without considering cases such as *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986), and *FEC v. National Right to Work Committee*, 459 U.S. 197 (1982), that upheld identity-based restrictions).

281. *See Citizens United*, 130 S. Ct. at 904–08.

282. *See id.* at 908–11.

283. William D. Araiza, *Citizens United, Stevens and Humanitarian Law Project: First Amendment Rules and Standards in Three Acts*, 40 STETSON L. REV. 821, 825 (2011) (footnotes in original).

284. *Citizens United*, 130 S. Ct. at 911.

285. *See, e.g.*, Turner Broad. Sys. v. FCC, 520 U.S. 180, 195 (1997) (emphasizing deference to Congress for regulation of the cable television industry); Turner Broad. Sys. v. FCC, 512 U.S. 622, 665 (1994) (same); *see also* Columbia Broad. Sys. v. Democratic Nat. Comm., 412 U.S. 94, 103 (1972) (emphasizing deference to Congress for regulation of the radio broadcast industry).

286. *See, e.g.*, Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2731, 2739 (2010) (Breyer, J., dissenting) (citing cases).

Justice Kennedy did not explicitly engage the deference question. However, he did strongly suggest that such deference would be inappropriate:

> When Congress finds that a problem exists, we must give that finding due deference; but Congress may not choose an unconstitutional remedy . . . . We must give weight to attempts by Congress to seek to dispel either the appearance or the reality of [corrupting] influences. The remedies enacted by law, however, must comply with the First Amendment; and, it is our tradition that more speech, not less, is the governing rule.[287]

While Justice Kennedy did not explicitly engage this question, at oral argument Justice Scalia, another member of the *Citizens United* majority, did. He repeated the view that he had expressed in prior writing that campaign finance restrictions generally operated to the benefit of incumbents, who therefore should not be trusted to make findings regarding the necessity for such regulations.[288]

Justice Stevens wrote a long and detailed dissent for four justices.[289] For our purposes, the most notable part of his opinion was his sharp critique of Justice Kennedy's categorical analysis. He criticized as a "glittering generality" Justice Kennedy's statement that the First Amendment prohibited identity-based distinctions between speakers.[290] He provided a long list of cases in which the Court had upheld such distinctions and challenged Justice Kennedy's explanation that they could be distinguished as cases in which the government was in a managerial or custodial relationship with the speakers.[291]

287. *Citizens United*, 130 S. Ct. at 911 (alteration added).

288. *See* Transcript of Oral Argument at 50–51, *Citizens United*, 130 S. Ct. 876 (No. 08-205). As Justice Stevens noted in his dissent, both Justice Kennedy and Justice Scalia had expressed this view in their dissenting opinions in *McConnell v. FEC*, 540 U.S. 93 (2003), one of the opinions partially overruled by *Citizens United*. *See Citizens United*, 130 S. Ct. at 969 (Stevens, J., dissenting) (citing *McConnell*, 540 U.S. at 249–50, 260–63 (Scalia, J., concurring in part and dissenting in part) and *McConnell*, 540 U.S. at 306 (Kennedy, J., concurring in the judgment in part and dissenting in part)).

289. *See Citizens United*, 130 S. Ct. at 929 (Stevens, J., concurring in part and dissenting in part).

290. *Id.* at 930.

291. *See id.* at 945–48.

Justice Stevens also engaged the deference point.[292] He criticized as "airy speculation" the idea that campaign finance regulation inherently favored incumbents.[293] He recognized the risk that such regulation might be motivated by legislators' desire to insulate themselves from challengers.[294] However, consistent with his distrust of categorical rules and the practices (such as refusals to defer) that accompany them, he rejected a skepticism based on such non-empirical speculation in favor of a "conscientious policing for impermissibly anticompetitive motive or effect in a sensitive First Amendment context."[295]

Together, the justices' disagreements on these two issues—the presumptive unconstitutionality of content- and identity-based speech distinctions and the deference to legislative judgments supporting those distinctions—throw into sharp relief Justice Stevens' overall approach to the First Amendment. He rejected a rigid embrace of the rule against content- and identity-based distinctions because he found that rule to be inconsistent with the Court's precedent.[296] Instead, he insisted on an inquiry into whether this *particular* distinction promoted or impeded a core free speech value derived from the First Amendment itself.[297] His rejection of such categorical rules then led him to reject the Court's skeptical view of Congress's determination of the need for campaign finance regulation.[298] Still, consistent with his refusal to apply rigid presumptions in either direction, he called not for deference to Congress's views but for the type of "conscientious policing"[299] for

292. *Id.* at 968–70.

293. *Id.* at 969.

294. *Id.* at 970.

295. *Id.*

296. *Id.* at 942–48.

297. *See Citizens United*, 130 S. Ct. at 946 (Stevens, J., concurring in part and dissenting in part) ("It is fair to say that our First Amendment doctrine has frowned on certain identity-based distinctions, particularly those that may reflect invidious discrimination or preferential treatment of a politically powerful group. But it is simply incorrect to suggest that we have prohibited all legislative distinctions based on identity or content." (citation omitted) (internal quotation marks omitted)); *see also id.* at 947 ("[C]orporate spending is . . . furthest from the core of political expression, since corporations' First Amendment speech and association interests are derived largely from those of their members and of the public in receiving information." (quoting FEC v. Beaumont, 539 U.S. 146, 161 n.8 (2003) (internal quotation marks omitted)).

298. *See Citizens United*, 130 S. Ct. at 968–70 (Stevens, J., concurring in part and dissenting in part).

299. *Id.* at 970.

bad motives that was appropriate "in a sensitive First Amendment context."[300]

B. Holder v. Humanitarian Law Project

In *Humanitarian Law Project* the Court upheld a statute banning provision of "material support" to named terrorist groups.[301] The statute applied to individuals who wished to work with those groups by teaching them how to use international forums for peaceful dispute resolution.[302] Chief Justice Roberts, writing for a six-justice majority, rejected the plaintiffs' Fifth Amendment vagueness and First Amendment association and speech claims.[303] In considering the speech claim, Chief Justice Roberts rejected the government's argument that the Court should apply the "intermediate scrutiny"[304] performed under *United States v. O'Brien*[305] when the government regulated expressive conduct. Chief Justice Roberts recognized that application of the material support statute to the plaintiffs' conduct was not unrelated to the conduct's expression, a conclusion that rendered *O'Brien* inapplicable.[306] Instead, Chief Justice Roberts described the government action in *Humanitarian Law Project* as a content-based regulation of speech[307] that therefore required application of "a more demanding standard."[308]

Thus, the Court set up the case as if it were applying some level of particularly heightened scrutiny. It described the insufficiently rigorous *O'Brien* standard as "intermediate," stated that it was applying "a more demanding standard," and characterized the government action as a content-based speech restriction—the type of government action that normally elicits strict scrutiny.[309] Yet, the

300. *Id.*

301. 18 U.S.C. § 2339B(a)(1) (2006).

302. *See* Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2716 (2010).

303. *Id.* at 2731. The dissenting justices agreed that the statute was not unconstitutionally vague. *See id.*

304. *Id.* at 2723 (describing the scrutiny performed under *United States v. O'Brien*, 391 U.S. 367 (1968)).

305. 391 U.S. 367 (1968).

306. *Id.* at 377.

307. *See Humanitarian Law Project*, 130 S. Ct. at 2723.

308. *Id.* at 2724 (quoting Texas v. Johnson, 491 U.S. 397, 403 (1989)).

309. *See, e.g.*, Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 117–18 (1991).

Court's application of this supposedly heightened scrutiny was surprisingly mild. Chief Justice Roberts deferred to Congress's finding that all assistance to terrorist groups was fungible, on the theory that all of it contributed to the group's ability to engage in violence.[310] The evidence on this point consisted mainly of an affidavit from a State Department official.[311]

The Court also adopted further glosses on standard heightened scrutiny. Most notably, it failed to perform any significant narrow tailoring analysis.[312] It did note that Congress had imposed limits on the statute's prohibitions.[313] But, of course, strict scrutiny does not normally stop with the question of whether the legislature itself limits its regulations' scope. Rather, a court must be independently convinced that those limits are adequate to satisfy the narrow tailoring requirement.

Two further points about the majority are notable. First, Chief Justice Roberts went out of his way to limit the scope of his analysis. He noted that the Court was not deciding the constitutionality of restrictions on independent speech—that is, speech supporting terrorist groups made without coordination with those groups. He also disclaimed any judgment on application of the material support statute to coordinated speech in support of *domestic* terrorist groups. Second, he closed his opinion with quotations from the Constitution's preamble and the Federalist Papers that noted the centrality of national defense as one of the Constitution's great objects.[314]

Justice Breyer's dissent criticized the Court's First Amendment analysis.[315] Applying standard First Amendment doctrine, he first

310. *See Humanitarian Law Project*, 130 S. Ct. at 2725–26. In fairness, it should be noted that the Court announced that it was independently convinced of this linkage. Nevertheless, the Court announced that it was deferring to Congress's judgment on this issue. That statement would have been superfluous had the Court been willing to rest its conclusion on its own estimation of the evidence.

311. *See id.* at 2725–35. Indeed, the affidavit was produced in 1998, before the enactment of the original version of the statute challenged in *Humanitarian Law Project*, apparently as part of an earlier phrase of the *Humanitarian Law Project* litigation. *See* Joint Appendix at 127, *Humanitarian Law Project*, 130 S. Ct. 2705 (Nos. 08-1498, 09-89), 2009 WL 3877534.

312. *See, e.g.*, *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 476–82 (2007) (applying narrow tailoring to a content-based speech restriction).

313. *See Humanitarian Law Project*, 130 S. Ct. at 2728.

314. *See id.* at 2731.

315. Justice Breyer and the other two dissenters (Justices Ginsburg and Sotomayor) agreed with the majority that the statute was not unconstitutionally vague. *Id.* (Breyer, J., dissenting).

considered whether the speech fell outside the boundaries of First Amendment protection. Having decided that it did not, he suggested that strict scrutiny—a term never used by the majority—was the appropriate standard.

Even applying the majority's vague "more demanding standard," he questioned whether the statute satisfied normal First Amendment requirements. He criticized the Court's reliance on Congress's findings about the fungibility of aid, concluding that those findings were too general to support the constitutionality of the restriction on the speech the plaintiffs wanted to make. He also critiqued the justification that the type of assistance the plaintiffs wanted to provide tended to legitimate the group, arguing that that reasoning swept in too much protected speech. In turn, he argued that any line between restricted and unrestricted speech legitimating the group would be so vague as to chill protected speech.

The point of this discussion is not to evaluate the merits of the two sides' arguments. Terrorism poses difficult free speech questions for both courts and policymakers. For our purposes, the relevant issue in *Humanitarian Law Project* is the workability of rigid doctrinal rules in free speech law and in constitutional law more generally. On that point, it is notable that the majority that announced and deployed such rules so confidently in *Citizens United* engaged in such contextual, nuanced review in *Humanitarian Law Project*.[316] In *Humanitarian Law Project*, Chief Justice Roberts described the challenged application of the statute as a content-based speech restriction.[317] However, he did not explicitly apply strict scrutiny. Beyond semantics (as telling as they are), the "more demanding scrutiny" he did apply was curiously muted. He deferred to Congress's highly general conclusions about the fungibility of aid to terrorist groups, based largely on a litigation-driven affidavit. He did not seriously consider the possibility that the type of aid the plaintiffs wished to provide might *further* Congress's goals in preventing terrorist attacks on Americans.[318] Nor did he seriously

316. The majorities in these two cases consisted of exactly the same judges, except for Justice Stevens, who dissented in *Citizens United* and joined the majority in *Humanitarian Law Project*.

317. *See id.* at 2723–24 (majority opinion).

318. *See id.* at 2739 (Breyer, J., dissenting) (making this point).

consider whether the statute's sweep was overbroad or risked chilling protected speech. This is surely heightened scrutiny lite.[319]

Returning to the focus on Justice Stevens, the interesting point about *Humanitarian Law Project* is that he abandoned the liberal bloc and joined Chief Justice Roberts' majority. *Humanitarian Law Project* was one of the very last decisions in which Justice Stevens participated. Combined with *Citizens United*, it constitutes an apt summation of his approach to First Amendment issues and to constitutional adjudication more generally. Most notably, both cases reveal his skepticism about rigid rules and his focus on deciding the case in front of him. His dissenting opinion in *Citizens United* reflected these principles more explicitly—hardly a surprising observation in light of the fact that Justice Stevens wrote it. But *Humanitarian Law Project*'s vague incantation of "more demanding scrutiny" and deference to legislative judgments and line-drawing reflect the more nuanced, less categorical approach that Justice Stevens took throughout his career and that infused his *Citizens United* dissent. Similarly, Chief Justice Roberts' insistence that he was deciding only the case in front of him, not making sweeping pronouncements about the First Amendment, and—perhaps paradoxically—his concluding rhetorical flourish hearkening back to constitutional first principles, both find an easy fit with Justice Stevens' approach that sought to decide the case in front of him[320] based on broad standards derived from the Constitution itself.[321]

Indeed, a fascinating thread running through the majority's opinion in *Humanitarian Law Project* and Justice Stevens' dissent in *Citizens United* illustrates a skepticism about rigid rules. In *Citizens United*, Justice Stevens ridiculed Justice Kennedy's claim that identity-based speech restrictions were nearly always unconstitutional by suggesting, rhetorically, that under the majority's

319. Indeed, I have described *Humanitarian Law Project* as the Roberts Court's version of *Grutter v. Bollinger*, 539 U.S. 306 (2003), in which the Court purported to apply strict scrutiny to a university's use of race as an admissions criterion, but largely deferred to the university's judgments and did not insist on narrow tailoring. Araiza, *supra* note 283, at 830–33.

320. *See, e.g.*, Stevens, *supra* note 5, at 1307–08 (questioning the litigation strategy of the broadcaster in *Pacifica* for making a broad First Amendment claim instead of one that focused on the likely "meager" offense the broadcast actually caused).

321. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 430–31 (1992) (Stevens, J., concurring in the judgment) (arguing that viewpoint-based speech restrictions are especially pernicious because they violate core constitutional principles prohibiting the government from skewing debate or restricting discussion of ideas because the government finds them offensive).

approach Tokyo Rose would have had a First Amendment right to speak during World War II.[322] Similarly, in *Humanitarian Law Project*, Chief Justice Roberts mocked the dissent's strict scrutiny analysis by suggesting that the dissent would have found a constitutional right to instruct Imperial Japanese officials in methods of international dispute resolution during World War II.[323] We may never know if the appearance of strikingly similar analogies in these two opinions was anything more than coincidental. But, for our purposes, what *is* clear is the important point those analogies make: both Justice Stevens and Chief Justice Roberts were arguing that, at least in some cases, rigid rules simply do not make good sense.

III. RULES AND STANDARDS EVALUATED: THE LEGACY OF JUSTICE STEVENS

Justice Stevens' equal protection and free speech jurisprudence forces us to confront the limitations of both rigid doctrinal rules mediating between vague constitutional text and judicial decisions and his own standards-based approach that aspires to be more closely tethered to constitutional text and principle. From his earliest years on the Court[324] to one of his last major constitutional law opinions,[325] Justice Stevens expressed skepticism about mediating rules such as the content-neutrality rule and the tiered structure of equal protection. Most notably, he protested what he viewed as talismanic incantations of those rules as a replacement for more direct applications of principles derived from the constitutional text to the challenged government action, in light of the facts and context of the case.

To evaluate his approach, it may be helpful to clarify the status of the rules Justice Stevens protested. The tiered scrutiny structure of equal protection is much closer than the First Amendment's content-neutrality rule to being a pure mediating rule.[326] The very idea of

322. *See* Citizens United v. FEC, 130 S. Ct. 876, 947 (2010) (Stevens, J., concurring in part and dissenting in part).

323. *See Humanitarian Law Project*, 130 S. Ct. at 2730.

324. *See* Craig v. Boren, 429 U.S. 190, 211–12 (1976) (Stevens, J., concurring) ("There is only one Equal Protection Clause. It requires every State to govern impartially. It does not direct the courts to apply one standard of review in some cases and a different standard in other cases.").

325. *See Citizens United*, 130 S. Ct. 876.

326. Scholars have argued that almost all constitutional analysis performed by courts involves application of a mediating rule of one sort or another. *See, e.g.*, Mitchell N. Berman,

according heightened scrutiny to some classifications reflects a sense that "suspect" classifications are more likely to violate equal protection's core command. As Justice Kennedy argued in *Adarand*—responding to Justice Stevens' complaint about the Court not knowing the difference between exclusionary and inclusionary use of race—strict scrutiny serves to illuminate that difference by "smok[ing] out" illegitimate uses of race.[327] Thus, strict scrutiny in this context plays an indirect role in uncovering constitutional meaning. This is consistent with the foundational theory of the tiered scrutiny structure from *Carolene Products*. The theory is best understood not as reflecting direct constitutional meaning, but as simply illuminating what equal protection likely requires by considering the degree to which the burdened group is presumed to have been able to influence the legislature.[328]

By contrast, the content-neutrality rule comes closer to reflecting direct constitutional meaning, by implementing a principle that the government lacks the authority to dictate the topics suitable for public discourse. In this sense, the content-neutrality rule serves, at least to some degree, as a competing principle to Justice Stevens' own direct constitutional principle that the government may not suppress a message because it disagrees with it. Still, the content-neutrality rule is significantly more rigid than Justice Stevens' preferred principle. As expressed by its most fervent advocate, Justice Kennedy, it stands for the proposition that any content-based speech restriction is per se unconstitutional.[329] The majority of the Court has not accepted Justice Kennedy's view.[330] Still, even the strict scrutiny applied by the Court reflects a significantly more rigid

Constitutional Decision Rules, 90 VA. L. REV. 1, 10 (2004). This may be true. Nevertheless, this does not obviate the fact that Justice Stevens' approach, especially to equal protection, aspires to a much more direct application of constitutional meaning than the Court's self-consciously indirect method of tiered scrutiny review.

327. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 226 (1995) (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989)).

328. *See* Araiza, *supra* note 11, at 481–82.

329. *See* Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 124 (1991) (Kennedy, J., concurring in the judgment); *Citizens United*, 130 S. Ct. at 898–99; *see also* Beauharnais v. Illinois, 343 U.S. 250, 275 (1952) (Black, J., dissenting) (insisting on a per se rule against infringements on speech).

330. *Compare Simon & Schuster*, 502 U.S. at 108–23 (applying strict scrutiny to a content-based speech restriction), *with id.* at 124–25 (Kennedy, J., concurring in the judgment) (questioning the use of strict scrutiny).

approach to speech restrictions than Justice Stevens' approach, especially when the content-neutrality rule is combined with the Court's other rigid speech rules.[331] While the point is not as obvious as with the Court's tiered scrutiny structure in equal protection, the ostensible[332] rigidity of the content-neutrality rule suggests its mediating nature, as opposed to its nature as a direct statement of constitutional principle. At any rate, as with his approach to equal protection, Justice Stevens' approach to the First Amendment requires more contextualized, nuanced judgments than the Court's approach.

Thus, Justice Stevens' approach to equality and speech issues brings us back to the fundamental questions asked early in this Article about the relative usefulness of rigid rules and more nuanced, but less definite, standards.[333] Do rigid rules do a better job at constraining judicial discretion? Are mediating rules a necessary evil in light of the impossibility of deriving sufficiently precise meaning, translatable into reasonably clear guidance to lower courts, directly from the Constitution's text? And, finally, which approach better reflects the judicial humility that Chief Justice Roberts expressed in his confirmation hearings?

As one might expect, the answers to these questions cannot be definite. Constitutional adjudication is a difficult job in terms of both the intellectual demands it places on judges and the temptation to reach results that comport with one's moral preferences—especially when a judge sits on a court of final review. This Article has already made clear some of the pitfalls of both approaches. Still, a few final thoughts may be in order.

First, it is not at all clear that Justice Stevens' approach provided him with appreciably more discretion than that of the Court. As Professor Siegel has noted, Justice Stevens' results in equal protection cases did not significantly diverge from those of his

331. *See, e.g.*, FCC v. Pacifica Found., 438 U.S. 726 (1978) (plurality opinion) (recognizing that a restriction on the broadcaster's speech would be more problematic if it were based on disagreement with the speech's message, as compared with a concern for the children in the listening audience, in a medium uniquely accessible to children); R.A.V. v. City of St. Paul, 505 U.S. 377, 416–36 (1992) (Stevens, J., concurring in the judgment) (reviewing the speech restriction at issue based on the nature of the speech, the nature of the restriction, and the context of the speech).

332. *See supra* text accompanying notes 241–55, 256–87; Stevens, *supra* note 5, at 1304.

333. *See supra* text accompanying notes 21–25.

colleagues,[334] even if his pattern was somewhat idiosyncratic.[335] While this observation does not necessarily indicate cabined discretion, it at least suggests that Justice Stevens' approach did not give him free rein to vote whichever way his heart took him. Moreover, the Court itself has not been particularly consistent in its approach to equal protection and free speech cases. The Court that confidently applied a searching form of strict scrutiny to the race-based set-asides in *Croson* and *Adarand* also deferred to the University of Michigan Law School's justifications for race-conscious action in *Grutter v. Bollinger*.[336] More generally, the Court's application of rational basis review has, over the last quarter-century, been subject to notable inconsistencies.[337] Moreover, its sex equality jurisprudence has significantly evolved even within the confines of the same ostensible standard in effect since 1976.[338] In the First Amendment area, the Court that struck down St. Paul's cross-burning ordinance in *R.A.V.* as a content-based speech restriction upheld the bulk of Virginia's cross-burning law in *Virginia v. Black*.[339] And, of course, its review of the content-based speech restriction challenged in *Citizens United* was significantly different from its review of the content-based restriction challenged in *Humanitarian Law Project*.[340]

All of these seeming inconsistencies can be explained by differences in the challenged laws or the procedural postures or factual backgrounds of the cases. But that is precisely the point: the Court retains the ability to distinguish earlier cases and reach different results while ostensibly applying the same rigid rule. Thus,

334. *See* Siegel, *supra* note 20, at 2361–62.

335. *See supra* text accompanying notes 140–44.

336. 539 U.S. 306 (2003).

337. *See* Romer v. Evans, 517 U.S. 620 (1996) (striking down Colorado's Amendment 2 as irrational discrimination against gays, lesbians and bisexuals); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985) (striking down a town's refusal to grant a permit for a group home for mentally retarded people as unconstitutionally irrational); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528 (1973) (striking down as unconstitutionally irrational a federal refusal to provide food-stamp assistance to households comprised of unrelated persons).

338. *Compare* United States v. Virginia, 518 U.S. 515, 524 (1996) (requiring that sex classifications have an "exceedingly persuasive justification"), *with id.* at 566–603 (Scalia, J., dissenting) (complaining that the Court was manipulating the scrutiny standard without being forthright about it).

339. 538 U.S. 343 (2003).

340. *See generally supra* Part II (discussing the majority's approaches in *Citizens United* and *Humanitarian Law Project*).

application of such rules does not substantially cabin the Court's discretion to reach the result it thinks appropriate.

This realization suggests that rigid rules are not enough to cabin judicial discretion. Rather, what is also needed is a more formalistic application of those rules. Such an approach would rightly be criticized as what Justice Frankfurter once described as "falsifying the actual process of judging."[341] Of course, Justice Frankfurter was well known for his unwillingness to be bound by rigid rules unless they were textually compelled;[342] thus, one cannot simply rest on his critique of formalistic application of rules as the final word. Still, the realization that rules are not enough—that the consistency benefit of rules comes only when those rules are mechanically applied—is a telling criticism of the position that rules are useful mechanisms for judges seeking to tie themselves to the mast.

Second, it is not clear that Justice Stevens' attempt at unmediated constitutional interpretation was a complete failure. As noted above, his results were neither out of the Court's mainstream nor any less internally inconsistent. On the other hand, one can question the credibility of his pronouncements in the race cases about a judge's ability always to know the difference between a welcome mat and a "No Trespassing" sign.[343] Similarly, one can worry that his views about when a law violates one of his First Amendment principles are not so self-evident that other judges applying those same principles would reach the same results in similar cases.

These observations suggest that judicial review based on a direct application of vague constitutional text or constitutional principles may be problematic, especially for appellate judges whose duty includes providing intelligible guidance to lower court judges. But, on the other hand, one can discern these same problems with the mediating rules the Court adopts. They, too, require substantive judgments.[344] In addition, the Court's inconsistent application of those rules has led critics to complain that lower courts would face

341. Universal Camera Corp. v. Nat'l Labor Relations Bd., 340 U.S. 474, 489 (1951).

342. *See, e.g.*, Jeffrey L. Fisher, *Categorical Requirements in Constitutional Criminal Procedure*, 94 GEO. L.J. 1493, 1526 (2006).

343. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 245 (1995) (Stevens, J., dissenting).

344. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 533–34 (1996) (explaining that careful review of sex classifications does not cast doubt on sex classifications intended to promote women's equal status).

serious difficulty conscientiously following the Court's guidance.[345] If the choice is between mediating rules, which entail judges making substantive value judgments and reaching results that may be difficult for lower courts to replicate, and unmediated interpretation that raises the same problems, an argument can be made for the latter simply on the ground that it at least is more closely anchored to the text.

These two points require consideration of how well the Court's own approach has performed. While a generalization at such a high level is obviously hazardous, it appears as though the Court's approach, like Newtonian physics, does a good job at producing consistent, predictable results in most cases, but breaks down in the harder ones.[346] The cases from the October 2009 term illustrate this point. Campaign finance is a difficult issue. It involves core political speech that, if one were to rank all speech in terms of its First Amendment centrality, would be at the very top.[347] On the other hand, the government interests in regulating that speech—prevention of corruption and the appearance of corruption that demoralizes the citizenry and leads them to disengage from self-government—are among the most compelling government can offer. Similarly, the speech in *Humanitarian Law Project* deals with commentary on core matters of government policy. Yet, the prevention of terrorism is unquestionably a compelling government interest. The majorities in *Citizens United* and *Humanitarian Law Project* are disappointing in their inconsistent approaches to the difficult choices presented by these issues. *Citizens United* was a classic rule-based opinion. *Humanitarian Law Project*, while it genuflected in that direction, was considerably more nuanced. Neither approach is necessarily

345. *See, e.g.*, *id.* at 566–70 (Scalia, J., dissenting) (complaining about the majority's *sub silentio* alteration to the intermediate scrutiny standard for sex classifications); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 460 (1985) (Marshall, J., concurring) (expressing sympathy for lower courts faced with the task of following the majority's application of rational basis review).

346. *Cf.* Denver Area Educ. Telecomms. Consortium v. FCC, 518 U.S. 727, 774 (1996) (Souter, J., concurring) ("Reviewing speech regulations under fairly strict categorical rules keeps the starch in the standards for those moments when the daily politics cries loudest for limiting what may be said.").

347. *See, e.g.*, Citizens United v. FEC, 130 S. Ct. 876, 898 (2010) ("The First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office." (internal quotation marks omitted)).

right or wrong. Yet, it is surely disheartening to see the Court act so inconsistently within the space of a few months.[348]

But not Justice Stevens. As noted early in this Article, Justice Stevens was the only Justice on the Court to adopt methodologically consistent approaches in these two cases. This fact goes to the third criterion for judging him and the Court: humility. Both approaches discussed in this Article have their advantages. Both present problems. But one might hope that a humble judge—a judge who aspires to act like a judge rather than a policymaker—approaches cases consistently when they present a similar challenge, such as that provided by a vague constitutional text. Indeed, in a sense, the largest constraint on judges may be a methodological one. This point has been made, for example, by commentators who criticize justices who adopt a stridently originalist method in one case and then fail even to mention it in another.[349]

In sum, one thing we can appreciate about Justice Stevens' approach to equal protection and free speech issues is his larger-scale consistency. His approach in these areas may be subject to fair criticism. But whatever one might think about his approach, neither the current Court's rules-based approach nor its broader methodological inconsistency cabins judicial discretion, leads to predictable or replicable results, or reflects genuine humility about the judicial role.

Not even close.[350]

348. For an especially tart accusation of the Court acting inconsistently in a short timeframe, see *Mayflower Farms, Inc. v. Ten Eyck*, 297 U.S. 266, 274 (1936) (Cardozo, J., dissenting). "The judgment just announced is irreconcilable in principle with the judgment in Borden's Case, [297 U.S. 251], announced a minute or so earlier." *Id.*

349. *See, e.g.*, Book Note, *Justice Thomas's Inconsistent Originalism*, 121 HARV. L. REV. 1431, 1435 (2008) (reviewing CLARENCE THOMAS, MY GRANDFATHER'S SON: A MEMOIR (2007)); Dale E. Ho, *Dodging a Bullet:* McDonald v. City of Chicago *and the Limits of Progressive Originalism*, 19 WM. & MARY BILL RTS. J. 369, 398 (2010) (citing scholars making this claim); David A. Strauss, *On the Origin of Rules (with Apologies to Darwin): A Comment on Antonin Scalia's* The Rule of Law as a Law of Rules, 75 U. CHI. L. REV. 997, 1010–13 (2008) (arguing that Justice Scalia's originalist methodology is inconsistent with his analysis of the Sixth Amendment issue in *Crawford v. Washington*, 541 U.S. 36 (2004)).

350. *See Citizens United*, 130 S. Ct. at 945–46 (Stevens, J., concurring in part and dissenting in part).