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BAKKE, WEBER AND MR. JUSTICE STEWART: CONSTITUTIONAL THEORY AND AFFIRMATIVE ACTION

ALBERT BRODERICK*

On June 28, 1978, the United States Supreme Court held that a program of a state university medical school that reserved 16 out of 100 seats for minority applicants violated the right of a white applicant who would otherwise have been admitted. On June 27, 1979, the Supreme Court upheld a private employer's job training program (arranged jointly with the plant's union) that reserved ten out of twenty places for minority applicants, denying the asserted right of a white employee whose exclusion had been solely because of his race.

To the Court, and to the initiated of the legal profession, there is no conflict between the two rulings (tension perhaps, but no conflict). The 1978 case, *Bakke*,¹ involved state activity that triggered the constitutional sanction of the equal protection clause of the fourteenth amendment. However, only one of the five-Justice majority rested Bakke's win on that ground. The 1979 case, *Weber*,² concerned purely private arrangements. In that case the sole question was whether Congress had made such private arrangements illegal by enacting Title VII, the job discrimination provision of the Civil Rights Act of 1964.

These two cases may be examined to ask if there has been a realignment by the Court on crucial aspects of racial relations, both as to the constitutional requirement of equal protection and the scope of the Civil Rights Act of 1964. To answer this question in practicing lawyers' style we would scrutinize the most recent views of the present Justices, and such hints as may be gathered from their votes. Doing this would lead us directly to the swing Justice from *Bakke* to *Weber*—Justice Potter Stewart. These cases also give focus to an even larger question. Does the Court have any accepted methodology in reaching its decisions? This second question once was of interest chiefly to law professors and law students. However, now it touches a current concern of the general public, whose life events are affected directly and extensively by the Court. This second question, whether the nine supreme

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

2. *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979).

decision-makers rely on law, on accepted principle, or on unreasoned and unpredictable personal preference, is now very much in vogue. This study addresses each of these questions, which are in fact entwined. It attacks the larger second question first. No judgment on the Court's present posture on racial discrimination is intelligible without a searching glance at the source of the Court's power. Its power to interpret a congressional statute, like any court's, does not give it the final word. A statute may be amended; however, its power, through judicial review, to declare a federal or state act unconstitutional is all but final. Our study first considers the origins of the Court's power. We then observe how the power has been used in two main areas—due process and equal protection. Only then is it time to address the first question—the law of racial discrimination after *Bakke* and *Weber*.

I. ORIGINS OF JUDICIAL REVIEW

The power of the Supreme Court in the American system of constitutional government is rooted in the notion that the federal Constitution is a higher law than legislation of Congress and, where applicable, than the constitutions, legislation, and decisional law of the states. From *Marbury v. Madison*³ in 1803, the Supreme Court has consistently asserted that "[i]t is emphatically the province and duty of the judicial department to say what the law is"⁴ and to declare unconstitutional a law it deems contrary to the Constitution when the question is raised in a litigated case. This assertion has never been successfully challenged. What does it mean to say that the Constitution is a "higher law," or, as Chief Justice Marshall called it, "a superior paramount law"⁵? In a classic study entitled *The "Higher Law" Background of American Constitutional Law*,⁶ Professor Edward S. Corwin examined the remote and immediate historical origins of what we have come to call this power of judicial review. A summary of his findings will serve us well here.

A. Remote Origins—Greece, Rome, and Medieval Christendom

The doctrine of a higher law superior to positive (enacted) law was common in Greece and Rome. Aristotle and Cicero were its most influential formulators. They made the civil law of the state (*ius civile*) their central concern. They stressed that this civil law was formulated under the continuing stimulus of "natural" principles of justice (*ius*

3. 5 U.S. (1 Cranch) 137 (1803).

4. *Id.* at 177.

5. *Id.*

6. Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 149 (1928), reprinted in E. CORWIN, *THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW* (Cornell Univ. Press 1955) [hereinafter cited as CORWIN]. The citations *infra* are to the 1955 edition.

naturale) based upon the nature of man. They did not make these principles explicit, but for Cicero, at least, the chief among them was man's reason itself (*recta ratio*). "Right reason" would unfold principles which were valid at all times and places. The Roman jurisconsults and praetors identified many such natural principles of justice and applied them to the separate system of Roman law applicable to foreigners, the *ius gentium* (a remote antecedent of international law).

Gradually many principles were adopted within what would become the codified Roman law itself. A distinct but related doctrine—popular sovereignty—has been attributed to the great codifier of Roman law, Justinian: the power of the ruler (king, emperor) derived from the people. Once this assumed delegation had taken place, however, Justinian ascribed to the ruler the ultimate power to pronounce the law, hopefully guided by the principles of *ius naturale* as the Roman praetors had incorporated them in the *ius gentium*.

In the medieval era, Thomas Aquinas and other Catholic theologians adapted the natural law of Aristotle and Cicero as a natural moral law. They identified this natural moral law as known to each person by virtue of his or her humanity. Their claim as to the content of this natural moral law, which they stated was known apart from divine Revelation, was modest. In an ecclesiastical sense, the natural moral law was considered part of the eternal law of a creating God, and to a significant extent, it corresponded to the laws given to Moses in the Ten Commandments.

Positivists from the time of Hobbes have resolutely denied the reality of a natural law distinct from the positive law of a given legal system. Corwin was as wary as any positivist of this medieval interdisciplinary blurring between law and moral philosophy on the one hand, and theology and religion on the other. His narrative seems to step gingerly around medieval natural law. Yet, he conceded its indirect significance for American constitutional theory in two respects at least: (1) According to the Greek and Roman authors, natural law had been chiefly a stimulus to legislators and codifiers to pass the best possible laws, and thus natural law took flesh in an enlightened civil positive law. By contrast, Corwin found "the medieval conception [of natural law] was that it checked and delimited authority from without."⁷ (2) Corwin viewed the medievalists' distinction (John of Salisbury was central here) between the "tyrant" (who rules by force) and the "prince" (who rules in accordance with laws) as foreshadowing the modern "notion of all political authority as intrinsically limited."⁸

7. *Id.* at 23.

8. *Id.* at 18-19.

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B. *English Common Law*

Although the ancient and general medieval views of "higher law" have relevance, Corwin insists that the development of higher law doctrine in England was more significant to American judicial review. "Before it [common law] was higher law it was positive law in the strictest sense of the term, a law regularly administered in the ordinary courts in the settlement of controversies between private individuals."⁹

So we must turn to the English institutions to view the enforcement of higher law doctrines as positive law at work, "binding in some sense upon government in all its phases"¹⁰ executive, legislative, and judicial. Corwin sees this development in several stages that bridge 600 years from Henry II's twelfth century establishment of a system of national courts¹¹ to Blackstone's eighteenth century confirmation of "legislative supremacy" on the eve of the American Revolution.

1. *The common law*

From its inception the common law was viewed as resting on custom. A dispute between two private parties (i.e. for an assault or other personal injury) or between the king and private parties (criminal law, or trespass on royal property) would be decided by a judge of one of the various local courts on the basis of local custom. In the late twelfth and early thirteenth centuries as a result of Henry II's new national courts, the common law "was custom gradually rendered national, that is to say common, through the judicial system. . . ."¹² The court selected among customs. In the English courts there was at this point an awareness of the ideas of natural law, which were then current throughout western Europe, although having very little effect on the existing law as enforced outside of England. The Ciceronian concept of natural law as "right reason" was imported by the English judges—but significantly modified. To Cicero it was the *recta ratio* of all men. "The right reason which lies at the basis of the common law, on the other hand, was from the beginning *judicial* right reason."¹³

What actually developed was a body of law—institutions and legal principles and rules that were largely not the product of a "prince" or legislature, but of the decisions of judges. There was occasional legisla-

9. *Id.* at 24.

10. *Id.* at 32.

11. "The true starting point in the history of the common law is the establishment by Henry II in the third quarter of the twelfth century of a system of circuit courts with a central appeal court." *Id.* at 25.

12. *Id.*

13. "Considered as an act of knowledge or discovery, the common law was the act of experts" *Id.* at 26. These experts were not philosophers, or theologians, nor commentators. They were the judges themselves. The rule applied to *A v. B* would be applied in the similar case of *C v. D* under the accepted practice of adherence to precedent (*stare decisis*).

tion¹⁴—at first proclamations of a king (often embodying political concessions exacted from him, as was Magna Carta in 1215).¹⁵ As Parliament took form, beginning in the thirteenth century, it authored occasional legislation which the courts would interpret in cases before them. The judicial pronouncements in those cases chiefly constituted “the law.”

Corwin discusses the development of the common law itself as a “higher law” largely in terms of one “event” (Magna Carta) and four men; two of these were “commentator” judges of the national courts (Bracton and Coke), one a philosopher (Locke), and the fourth basically a “commentator” law professor (Blackstone, also a quondam judge). I shall note briefly only the major contribution Corwin attributed to each.

2. *Bracton*

At a time when Roman law, and also the higher law notions, were being “received” on the Continent, Henry de Bracton, who was skilled in both of these, compiled the first significant book of English law, *De Legibus et Consuetudinibus Angliae* (Laws and Customs of England), a commentary on a compilation of 2,000 common law decisions. Bracton was sufficiently impressed with higher law notions to consider subjecting the king to the law. Bracton also believed that the king should be subject to a higher law.¹⁶ Corwin argues, however, that Bracton had “no idea of the modern concept of the ‘rule of law.’”¹⁷ He intimates that to Bracton “the sole redress against tyranny is reliance on divine vengeance.”¹⁸ Bracton had no solution to the problem of providing an institutional control upon the acts of the king. “The measure of such control should be the law . . . but the institution capable of applying this test with regularity and precision has not yet disclosed itself.”¹⁹

14. Not until the wave of legislation launched by Jeremy Bentham’s program of legal reform did legislation constitute more than an incidental aspect of English law. This contrasted with the continent, where the law (in the period we are discussing) was largely constituted by legislative codes (based largely on Roman law).

15. Corwin recalls, Magna Carta was “not an enactment, but . . . a compact,” of King John with his protesting barons. At any rate, it was a document and as such “gave definite, tangible embodiment to the notion of higher law.” *Id.* at 30-31.

16. The celebrated passage is: “The King himself ought not to be subject to man, but subject to God and to the law, for the law makes the King. Let the King then attribute to the law what the law attributes to him, namely dominion and power for there is no King where the will and not the law had dominion.” CORWIN, *supra* note 6, at 27. This passage could have come from Bracton’s contemporary, Thomas Aquinas. However, Corwin points out, on the whole Bracton’s conception of law “is even by modern tests strikingly positivistic.” *Id.* at 28.

17. *Id.* at 29.

18. *Id.*

19. *Id.* at 29-30.

3. *Coke*

Coke is the central figure in Corwin's account of the development of a higher law theory of the common law. Three of his contributions, not mutually consistent, had an impact both on the later development of English constitutional law, and on what would be the new, completely new, American theory of constitutional government.

(a) *Dr. Bonham's Case*

In a celebrated opinion in the Court of Common Pleas in 1610, Coke held that the London College of Physicians could not rely upon an Act of Parliament to justify punishing Dr. Bonham for practicing medicine without a license. Not only did Coke assert the court's right to declare an Act of Parliament invalid, but he suggested that its standard for doing so need not be rooted in a superior Act of Parliament, but in the court's concept of "reasonableness":

And it appears in our books, that in many cases, the common law will controul [sic] acts of parliament, and sometimes judge them to be utterly void: for when an act of parliament is against common right and reason, or impossible to be performed, the common law will controul [sic] it and adjudge such act to be void.²⁰

The basis for Coke's conclusion that the College of Physicians had offended against "unreasonableness" was that they had acted as complaining witnesses and judges in the same case and, under the Act of Parliament, were entitled to keep half the fine for themselves.²¹ Coke claimed as the judges' prerogative the right to test parliamentary acts by "reasonableness," a higher law claim that would later be cited by colonial advocates of American judicial review. Such a broad claim had not been made before in England. Coke himself would soon repudiate it, and the last time it seems to have been made in English law was by Chief Justice Holt in 1701.²² Coke's enduring contribution to the notion of higher law derives from another approach, an approach rooted in judicial construction of the Magna Carta, and of other declarations of rights in parliamentary enactments.

(b) *Magna Carta and beyond*

As suggested above, in 1215 Magna Carta was not itself a statute. Its chapter 29 (39 in later editions) is of special interest as a source of what Corwin is calling "higher law":

20. *Dr. Bonham's Case*, 77 Eng. Rep. 6, 46 (1610).

21. CORWIN, *supra* note 6, at 39.

22. "From Holt's time, the dictum finds no place in important judicial opinions in England; but it does find its way into the *Digests* and *Abridgements* of the time. . . . Through these works, as well as the *Reports*, it passed to America to join there the arsenal of weapons being accumulated against Parliament's claims to sovereignty." *Id.* at 53.

No free man shall be taken or imprisoned or deprived of his freehold or of his liberties or free customs, or outlawed, or exiled, or in any manner destroyed, nor shall we go upon him nor shall we send upon him, except by a legal judgment of his peers or by the law of the land.²³

If originally the Magna Carta was concerned with the high vassals, by 1225 (its second issuance) it spoke of extending liberties "to people and populace." A quarter century more and the term "common liberties" is being used to describe the scope of the charter. Throughout a century and a half there are (Coke finds) thirty-two royal confirmations. In 1368, near the end of the reign of Edward III, "to the normal form of confirmation the declaration was added by statute that any statute passed contrary to Magna Carta was null."²⁴ From this time until the anti-Stuart revival of the charter in the beginning of the seventeenth century, the Magna Carta is in eclipse. In Coke's hands—his judicial opinions, his arguments, his parliamentary debates, and his summary of English law in the *Institutes*²⁵—the Magna Carta is restored and extended to the status of a superior ("fundamental") parliamentary law. In the *Institutes* Coke writes that it is called "Magna Carta, not for the length or largeness of it . . . but . . . in respect of the great weightiness of the matter contained in it; in a few words, being the fountain of all the fundamental laws of the realm."²⁶ Corwin recalls the benefits to which Coke refers: "the historical procedure of the common law, the known processes of the ordinary courts, indictment by grand jury, trial by the 'law of the land,' habeas corpus, security against monopoly, taxation by the consent of parliament."²⁷

Coke has given up, says Corwin, the vague concept of common right and reason, which "could not have survived," in favor of "the doctrine of a law fundamental, binding Parliament and king alike, a law, moreover, embodied to a great extent in a particular document and having a verifiable content in the customary procedure of everyday institutions."²⁸

4. John Locke

Corwin's interest in John Locke is less in terms of his influence on English law and constitutional theory than his impact upon American constitutional law. To be sure, Locke's *Second Treatise on Civil Govern-*

23. "Nullus liber homo capiatur vel imprisonetur aut disseisiatur de libero tenemento suo vel libertatibus vel liberis consuetudinibus suis aut utlagetur aut exuletur aut aliquo modo destruat nec super eum ibimus nec super eum mittemus, nisi per legalium iudicium parium suorum vel per legem terrae." *Id.* at 31-32.

24. *Id.* at 33.

25. E. COKE, *INSTITUTES* (1st ed. 1628).

26. Corwin, *supra* note 6, at 33.

27. *Id.*

28. *Id.*

*men*²⁹ was the theoretical justification of the Glorious Revolution of 1688 which definitively deposed the Stuarts. But, Corwin argues, Locke (with Coke) was the dominant influence upon the theory of the American Constitution, and of judicial review, which became its unwritten institutional method for enforcement of natural rights.

Corwin cites Locke's obvious dependence upon the continental revival of natural law, with particular emphasis on Grotius, who stressed its Ciceronian origins free "from any suspicion of dependence on ecclesiastical and Papal intervention."³⁰ For Grotius, as with Cicero, natural law is "right reason" and is at once "a law of, and a law to, God."³¹ Locke also relies on "English legal tradition" in which "the entire emphasis . . . has always been on rights of the individual rather than on rights of the people considered in the mass."³² Locke's government creates no rights; it is a "fiduciary" whose task is to make more secure and more readily available rights which antedate it and would survive it. Popular interpretation of natural law is the "ultimate test of the validity of civil law." True, Locke depends in the main on legislative supremacy "for the safeguarding of the rights of the individual"³³ but legislative power is not arbitrary. "It is bound to dispense justice and decide the rights of the subject by promulgated standing laws, and known authorised [sic] judges."³⁴ Nor is it ultimate. "The community perpetually retains a supreme power of saving themselves from the attempts and designs of anybody, even their legislators, whenever they shall be so foolish or so wicked as to lay and carry on designs against the liberties and properties of the subject."³⁵

Locke's special concern among natural rights is the right of property. He frankly and determinedly defends the "inequality of possessions" as harmonious with the social compact.³⁶ He defends the "public good" both as an objective and as a limitation of legislative action, and a broad executive power to which "the laws themselves should in some cases give way. . . ."³⁷ Indeed this last is required by "the fundamental law of nature and government—viz., [t]hat as much as may be, all the members of the society are to be preserved."³⁸

Corwin sees Locke and Coke as complementing each other:

1. "Locke's version of natural law rescues Coke's version of the Eng-

29. J. LOCKE, SECOND TREATISE ON CIVIL GOVERNMENT (1st ed. 1690).

30. Corwin, *supra* note 6, at 58.

31. *Id.*

32. *Id.* at 63.

33. *Id.* at 67.

34. *Id.*

35. *Id.* at 68-69.

36. *Id.* at 69.

37. *Id.* at 71.

38. *Id.*

lish constitution from a localized *patois*, restating it in the universal tongue of the age.”

2. Coke urged “the historical procedure of the common law as a permanent restraint . . . on the power of the English crown.”
3. Coke (by rooting “fundamental law” in the Magna Carta) “rescued the notion of fundamental law from what must sooner or later have proved a fatal nebulosity.” (By this Corwin seems to mean Coke’s own early formula of “common right and reason” from which he later backed off.) Yet, Corwin adds, Coke’s rooting fundamental law in ancient documents risked “archaism,” by making only the ancient “fundamental.”
4. Locke’s movement away from historical to philosophical reasoning offered promise for a broader development of rights but he lacked clear institutional form for this criticism. As Corwin says, “While he contributed to the *doctrine* of judicial review, it was without intention.” Among the three powers—legislative, executive, and judicial—Locke stood for legislative supremacy. This was, it is true, a legislative supremacy “within the law” and subject to the people—but unlike Coke, Locke does not “reveal any perception of giving imperative written form to the constitutional principles which he formulated.” By contrast, “The hardfisted Coke, writing with a civil war ahead of him instead of behind him, was more prescient.”³⁹

Coke and Locke, in their combined influence in the American colonies, set the stage for the doctrine of revolution (Locke), for the value of a written constitution (Coke), for the articulation of natural rights in Bills of Rights (Locke and Coke), and for the post-Constitutional institution and development of a doctrine of judicial review. They did so in face of an active pre-Revolutionary generation in America that had been schooled in an unqualified “legislative supremacy” given visibility and credence by Blackstone.

5. *William Blackstone*

By the time that the first edition of *Blackstone’s Commentaries* (1765-69) appeared in Philadelphia in 1771-72 (1400 copies having been ordered in advance), the full impact of Coke and Locke had been felt in the colonies, which were by then engaged in sharp dispute with England. Blackstone reflected, rather than created, the new constitutional theory finally accepted in England—unqualified legislative supremacy.⁴⁰ Corwin marks the key date as 1706, the debate on the Declaratory Act.⁴¹ Blackstone popularized the “new” doctrine (deriving from Thomas Hobbes) in his celebrated work. He rejected the posi-

39. *Id.* at 72, 68.

40. *Id.* at 85.

41. *Id.* at 83-84.

tions of Coke and Locke that Parliament's power was not an unlimited one. The doctrine of Hobbes prevailed. Parliament "can, in short, do everything that is not naturally impossible, and therefore some have not scrupled to call its power by a figure rather too bold, the omnipotence of Parliament. True it is, that what the Parliament doth no authority upon earth can undo."⁴²

Corwin points out that the mood in the colonies during the pre- and post-Revolutionary days was receptive to this doctrine of legislative sovereignty which threatened to submerge all the rights of man "in a single right, that of belonging to a popular majority, or more accurately, of being represented by a legislative majority."⁴³ The state legislature was closer to the people than the remote Continental Congress, and within the state "the legislature was conceived to stand nearer the people than the other departments."⁴⁴ Why then, Corwin asks, did not legislative sovereignty establish itself in our constitutional system? His twofold answer concludes his study:

1. In the "*American written Constitution*, higher law at last attained a form which made possible the attribution to it of an entirely new sort of validity, the validity of a *statute emanating from the sovereign people*." This automatically dissolved the notion that the ordinary legislative organ itself was the supreme law making body.
2. "Even statutory form could hardly have saved the higher law *as a recourse for individuals* had it not been backed up by *judicial review*."⁴⁵

The Constitution of 1787, providing for lifetime federal judges, was supplemented by the Bill of Rights (first ten amendments) in 1791. There was not a word in either about judicial review. That basic doctrine of American constitutional law awaited declaration by Chief Justice Marshall in *Marbury v. Madison* in 1803.⁴⁶

C. The Beginnings

The Constitution which was produced in Philadelphia in the summer of 1787, and ratified by the required number of states after a bitter debate, was a compromise. Neither those who would have kept the loose federation of autonomous states, nor those who would have a strong national government worked their will. What emerged was a constitutional federalism in which there was a built-in structural tension between these two views. Likewise, there was compromise between those who contended for a strong executive, and those favoring

42. *Id.* at 87, quoting 1 W. BLACKSTONE, COMMENTARIES 160-61 (1st ed. 1765).

43. *Id.*

44. *Id.*

45. *Id.*

46. 5 U.S. (1 Cranch) 137 (1803).

the new English model of legislative supremacy. There was hardly a voice for judicial domination. The document which emerged has commonly been termed an implementation of Montesquieu's model of separation of powers, checks and balances being a form of popular protection against governmental domination of any kind. The first three articles of the Constitution were divided explicitly among legislative (article I), executive (article II), and judicial power (article III). This was purely the result of last minute touching up, by the Convention's Committee on Style, of decisions previously made at the Convention. What the Convention finally enacted was truly in the Montesquieu mold. Here, as with its federalism, there were deliberately built-in structural tensions, overlappings as well as mutual checks among the three branches, which made for inevitable future disputes that somehow would have to be resolved.

In *Marbury v. Madison*⁴⁷ in 1803, Madison, Jefferson's Secretary of State, denied Marbury a commission as judge that had been signed and sealed in the closing hours of the Adams' administration. Marbury sued Madison by original action in the Supreme Court, and Chief Justice Marshall, speaking for the Court, recognized that Marbury indeed had a "right" to this commission, and that where there is a right it is the policy of the law to grant a remedy. However, Marbury could not recover because he had not proceeded with an *appropriate* remedy, even though he followed the specific terms contained in the Judiciary Act of 1789, which purported to give the Supreme Court jurisdiction of such a case. Marshall said that the act was contrary to the constitutional provision limiting the jurisdiction of the Supreme Court. To make this judgment dismissing Marbury's suit, Marshall had to answer two questions that the court had not faced before. First, when a provision of legislation conflicts with the language of the Constitution, which should prevail? Marshall had no trouble here, and simply stated that the Constitution was the "higher law," expressly deriving from the people. In case of conflict⁴⁸ the Constitution was supreme. The very words of article VI, section 2,⁴⁹ support this conclusion. Second, assuming that the Constitution is to prevail over conflicting Congressional legislation, who is to make the ultimate judgment? Marshall answered this question: "[t]he [C]ourt." He thus gave birth to the doctrine of judicial review, the fulcrum on which rests almost all of what we have come to

47. *Id.*

48. Marshall's critics have delighted to point out that this conclusion was not so obvious as he made it sound. In post-Revolutionary France, the written constitution did not prevail in case of conflict with subsequent legislation.

49. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land. . . ." Marshall's critics reply that this provision was directed against conflict with state action, and not to conflicts within the national government itself.

know as American constitutional law.⁵⁰

The irony was that the question, whether a court could declare an act of Congress unconstitutional, is not specifically dealt with in the Constitution. Here was the supreme structural tension, and the Court resolved it in favor of itself. By so concluding, did it assume the prerogative to resolve all subsequent constitutional tensions? Yes, provided that the answer was necessary for the decision of a case properly brought before the Court for resolution. Marbury lost not because he had shown no "right" to his commission; he lost because the case was not one properly before the Supreme Court for resolution, in light of the Court's conclusion that the Constitution barred it from taking original jurisdiction of a suit of mandamus which Congress had mistakenly given it.

The Supreme Court at first made light use of its weapon of supremacy. Not until the *Dred Scott*⁵¹ case would it declare another act of Congress unconstitutional. However, in important cases involving the states, the Court did declare acts of state legislatures to be in violation of the "Supreme Law of the land." For example, in the celebrated *Dartmouth College*⁵² case in 1819, the state legislature's action in changing a provision of the college's charter was held a violation of the constitutional provision "against impairing the obligation of contract."⁵³ This provision was used (some said) in vindication of the "natural right" of property celebrated by John Locke. In making such an evaluation, the Court came to recognize that the Constitution did imply that the state had a zone of proper action, termed its "police power" (health, welfare, safety, morals). It was for the Court to determine in each case whether the state's "assertion" of its "police power" violated a specific constitutional provision. However, the Court held in *Barron v. Baltimore*⁵⁴ in 1833 that the Bill of Rights, the first ten amendments (including the due process provision of the fifth amendment), was not a limitation against the states, but only against offending action by the national government. The most frequent clause relied on by the Court to overturn state laws prior to the adoption of the fourteenth amendment in 1870 was article I, section 8, which provided that "Congress shall have the power . . . to regulate commerce be-

50. As critics point out some countries leave final determination of constitutionality to the legislature, while granting that the constitution is supreme law (Switzerland). In a Massachusetts case as late as 1854 Chief Justice Shaw assumed that the legislature, not the court, should have final word on what was "equal protection of the law." *Roberts v. Boston, Mass.* (5 Cush.) 198 (1849).

51. *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857).

52. *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819).

53. U.S. CONST., art I § 10.

54. 32 U.S. (7 Pet.) 243 (1833).

tween the states.”⁵⁵ Not until the passage of the fourteenth amendment with its due process and its equal protection clauses applicable to state action does the Supreme Court turn productively to the question of just what rights are specifically protected under the constitutional provisions that say that “no state shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.”⁵⁶ It is primarily within the context of these clauses that constitutional consideration of rights has taken place. I will first consider what the Court has done to give content to the notion of due process, and then turn to equal protection with which the Court has been preoccupied in most recent years.

II. “DUE PROCESS OF LAW”

Not until 1855 did the Supreme Court face the question how to determine whether action by the national government violated the fifth amendment requirement of due process. Was the clause to be an open-ended vehicle for judicial pronouncement of constitutional rights? In its first answer to this question in *Murray v. Hoboken Land and Improvement Company*,⁵⁷ the Court’s approach was cautious. Two quite objective tests were coupled. The first was unimaginative: the terms of the Constitution—specifics contained in the Bill of Rights itself; this would make the due process clause largely duplicative of rights already identified. The second test was historical, and equally conservative: “due process” was in effect “old process”—“those settled usages and modes of proceeding existing in the common and statute law of England before the immigration of our ancestors,”⁵⁸ provided they are not “unsuited” to our need.

The next formulation of a constitutional standard to measure claims that a party’s rights had been infringed for want of due process did not come until after the fourteenth amendment had been adopted in 1870 making, as we have seen, claims of violation of due process applicable against the states. A fresh concern was present here. Although a catalog of limitations against abridgement of rights by *federal* power was contained in the specific language of the first eight amendments, the only sources of constitutional limitations on *state* action in the new fourteenth amendment were three clauses of great generality—the due process and equal protection clauses already referred to, and a clause preventing a state from denying to any citizen the privileges and immu-

55. The Marshall court gave a broad national scope to this clause. The Jacksonian court under Taney was more oriented to sustaining state conduct under the clause. The pendulum has since swung back and forth. And so it has with the obligation of contract clause.

56. U.S. CONST. amend. XIV.

57. 59 U.S. (18 How.) 272 (1855).

58. *Id.* at 277.

nities of citizens of the United States (a clause destined to have a very sparse history).

The year 1877 produced a more open-ended but unilluminating step in the search for "the intent and application of due process" in *Davidson v. New Orleans*.⁵⁹ The case yielded another "formula" which is still occasionally voiced by the Court: "the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require."⁶⁰ Unlike *Murray's* test, this left the door wide open to judicial pronouncements of new constitutional rights. The *Murray* test was supplemented, rather than displaced, in *Hurtado v. California*,⁶¹ an 1884 case that produced what could fairly be called (with *Murray*) the second landmark in due process formulation.

The right to indictment by a grand jury prior to trial had long been enforced in the English courts as an ingredient of the historic rights of Englishmen. *Hurtado* had been convicted in a California court after indictment by simple filing of an "information" citing the details of the charge, rather than by grand jury process. *Hurtado* contended that his right to this "due process" had been abridged, in violation of the fourteenth amendment, since *Murray* had specified that "due process" is at least "old process." In rejecting this view, Justice Matthews for the Supreme Court opened the gate wide for an evolving judicial declaration of natural rights. The basic constitutional guarantees of due process, said Matthews, do not merely consecrate "particular forms of procedure" (as *Murray* had suggested); "they constitute the very substance of individual rights to life, liberty and property."⁶² In what would become a landmark phrase (very reminiscent of Coke) the Court added that these rights consist in "those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."⁶³ These would be identified by judicial pronouncement. Was there no way to identify them once and for all (as the *Murray* formula had attempted)? No, for they are not rigidly frozen but "developed by a progressive growth and wise adaptation to new circumstances and situations of the forms and processes found fit to give, from time to time, new expression and greater effect to modern ideas of self-government."⁶⁴ It was a curious opinion, on the one hand upholding state legislative action that wiped out what had been a traditional "right" secured to Englishmen under the courts' implementation of the Magna Carta. On the other hand it gave wide scope to the Supreme Court to

59. 96 U.S. (60 How.) 97 (1877).

60. *Id.* at 104.

61. 110 U.S. 516 (1884).

62. *Id.* at 532.

63. *Id.* at 535.

64. *Id.* at 530.

identify new constitutional rights—but by what criteria? Matthews' brush was broad: history, comparative law, natural law (in the sense of "justice—*suum cuique tribuere*," give to each his own, the Justinian definition), and, finally, experience.⁶⁵ The search was always for "fundamental principles of liberty and justice." The state could not violate these for "[l]aw is something more than mere will exerted as an act of power."⁶⁶ Still in *Hurtado*, the state had stayed within permissible bounds in failing to furnish a grand jury because, the Court held, this right was not "fundamental."

Hurtado highlighted what was to be the continuing preoccupation of the Supreme Court in identifying rights secured by due process. Of the two due process clauses, the one in the fifth amendment was binding only against the national government and the District of Columbia, the other in the post-Civil War fourteenth amendment extended to "state action" that infringed asserted rights. Subsequent to *Hurtado*, the Court invariably found itself interpreting due process in challenges to state infringement of rights. Furthermore, prior to *Hurtado* the Court had limited the range of rights protected by due process to specific procedural guarantees earlier recognized by the English courts, and refused to use the due process clause to uphold claims of rights to property and contract. The argument for such a "natural rights" interpretation had been made in dissent by Justice Field in the celebrated *Slaughter-House Cases*⁶⁷ in 1873, and in a series of later cases. In 1897 the Court adopted the Field view,⁶⁸ and for the next forty years due process interpretation was dominated by what one author titled "The Revival of Natural Law Concepts,"⁶⁹ and what Corwin called "principles of Lockian individualism and of Spencerian Laissez Faire."⁷⁰ A new chapter of due process, substantive due process striking at state economic legislation, was sketched out and written. It was an era of judicial supremacy in the economic area that paralleled resolute judicial self-effacement in the field of personal liberties. Early in this era the Court made its third self-conscious effort to chart out a test of the applicability of the due process clause. In so doing, it rebuffed a serious revolt by dissenting Justice Harlan that would have required the Court to recognize each right identified by the first eight amendments

65. *Id.* at 531.

66. *Id.* at 535.

67. 83 U.S. (16 Wall.) 36 (1873).

68. *Allgeyer v. Louisiana*, 165 U.S. 578 (1897). This view also prevailed in later cases. *Adair v. United States*, 208 U.S. 161 (1908) (a fifth amendment case); *Coppage v. Kansas*, 236 U.S. 1 (1915); *Lochner v. New York*, 198 U.S. 45 (1905).

69. C. HAINES, *REVIVAL OF NATURAL LAW CONCEPTS* (1930).

70. Corwin, *The Supreme Court and the Fourteenth Amendment*, 7 MICH. L. REV. 643, 646 (1909).

as secured against the states by the due process clause of the fourteenth amendment.

This third landmark case was *Twining v. New Jersey*⁷¹ in 1908. New Jersey practice permitted a judge to comment critically to the jury when a defendant exercised his admitted privilege not to take the stand in a criminal case. Twining attacked this state practice as a violation of his privilege against self-incrimination, which he asserted to be within the protection of the due process clause of the fourteenth amendment. Justice Harlan, in dissent, contended that such judicial comment in a federal court would clearly be a violation of the fifth amendment privilege. This entailed that such comment in a state court was a violation of fourteenth amendment due process because, Harlan argued, the fourteenth amendment "incorporated" the first eight amendments of the Constitution, and specifically secured against the states those rights which the federal Bill of Rights had secured against federal action.⁷² Justice Moody, for the Court, rejected this contention. In denying that Twining's constitutional rights had been infringed, he reformulated the measure of due process. There were, he ruled, three complementary tests of due process: 1) old process (*Murray*); but 2) not every old process (*Hurtado*); 3) old or new, due process would bar state deprivation only of those processes which constituted "established principles of private rights and distributive justice,"⁷³ "immutable principles of justice which inhere in the very idea of free government,"⁷⁴ "fundamental rights."⁷⁵ Whereas "property" rights and "contract" rights, the Court said, clearly met this test, the privilege against self-incrimination (in this nuance at least) did not. The *Twining* formula seemed to restate Justice Matthews' *Hurtado* test in its emphasis on "fundamental rights"; its decisive intonations would be Court doctrine until the criminal rights revolution of the Warren Court four decades later. Meanwhile, the Supreme Court's judicial review would be sparingly employed within the sphere of procedural due process.

*Palko v. Connecticut*⁷⁶ in 1937 gave us what can be called the fourth major formulation of due process. It was not worlds apart from *Hurtado* and *Twining*, but it came from the hands of Justice Benjamin Cardozo, one of the few Justices of the Supreme Court who had defined for all in advance of his appointment precisely what he conceived

71. 211 U.S. 78 (1908).

72. The first attempts at the "incorporation" argument were made in argument of counsel in *Spies v. Illinois*, 123 U.S. 131 (1887) and in a dissent by Justice Field in *O'Neil v. Vermont*, 144 U.S. 323 (1892). Justice Harlan had argued the point in his dissent in *Maxwell v. Dow*, 176 U.S. 581, 605 (1900).

73. 211 U.S. at 101.

74. *Id.* at 102.

75. *Id.*

76. 302 U.S. 319 (1937).

the judicial function to be.⁷⁷

Palko was indicted for first degree murder. However, the jury convicted him of second degree murder and, instead of the death penalty, he received a life sentence. Connecticut law permitted the state to appeal the sentence. It did so, and won a new trial which resulted in a first degree murder conviction and a death sentence. *Palko* appealed, claiming he had been subjected to double jeopardy. He argued that this violated a specific right guaranteed by the fifth amendment against federal action. It therefore must be conceived as "fundamental," and thus guaranteed against state infringement by the due process clause of the fourteenth amendment. Ultimately, putting chief reliance on *Twining*, Cardozo and the Supreme Court ruled that there was no violation of Palko's rights by the state practice. In doing so Cardozo took note of developments since *Twining* in the field of personal rights. He then reaffirmed *Twining's* "fundamental rights" doctrine in a craftsman's language that became the due process formula of the Supreme Court for a quarter century, and still claims adherents among today's Justices.⁷⁸

The major due process innovations by the Court between *Twining* and *Palko* had been in the area of the first amendment, with its guarantees of speech, press, assembly, and religion. It was argued that if any rights were "fundamental" and thus entitled to protection against state action, these first amendment rights certainly were. The Court at first resisted.⁷⁹ Then, in a series of cases from 1925 to 1937, it agreed that these rights, secured against federal action by the specific language of the first amendment,⁸⁰ were entitled by the fourteenth amendment due process clause to be protected against infringement by the states.⁸¹

In the Scotsboro murder trials,⁸² a celebrated 1935 state case with racial overtones on a national level, the Court ruled that the right to counsel might be sufficiently "fundamental" to be required by due process. The sixth amendment guaranteed the right to "assistance of counsel" in the national courts. The Court conceded that counsel was not guaranteed at common law at the time of the enactment of the Constitution. Still, it found the *Murray* formula no longer a barrier.

77. B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921).

78. Cardozo's formula (discussed below) has been particularly esteemed by Justices Frankfurter, Harlan, and Powell.

79. *Ownbey v. Morgan*, 256 U.S. 94 (1921).

80. U.S. CONST. amend. I, "Congress shall make no law respecting the establishment"

81. By 1937, the Court had decided cases involving speech, press, and assembly. The religion cases would follow in 1946. See, e.g., *Gitlow v. New York*, 268 U.S. 652 (1925); *Whitney v. California*, 274 U.S. 357 (1927); *Herndon v. Lowry*, 301 U.S. 242 (1937) (speech); *Grosjean v. American Press Co.*, 297 U.S. 233 (1933); *Near v. Minnesota*, 283 U.S. 697 (1931) (press); *DeJonge v. Oregon*, 299 U.S. 353 (1937) (assembly).

82. *Powell v. Alabama*, 287 U.S. 45 (1932).

All nine Justices (including Justice Butler who dissented) agreed in *Powell* that effective "assistance of counsel" was required by fourteenth amendment due process in the circumstances of that case. The Court narrowly confined itself to the unusual facts of the case at hand, "a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like."⁸³

In *Palko* Justice Cardozo resisted the argument that, as with the first amendment cases and the right to counsel, the double jeopardy claim of the defendant should be viewed as "absorbed" from the Bill of Rights into the fourteenth amendment due process clause. Cardozo's chief reliance was on *Twining*, which had recognized "that some of the personal rights safeguarded by the first eight amendments against national action may also be safeguarded against state action"⁸⁴ by the fourteenth. This is so, not because those rights are enumerated in the first eight amendments, but because they are included in the conception of due process,⁸⁵ that is, because the rights asserted are "fundamental." How was the Court to determine whether an asserted right was one of the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions"?⁸⁶ Was it a mere matter of judicial whim? No, said Cardozo, although there might be cases on both sides of the "fundamental" line. There was a unifying, rational principle that would place them here or there. Did the statute or decision subject defendant "in the particular situation" to "a hardship so acute and shocking that our polity will not endure it"?⁸⁷ Finally, in the standard (or restatement of *Twining*) that was to endure, did the statute or decision defile immunities which were "implicit in the concept of ordered liberty" (again, "of the very essence of a scheme of ordered liberty"⁸⁸)? Did the state's second trial of Palko after a criminal appeal violate this principle? "The answer surely must be 'no.' . . . A reciprocal privilege, subject at all times to the discretion of the presiding judge, (citation omitted), has now been granted to the state. There is here no seismic innovation. The edifice of justice still stands, in its symmetry, to many, greater than before."⁸⁹ The language was resonant and majestic. The voice of the Justices was hardly a step away from the 1877 case's explanation⁹⁰ of due process as "the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall re-

83. *Id.* at 71.

84. *Palko v. Connecticut*, 302 U.S. 319, 326 n.4 (1937).

85. *Id.*

86. *Hebert v. Louisiana*, 272 U.S. 312, 316 (1926).

87. 302 U.S. at 328.

88. *Id.* at 325.

89. *Id.* at 328.

90. *Davidson v. New Orleans*, 96 U.S. 97 (1877).

quire.”⁹¹

The Court almost routinely applied the *Palko* formula in the 1947 case of *Adamson v. California*,⁹² a case that produced a dissent by Justice Black that missed becoming majority doctrine by a single vote. The revival of the Harlan “incorporation” doctrine in that dissent, and the “classic debate” (Justice Brennan’s phrase)⁹³ that ensued, laid bare a bitter division in the Supreme Court as to the means of identifying constitutionally protected rights under the due process clause of the fourteenth amendment.

Between *Palko* in 1937 and *Adamson* in 1947 a major revolution had taken place on the Supreme Court. Under pressure of a series of appointments by President Roosevelt, carefully screened for their hostility to judicial veto of state and national economic and social legislation, the Court had specifically renounced its previous activism under the banner of “property” and “freedom of contract” and “due process.” In the same period it had moved with considerable vigor against state legislation which brushed against the newly protected rights of free speech and press, assembly and religion. What should be the posture of this New Deal Court in the area of procedural due process? Where there had been a broad agreement as to substantive (economic and social) due process that activism was to be renounced, here it became apparent that the Justices differed widely.

The problem, as seen by Justice Black, was how to protect the liberties so recently confirmed against state action, such as speech, press and counsel, from intrusion by a future court, and yet forestall intrusion by a future court on the prerogatives of the states in the economic field? Black’s answer, as old as Lord Coke’s, was to revive Justice Harlan’s lost cause in his *Maxwell* and *Twining* dissents: that due process rights were measured by, and limited to, the first eight amendments of the Constitution.

Adamson in 1947 gave Justice Black his opportunity to present this position. Under California law the failure of a defendant to explain or deny evidence against him could be commented upon by the court and by counsel, and considered by the jury. *Adamson* was convicted of murder in the first degree, and he claimed that this practice used against him violated his right against compulsory self-incrimination, specifically guaranteed as to federal action by the fifth amendment, and, he argued, implicitly against state action by the due process clause of the fourteenth. It was, of course, *Twining* all over again. The defendant argued that *Twining* should be reversed. The Court, five to

91. *Id.* at 104.

92. 332 U.S. 46 (1947).

93. *Ohio ex rel. Eaton v. Price*, 364 U.S. 263, 274 (1960) (dissenting opinion).

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four, reaffirmed *Twining*, both on the self-incrimination issue and on its methodology (as annotated by *Palko*). Justice Black strongly attacked *Twining*. He demanded that it be overruled both on its precise holding (on self-incrimination), and on its general theory of due process ("the natural law" theory of the Constitution upon which it relies"⁹⁴). The debate was launched and continued, without clear resolution, for twenty years. In its course, the Black "incorporation" argument never secured majority support, and neither did the Court ever expressly renounce either the "fundamental rights" measure of *Twining*, or the Cardozo refinement: "concept of ordered liberty" as measures of due process. However, the bitter clashes of the "classic debate," especially between Justices Black and Douglas, on the one hand, and Justice Frankfurter (and later Justice Harlan) on the other, gave more than customary visibility to the wide difference of views on the Court (as there was off the Court) as to just what the Justices were (and should be) doing when confronted with assertions of constitutional rights. If Black lost his battle for "incorporation" of all the Bill of Rights in the fourteenth amendment's due process, he sat on the Court to see one by one various individual provisions of the first eight amendments recognized as "fundamental,"⁹⁵ and thus applicable against state action as an ingredient of due process.

These rights just noted are all reduplications of specific rights listed as such in the first eight amendments. There were other rights newly recognized that were not in the first eight, but these were few: the "right to travel,"⁹⁶ and the "right to proof of guilt beyond a reasonable doubt"⁹⁷ were given standing by the Court. Although highly spoken of earlier by the Court as a candidate for "rightship," education was ruled not a "fundamental" right within the context of *Rodriguez*,⁹⁸ an equal protection case that will be discussed later. Nor would the Court recognize a right to a judicial reminder to the jury of a presumption of innocence in a criminal case.⁹⁹

In an opinion that blurs over any intelligible explanation of what the Court had been doing in the two decades since *Adamson*, Justice White wrote for the Court in *Duncan v. Louisiana*,¹⁰⁰ a 1968 case applying the

94. 332 U.S. at 59.

95. The provisions styled not "fundamental" (hence, not applicable to the states) are the grand jury provision of the fifth amendment (see *Hurtado v. California*, 110 U.S. 516 (1884)) and the civil jury provision of the seventh amendment.

96. *Shapiro v. Thompson*, 394 U.S. 618 (1969).

97. *In Re Winship*, 397 U.S. 358 (1970).

98. *Rodriguez v. San Antonio Ind. School Dist.*, 411 U.S. 1 (1973). See text accompanying note 171 *infra*.

99. See *Taylor v. Kentucky*, 436 U.S. 478 (1978). In that case the Supreme Court held that failure to give a requested charge as to a presumption of innocence denied defendant a fair trial in the circumstances of that case. However, the court declined to make a *per se* rule.

100. 391 U.S. 145 (1968).

jury trial provision (somewhat) to the states. White stepped back from the notion of *Hurtado* and *Twining* that the "fundamental" aspect of rights was tied into a universal acceptance. More in line with the Coke rather than the Lockean heritage, he restricted the notion of fundamentalism to Anglo-American institutions. He could have done otherwise and termed a jury not "fundamental," since most systems of justice do not use juries at all. Unless *Rodriguez* means that the era of new rights has been closed (hardly likely), we are no closer than before to understanding what standards guide judges in determining constitutional rights. True, this is much the way the common law has always developed. From Coke we learned that "right reason" is judicial reason. The positivists are willing to pay the price of closing off future rights to protect (against the judges) the rights already recognized. To others this seems less rational than to run the risk from the vagaries of judicial interpretation.

III. "EQUAL PROTECTION OF THE LAWS"

A wave of legislation and constitutional amendments¹⁰¹ after the Civil War bequeathed to the American polity questions concerning rights of persons that courts, legislatures, and executives continue to address somewhat in a haze. Of the three constitutional amendments, it would have seemed that the thirteenth¹⁰² (abolishing slavery) and the fifteenth¹⁰³ (preventing denial of franchise on racial grounds) were straightforward enough; nevertheless, even these puzzled the courts for a time. An observer contemporary with the enactment of the fourteenth amendment,¹⁰⁴ with its many overlapping and, perhaps, contradictory provisions, could have predicted that the Supreme Court would have difficulty sorting it all out 110 years later. He would have been

101. In addition to the thirteenth, fourteenth, and fifteenth amendments, *see* notes 102-04 *infra*, these were chiefly, the Civil Rights Acts of 1866 and 1870.

102. U.S. CONST. amend. XIII,

"Section 1. Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation."

103. U.S. CONST. amend. XV,

"Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation."

104. U.S. CONST. amend. XIV,

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . .

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

right. He would perhaps have been surprised that for all its difficulty with due process, the Supreme Court would find itself most in the dark with the fourteenth's provision that "no state shall deny to any person . . . equal protection of the laws."¹⁰⁵ Our original spectator could hardly have anticipated that a great deal of the Court's confusion would be of its own making.

In those decisions that were most contemporaneous with adoption of the fourteenth amendment, the Supreme Court did not have trouble in discerning the meaning of equal protection and the "evil to be remedied by this clause."¹⁰⁶ In the *Slaughter-House Cases*¹⁰⁷ in 1873, the Court upheld a state-sanctioned monopoly of slaughter-houses against the plaintiff's claim that his constitutional right to pursue a calling had been infringed by the monopoly. The Court had its first occasion to pass on the scope of the various clauses of the fourteenth amendment. By way of overview the Court looked at the three Civil War Amendments as a whole:

[N]o one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him. It is true that only the fifteenth amendment, in terms, mentions the [N]egro by speaking of his color and his slavery. But it is just as true that each of the other articles was addressed to the grievances of that race, and designed to remedy them as the fifteenth.¹⁰⁸

Turning to the thirteenth and fourteenth amendments, and the specific clauses which included involuntary servitude, privileges and immunities of citizens of the United States, equal protection of the laws, and due process of law, the Court said, "The most cursory glance at these articles discloses a unity of purpose, when taken in connection with the history of the times, which cannot fail to have an important bearing on any question of doubt concerning their true meaning."¹⁰⁹ This history, the Court went on, centered on slavery:

The institution of African slavery, as it existed in about half the states of the Union . . . culminated in the effort, on the part of most of the states in which slavery existed, to separate from the Federal government, and to resist its authority. This constituted the War of the Rebellion, and whatever auxiliary causes may have contributed to bring

105. *Id.*

106. See text accompanying note 112 *infra*.

107. 83 U.S. (16 Wall.) 36 (1873).

108. *Id.* at 71-72.

109. *Id.* at 67.

about this war, undoubtedly the overshadowing and efficient cause was African slavery.

In that struggle, slavery, as a legalized social relation, perished. It perished as a necessity of the bitterness and force of the conflict. . . .

Hence the thirteenth article of amendment¹¹⁰

That the main purpose of the fourteenth amendment's first section defining citizenship "was to establish the citizenship of the [N]egro can admit of no doubt." The Court's comment on due process was modest, simply that its purpose was to extend the due process that had limited the federal government from the beginning (by the fifth amendment) by placing "the restraining power over the states in this matter in the hands of the federal government."¹¹¹

The Court next considered the equal protection clause:

In the light of the history of these amendments, and the pervading purpose of them which we have already discussed, it is not difficult to give a meaning to this clause. The existence of laws in the States where the newly emancipated [N]egroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden.¹¹²

Finally, the Court turned to section 5, the congressional enforcement clause of the fourteenth amendment:

If, however, the States did not conform their laws to its requirements, then by the fifth section of the article of amendment Congress was authorized to enforce it by suitable legislation. We doubt very much whether any action of a State not directed by way of discrimination against the [N]egroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other.¹¹³

In *Ex Parte Virginia*¹¹⁴ in 1880 this theme was continued:

One great purpose of these Amendments was to raise the colored race from that condition of inferiority and servitude in which most of them had previously stood, into perfect equality of civil rights with all other persons within the jurisdiction of the States. They were intended to take away all possibility of oppression by law because of race or color.¹¹⁵

In *Strauder v. Virginia*,¹¹⁶ decided the same day, a conviction of a black citizen was reversed because blacks had been excluded from the

110. *Id.* at 68.

111. *Id.* at 73, 68-69.

112. *Id.* at 81.

113. *Id.* The court explained the fifteenth amendment as similarly motivated by the conviction that blacks "living in the midst of another and dominant race, could never be fully secured in their person and their property without the right of suffrage." *Id.* at 71.

114. 100 U.S. 339 (1880).

115. *Id.* at 344-45.

116. 100 U.S. 303 (1880).

grand jury which indicted him. The Court repeated the above assertions from *Slaughter-House*, and added:

It was in view of these considerations the [f]ourteenth [a]mendment was framed and adopted. It was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States.

If this is the spirit and meaning of the amendment, whether it means more or not, it is to be construed liberally, to carry out the purposes of its framers.¹¹⁷

In all these cases, and in others,¹¹⁸ there was no disagreement that the fourteenth amendment had accorded rights to others than blacks. So too with the thirteenth. Thus, in *Slaughter-House*, the Court said:

Undoubtedly while [N]egro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter. If Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this amendment may safely be trusted to make it void.¹¹⁹

And in *Ex Parte Virginia* the Court had also noted that the purpose of the due process and equal protection clauses "was to secure equal rights to all persons. . . ."¹²⁰ This was reiterated in *Strauder* as self-evident, but the Court immediately underscored the reasons for special concern for the emancipated black citizens with "the right to exemption from unfriendly legislation against them distinctively as colored,—exemption from legal discrimination, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race."¹²¹ The Court then stressed the notion of discrimination in the sense of inflicting the stigma of inferiority:

The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.¹²²

117. *Id.* at 306-07.

118. In *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), for example, the equal protection clause was employed to give relief to Chinese laundrymen who had been discriminated against by administration of a statute on racial grounds.

119. 83 U.S. (16 Wall.) at 72.

120. 100 U.S. at 347.

121. 100 U.S. at 308.

122. *Id.*

This notion of invidious discrimination under the fourteenth amendment comprising "racial slur or stigma" would be briefly revived by the Court in 1977¹²³ on the eve of the decision in *Bakke*.¹²⁴

The *Civil Rights Cases*¹²⁵ in 1883 resulted in a serious setback to the use of congressional legislation under section 5 of the fourteenth amendment. *Ex Parte Virginia* had noted: "[I]t was to secure equal rights to all persons, and, to insure to all persons the enjoyment of such rights, power was given to Congress to *enforce* its provisions by appropriate legislation."¹²⁶ But the *Civil Rights Cases* set aside congressional provisions granting equal access to all races in specific public facilities on the ground that there had been no "state action" shown which denied equal access, and thus no need for the "corrective" legislation which alone, the Court said, section 5 permits. In perhaps its most damaging aspect, the opinion also refused to uphold the civil rights legislation as permitted by the thirteenth amendment's design to prohibit badges of slavery (such as segregated public facilities). Despite *Slaughter-House's* contrary indications, the Court now denied that the thirteenth reached anything but slavery itself.

For almost three-quarters of a century following the *Civil Rights Cases* of 1883, the Supreme Court disdained the views of those earlier decisions, contemporaneous to passage of the Civil War Amendments, that the central (if not exclusive) purpose of the amendments was to foster the integration of the former slaves and their descendants into American society; and that the chief vice of racial discrimination was the personal wound of stigma, beyond short-changing blacks on material benefits of the society.

A commission had been established in 1877 to settle the disputed presidential election of 1876 between the Democrat, Samuel Tilden, and the Republican, Benjamin Harrison. The deciding vote on the commission in favor of Harrison, who had received only a minority of the popular vote, was cast by Supreme Court Justice Bradley. The conventional wisdom of the day saw a trade-off here that would insure an end to Reconstruction and of an expansive view of the civil rights of the new black citizen.

It has been persuasively argued¹²⁷ that the first fruits of this "compromise of 1877" were Justice Bradley's restrictive opinion for the Court in the *Civil Rights Cases*. Thereafter, so far as racial matters were concerned, the fourteenth amendment fell into a not innocuous

123. *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977).

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

125. 109 U.S. 3 (1883).

126. 100 U.S. at 339-40.

127. See Scott, *Justice Bradley's Evolving Concept of the Fourteenth Amendment From the Slaughter-House Cases to the Civil Rights Cases*, 25 RUTGERS L. REV. 552 (1971).

desuetude, as did the thirteenth. The ground had been carefully laid in the *Civil Rights Cases* for the Court's decision in 1896, a decision that would leave a mark on American race relations and the rights of black citizens that has since proven itself quite indelible. This was the case of *Plessy v. Ferguson*¹²⁸ by which the Supreme Court made itself, and remained for fifty years, an integral part of the problem of continued racial discrimination in American society.

From the time of *Plessy*, race became a permissible basis for denying citizens the use of public facilities. Louisiana explicitly denied black citizens the use of railroad facilities used by whites. According to the Supreme Court, *Plessy* had stated no denial of equal protection rights because "separate" facilities were available to blacks, and "separate" facilities were not unequal. This was the prevailing formula in the Supreme Court in racial discrimination cases until *Brown v. Board of Education*¹²⁹ in 1954. Over Justice Harlan's eloquent protest, the *Plessy* Court resonated the *Civil Rights Cases*' philosophy that racial discrimination was largely a private, perhaps imagined, fault, and not actionable as a "badge of slavery"; nor was publicly enforced separation of the races in public facilities a denial of equal protection so long as there was a rough "equality" in "separate" facilities. Justice Harlan warned in dissent that the constitutional question was not whether "material" equality was achieved. It was, rather, whether the fourteenth amendment had banned publicly sanctioned separation of the races, thus reinforcing a perceived stigma of inferiority that impeded the integration of the new black citizens into American society contrary to the design of the Civil War Amendments. "We boast of the freedom enjoyed by our people above all other peoples,"¹³⁰ Harlan wrote. "But it is difficult to reconcile that boast with a state of the law which, practically, puts the brand of servitude and degradation upon a large class of our fellow-citizens, our equals before the law. The thin disguise of 'equal' accommodations for passengers in railroad coaches will not mislead any one, nor atone for the wrong this day done."¹³¹

The "separate but equal" rule wreaked its chief havoc in the constitutional support that it lent to segregated education, especially in the schools. In a few cases the Supreme Court held that separate educational facilities and transportation were unconstitutional because they were not in fact "equal."¹³² It was not until 1954 that the Court repudi-

128. 163 U.S. 537 (1896).

129. 347 U.S. 483 (1954).

130. 163 U.S. at 562.

131. *Id.*

132. Most of these cases were discussed in *Brown*. However, for a full discussion of all the more recent cases between *Plessy* and *Brown* see V. ROSENBLUM, LAW AS A POLITICAL INSTRUMENT 41-69 (1955).

ated the "separate" doctrine as to public education. In 1954 it finally agreed, unanimously, in *Brown v. Board of Education*¹³³ that "[s]eparate educational facilities are inherently unequal," and thus violate "the equal protection of the laws guaranteed by the [f]ourteenth [a]mendment."¹³⁴ The *Brown* opinion seemed to argue that, in education, the perception of the stigma of separation by young black students made equal education *psychologically* impossible. The point was later suggested that the psychological data relied on in *Brown* was not convincing, and that the conclusions drawn from the data by the Court were inaccurate.¹³⁵ Despite its grounding *Brown* in psychological rather than moral language, the Court soon ruled out enforced segregation in all public facilities regardless of whether the "separate" facilities were equal.¹³⁶ Without saying so as a Court, by this series of cases the United States Supreme Court in fact and law accepted Justice Harlan's prophetic dissent in *Plessy*. After a long delay in implementing *Brown*, the Court remained unanimous through its 1971 *Swann*¹³⁷ decision; it oversaw reorganization of school districts in south and north with a view of wiping out "root and branch," the dual system of racially segregated schools. In *Swann* the Court upheld busing of black and white children as a means of remedying the effects of unlawful segregation. Chief Justice Burger's opinion in *Swann* recalls the mindfulness of the original cases, and of Justice Harlan's *Plessy* dissent, that the design of the equal protection clause required remedial steps "in order to lessen the impact . . . of the state-imposed *stigma of segregation*."¹³⁸

The school segregation cases are the beginning and not the end of the inquiry into developments of what may be called the *Brown* era of interpretation of the Civil War Amendments. The years since *Brown*—at least until the 1978 *Bakke*¹³⁹ case—have seen an expanded hospitality to claims by blacks of racial discrimination, through the thirteenth and fifteenth amendments, and through the equal protection, due process and enforcement clauses of the fourteenth amendment. Before dealing with these matters it is time to review the use made by the Court of the equal protection clause in non-racial cases in the pre-*Brown* period, and the methodology (formulas, tests, and standards for decision of equal protection cases) that the Court developed as envelopes for its policy decisions.

133. 347 U.S. 483 (1954).

134. *Id.* at 495.

135. See Cahn, *Jurisprudence*, 30 N.Y.U.L. REV. 150 (1955).

136. See, e.g., the following cases which were decided by per curiam orders simply citing *Brown*. *Mayor of Baltimore v. Dawson*, 350 U.S. 877 (1955) (beaches); *Gayle v. Browder*, 352 U.S. 903 (1956) (buses); *Holmes v. City of Atlanta*, 350 U.S. 879 (1955) (golf courses).

137. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

138. *Id.* at 26.

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

Recall the theme discussed in connection with *Slaughter-House, Ex Parte Virginia* and *Strauder*, the "original" Civil War Amendment cases, that "[t]he existence of laws in the states where the newly emancipated [N]egroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied"¹⁴⁰ by the equal protection clause. There was no question that equal protection also protected others against discrimination. Protection was given laundrymen of Chinese origin in *Yick Wo v. Hopkins*¹⁴¹ in 1886. However, little use was made of the equal protection clause by the Court. Plaintiff challenged a sterilization statute on both due process and equal protection grounds in *Buck v. Bell*¹⁴² in 1927. Justice Holmes attended with some care to the due process argument before rejecting it. But for the equal protection argument Holmes had little time, calling it "the usual last resort of constitutional arguments."¹⁴³ When the Supreme Court did give attention to equal protection arguments it simply asked if there was a reasonable basis upon which the legislature might have fashioned the challenged classification. This was the so-called "rational basis" test. There were broader and narrower ways in which the Court might measure this "rational basis"¹⁴⁴ but, under equal protection the Court used an extremely light review of the governmental action. This remained true even in the heyday of substantive due process (1897-1937) when, as we have seen, the Supreme Court freely struck down economic and social legislation as violations of due process. Judicial reluctance to use the equal protection clause to find constitutional violations in economic matters continued, as would be expected, during the post-1937 days of the Roosevelt Court and its successors.

In a celebrated footnote in the *Carolene Products*¹⁴⁵ case in 1938, Justice Stone suggested that the Court might more carefully scrutinize legislative classifications where "fundamental rights" were involved, particularly those rights which impinged on the exercise of the democratic process (such as first amendment communications and voting), or where the classification bore heavily upon a "discrete and insular minority" (such as, presumably, the long belabored blacks). In two such cases during this period, the Court made initial moves to carve out a stricter measure of testing governmental action under the equal protection clause, when personal liberty, rather than property, underlay plaintiff's claim of right.

140. See text accompanying notes 108-22 *supra*.

141. 118 U.S. 356 (1886).

142. 274 U.S. 200 (1927).

143. *Id.* at 208.

144. *Williamson v. Lee Optical*, 348 U.S. 483 (1955); *Railway Express Agency v. New York*, 336 U.S. 106 (1949).

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

*Skinner v. Oklahoma*¹⁴⁶ in 1942 involved, like *Buck v. Bell*,¹⁴⁷ a state sterilization statute. It was limited to criminals convicted of a felony. Petitioner had been convicted of larceny, a felony that was defined much like embezzlement, a non-felony that was not subject to sterilization. Justice Douglas, for the Court, pointed out that the sterilization law impinged on one of the "basic rights of man," the right to procreate and have a family. In this context, the Court would subject the statute to "strict scrutiny," and not approve it merely because it had a "rational basis."¹⁴⁸ Two years later in *Korematsu v. United States*,¹⁴⁹ the Court passed on the constitutionality of a military order in World War II confining all persons of Japanese ancestry, citizens and noncitizens alike, in prescribed military areas in California. In a severely criticized decision, the Court affirmed the conviction against a claim that it was an invidious racial discrimination. Justice Black, speaking for a six-to-three Court, affirmed the constitutionality of the military order in one of the most restrictive decisions on personal liberty in the nation's history. Black, one of the Court's most foremost libertarians, endeavored to label this decision as one on the war power, and not a racial decision. Of chief interest to us here, Black took the lead from *Skinner* and extended the "strict scrutiny" formula to situations of race:

All legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonisms never can.¹⁵⁰

However, there was, he said, necessity here. In 1948 in *Oyama v. California*,¹⁵¹ the Court held it a violation of equal protection for California to apply its Alien Land Law to Oyama, an American citizen, insofar as its provisions discriminated against him on the basis of his parents' country of origin. "There is absent the compelling justification which would be needed to sustain discrimination of that nature."¹⁵² These cases gave a start to the notion that race was a "suspect class" that needed "compelling justification" to withstand an equal protection challenge. The race-as-a-suspect class category only became firm with three *Brown* era cases of the 1960's involving alleged discrimination against blacks.¹⁵³

146. 316 U.S. 535 (1942).

147. 274 U.S. 200 (1927).

148. 316 U.S. at 541.

149. 323 U.S. 214 (1944).

150. *Id.* at 216.

151. 332 U.S. 633 (1948).

152. *Id.* at 640.

153. See text accompanying notes 154-62 *infra*.

In *McLaughlin v. Florida*¹⁵⁴ in 1964, the Supreme Court invalidated, on equal protection grounds, a statute making racial cohabitation a distinct offense. The Court rejected the argument that equal protection is satisfied as long as white and black participants in the offense are similarly punished. In the same year, in *Anderson v. Martin*,¹⁵⁵ the Court declared unconstitutional a state statute requiring that the race of every candidate for elective office be placed on the ballot. “[P]lacing of the power of the State behind a racial classification induces racial prejudice at the polls.”¹⁵⁶ Three years later, in *Loving v. Virginia*,¹⁵⁷ the Court struck down a Virginia statute framed to prevent interracial marriages. Relying on *McLaughlin*, the Court said, “There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the [e]qual [p]rotection [c]lause.”¹⁵⁸ (The Court found an additional ground of invalidity in the *Skinner* suggestion of strict scrutiny where basic human rights were involved). The Court’s basic design in overturning the Virginia statute in *Loving*, as in the desegregation cases, was that the statute was plainly written to perpetuate the stigma of inferiority. While the Court did not hold that racial classifications were always unconstitutional:

At the very least, the [e]qual [p]rotection clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the most rigid scrutiny, (citation omitted) and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the [f]ourteenth [a]mendment to eliminate.¹⁵⁹

The Court concluded that “there is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification”¹⁶⁰ against mixed racial marriages. It was simply a measure “designed to maintain White Supremacy”¹⁶¹ and perpetuate the stigma of inferiority. Like *Brown*, then, these decisions in racial classification cases were tied to “[t]he clear and central purpose of the [f]ourteenth [a]mendment . . . to eliminate all official state sources of invidious racial discrimination in the States.”¹⁶²

The previously inert equal protection clause, enforced by only the light “rational basis” review, thus took on new significance in these areas of basic human rights—expanded to include political rights, nota-

154. 379 U.S. 184 (1964).

155. 375 U.S. 399 (1964).

156. *Id.* at 402.

157. 388 U.S. 1 (1967).

158. *Id.* at 12.

159. *Id.* at 11.

160. *Id.*

161. *Id.*

162. *Id.* at 10.

bly voting, and the "suspect" racial classification. In these two areas the Court more strictly examined the state legislation to see if (1) it achieved its designed purpose; and (2) more significantly, whether there was a special governmental interest which would justify state legislation hostile to these interests. The formula used by the Court whether entitled "compelling state interest," "subordinating state interest," or some comparable formula, was designed to require a very heavy showing of governmental necessity which could not be vindicated by less drastic, nonracial means.

Attempts have been made to expand the category of "suspect" classifications beyond race. Since 1971, alienage has enjoyed a brief career, progressively diminished in scope, as a "suspect classification" triggering the "compelling state interest" test.¹⁶³ Other attempts were made to secure recognition by the Court of poverty,¹⁶⁴ illegitimacy,¹⁶⁵ and sex¹⁶⁶ (or gender) as entitled to this more exacting standard of judicial review. These have been rebuffed and in such a way as to support the view that the Court was mindful of the special significance accorded racial discrimination and stigma in the original design of the equal protection clause of the fourteenth amendment, as recognized in the original decisions (*Slaughter-House*, etc.) and confirmed in the *Brown* era cases we have discussed. The manner in which the Court declined to make classifications based on wealth/poverty a "suspect" classification gives weight to this inference. In *Hunter v. Erickson*¹⁶⁷ in 1969, the Court held that equal protection had been violated by Akron's amendment of its city charter to prevent the city council from implementing any ordinance dealing with racial, religious, or ancestral discrimination in housing, until it had been specifically approved by the electorate. The Court ruled that the Akron amendment denied a black citizen equal protection because it treated "racial housing matters differently than other racial and housing matters."¹⁶⁸ In 1971 in *James v. Valtierra*,¹⁶⁹ the Court was called to pass on a California constitutional requirement for local legislative bodies to submit low-rent public housing decisions to a special community election. Low-cost housing clients claimed that

163. In *Graham v. Richardson*, 403 U.S. 365 (1971), the court held that a classification based solely on alienage was "suspect." This decision has been considerably limited by the Court as to the federal government by virtue of Congress' power over immigration and naturalization. See, e.g., *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976) (public employment); *Mathews v. Diaz*, 426 U.S. 69 (1976) (federal Medicare benefits). It has been limited as to state employees in light of state interest over "basic functions of government." *Foley v. Connelie*, 435 U.S. 291 (1978) (state police officer); *Ambach v. Norwick*, 441 U.S. 68 (1979) (public school teacher).

164. *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1 (1973).

165. *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972).

166. *Craig v. Boren*, 429 U.S. 190 (1976).

167. 393 U.S. 385 (1969).

168. *Id.* at 389.

169. 402 U.S. 137 (1971).

they had been singled out because of their poverty and therefore that they had been denied equal protection. The district court relied on *Hunter*, and granted plaintiff's relief. The Supreme Court reversed, and explained:

The present case could be affirmed only by extending *Hunter*, and this we decline to do *Hunter* rested on the conclusion that Akron's referendum law denied 'equal protection' by placing 'special burdens on racial minorities within the governmental process.' Unlike the Akron referendum position, it cannot be said that California's Article XXXIV rests on 'distinctions based on race'. . . .¹⁷⁰

This rejection of wealth/poverty as a "suspect" classification was confirmed in 1973 in the leading case of *San Antonio Independent School District v. Rodriguez*,¹⁷¹ in which the Supreme Court packaged its celebrated two-tier formula for equal protection review. If the state classification burdened a "fundamental right" which had been identified as such by the Court, or if it involved a "suspect classification," there would be "strict scrutiny" and the need of showing a "compelling governmental interest." Otherwise an equal protection challenge would be given only the limited "rational basis" review. In *Rodriguez* plaintiffs challenged Texas' financing arrangements for education, charging that in wealthier areas more state funds were expended for public education than in poorer areas. The Court denied both that wealth/poverty constituted a "suspect" classification (*James*), and that education was a "fundamental right" (despite its extravagant endorsement of the importance of education in the racial context of *Brown*). Accordingly, the Court applied the "rational basis" limited review, and found that Texas' financing scheme passed muster under the equal protection clause.

Claims for "suspect classifications" based solely on illegitimacy,¹⁷² and on sex or gender,¹⁷³ were likewise rejected by the Court. However, some scholars have made a good case that while the Court does not use "strict scrutiny" in sex and illegitimacy cases, it uses more than a light "rational basis" review.¹⁷⁴ In its latest formulation of the standard of reviewing alleged sex discrimination in *Craig v. Boren*,¹⁷⁵ the Court required that the challenged legislation bear a "fair and substantial rela-

170. *Id.* at 140-41.

171. 411 U.S. 1 (1973).

172. *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972). In *United States v. Clark*, 48 U.S.L.W. 4195, 4196 (1980) a Court majority restated the illegitimacy standard: "[A] classification based on illegitimacy is unconstitutional unless it bears 'an evident and substantial relation to the particular . . . interests [a] statute is designed to serve.'"

173. *Craig v. Boren*, 429 U.S. 190 (1976).

174. See Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1 (1972); G. GUNTHER, *CONSTITUTIONAL LAW: CASES AND MATERIALS* 663 (9th ed. 1975).

175. 429 U.S. 190 (1976).

tion to an important governmental interest.”¹⁷⁶ Despite its evident care in inspecting legislation that makes sex or illegitimacy the basis for receipt or denial of governmental benefits, the Court has not been willing to interpret the fourteenth amendment’s regard for sex and illegitimates with the same degree of scrutiny required by its central concern for race, or for the “fundamental rights” which, we have seen,¹⁷⁷ the Court has itself elicited from the term due process, and those it has specially identified as subject to the strictest protection of the equal protection clause.¹⁷⁸

A. *Other Brown Era Illustrations*

The position I have been developing is that in what we may call the *Brown* era, signifying the period commencing in 1954, the Supreme Court has reverted to the contemporaneous view of *Slaughter-House* that the Civil War Amendments were principally directed to erasure of slavery and its effects. We have just noted this in the context of a new “strict scrutiny” applied to governmental classifications based on race. It may also be seen in Warren and Burger Court cases dealing with the thirteenth amendment abolishing slavery, and with the fifteenth amendment banning racial discrimination affecting voting rights. In addition, greater protection has been given rights against racial discrimination in areas of fourteenth amendment jurisprudence that we have not yet considered, notably the extension of congressional power in race cases under section 5, and the greater scope of equal protection accorded voting rights when racial factors are in issue. I now turn to these matters.

1. *Resurgence of the Thirteenth Amendment—Jones v. Mayer*¹⁷⁹

The thirteenth amendment, enacted in 1865, deals explicitly with race, and only race. Its effectiveness had been greatly restricted by the *Civil Rights Cases*¹⁸⁰ and *Plessy v. Ferguson*¹⁸¹ which denied that Congress might legislate under that amendment to erase “badges of slavery,” such as racial discrimination. In 1866 Congress legislated to ban racial discrimination in all property and contract transactions. After the enactment of the fourteenth amendment in 1868, the provisions of the 1866 Act were re-enacted as part of the Civil Rights Act of 1870.

176. *Id.* at 197.

177. See text accompanying notes 96-100 *supra*.

178. Certain rights have been specially designated as “fundamental” under the equal protection clause, notably those dealing with access to the ballot, access to the courts, and the right to travel.

179. 392 U.S. 409 (1968).

180. 109 U.S. 3 (1883).

181. 163 U.S. 537 (1896).

After the *Civil Rights Cases* specified that the prohibitions of the fourteenth amendment applied only to state action, it had been assumed that the property (42 U.S.C. § 1982) and contract (42 U.S.C. § 1981) provisions of the Civil Rights Acts must also be restricted to governmental (and not private) discriminations. One Mr. Jones sued Mayer Co., charging that Mayer's failure to rent Jones a house because he was black constituted a violation of section 1982 which entitled Jones to recover damages. Mayer Co. answered that 1) section 1982 must be considered as re-enacted by Congress in 1870 pursuant to section 5 of the fourteenth amendment; 2) that being the case it was constitutionally applicable only to governmental (not private) discrimination. This seemed an impeccable argument under the Supreme Court's decisions in and following the *Civil Rights Cases* of 1883. However, in *Jones v. Mayer*,¹⁸² the Supreme Court, in an opinion by Justice Stewart, effected a massive change in its prior rules. First, it construed 1866 to be the operative date of section 1982. It looked to the date of its original enactment as part of the Civil Rights Act of 1866,¹⁸³ passed under Congress' enforcement authority in section 2 of the thirteenth amendment, rather than to 1870, the date of re-enactment under the fourteenth. Second, and of critical importance, the Court disavowed those parts of the *Civil Rights Cases* and *Plessy* that had denied that the range of the thirteenth amendment included "badges of slavery," such as racial discrimination. Justice Stewart's discrediting of the Court's position of eighty-five years is an especially significant indication of the Court's return to its "original position" (of *Slaughter-House*) because Mr. Jones' and other comparable problems would have been adequately resolved under the just-passed Civil Rights Act of 1968,¹⁸⁴ which allowed recovery of damages against individuals for discrimination in housing. It was abundantly clear that the Court would hold this 1968 Act constitutional—not under the fourteenth amendment, but under Congress' power to enact legislation that would bind private individuals under its power to regulate interstate commerce. In *Jones v. Mayer*¹⁸⁵ Justice Stewart for the Court minced no words in holding that section 1982 and the thirteenth amendment were enacted to eliminate restraints on "those fundamental rights which are the essence of civil freedom":

Just as the Black Codes, enacted after the Civil War to restrict the free exercise of those rights, were substitutes for the slave system, so the exclusion of Negroes from white communities became a substitute for the Black Codes. And when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their

182. 392 U.S. 409 (1968).

183. Ch. 31, 14 Stat. 27 (1866).

184. Pub. L. No. 90-284, 82 Stat. 73 (codified in scattered sections of 18, 42 U.S.C.).

185. 392 U.S. 409 (1968).

skin, then it too is a relic of slavery. . . .¹⁸⁶

2. *Fifteenth Amendment and Racial Voting Rights*

The unanimous 1966 decision in *South Carolina v. Katzenbach*¹⁸⁷ upheld an Act to remedy alleged efforts to prevent or discourage blacks from voting in the southern states. The Supreme Court, in upholding the extensive reach of the Voting Rights Act of 1965,¹⁸⁸ rested its decision on section 2, the enforcement clause, of the fifteenth amendment. However, in giving broad power to Congress under the enforcement clause, the Court returned to one of its early decisions. To section 2 of the fifteenth amendment, the Court applied language it had used to explain section 5 of the fourteenth amendment in the 1880 case of *Ex Parte Virginia*¹⁸⁹: "By adding [section 2 of the fifteenth amendment] the Framers indicated that Congress was to be chiefly responsible for implementing the rights created in [section] 1."¹⁹⁰ Then the Court quoted from *Ex Parte Virginia*: It is the power of Congress which has been enlarged. Congress is authorized to *enforce* the prohibitions by appropriate legislation. Some legislation is contemplated to make the [Civil War] amendments fully effective.¹⁹¹ The Court's tone was far from its hostility to racial aspirations in the *Civil Rights Cases* and *Plessy*. This becomes even more evident when the Court identifies "the basic test to be applied in a case involving [section] 2 of the [f]ifteenth [a]mendment":

Chief Justice Marshall laid down the classic formulation, [fifty] years before the [f]ifteenth [a]mendment was ratified: 'Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional.'¹⁹²

The Court added that this test of Marshall had been specifically adopted by the Court as the measure of enforcement clauses of the Civil War Amendments in *Ex Parte Virginia*, one of our original cases. There was no reference to the narrower hospitality it had allowed section 5 in the *Civil Rights Cases*.

A further comparison favorable to racial rights in the context of the fifteenth amendment may be seen in the manner in which the Court approached the implications for "voting rights" when impinged upon

186. *Id.* at 441-43.

187. 383 U.S. 301 (1966) (Justice Black did dissent from a portion of the Court's opinion that does not bear on the present discussion).

188. Pub. L. No. 89-110, 79 Stat. 437 (codified at 42 U.S.C. § 1971, 1973).

189. 100 U.S. 339 (1880).

190. 383 U.S. at 326.

191. 383 U.S. at 325-26.

192. *Id.* at 326, quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316 (1819).

by state political manipulation of voting districts, a practice known as "gerrymandering." Despite the broad protection given to voting rights as "fundamental rights" under the fourteenth amendment, the Court had refused in 1976 to find an infringement of voting rights in mere political gerrymandering.¹⁹³ However, in a case early in the *Brown* era it found a fifteenth amendment violation when the "gerrymandering" of districts was motivated by racial rather than Democrat/Republican partisanship.¹⁹⁴ Also relevant here is an aspect of the 1965 Voting Rights Act¹⁹⁵ (section 5) which may require reorganization of election districts to correct racial imbalances. This feature, upheld by the Court against both statutory and equal protection challenges in *United Jewish Organizations v. Carey*¹⁹⁶ in 1977, will be discussed more fully below.

3. Fourteenth Amendment: Section 5 and Voting Rights

Other aspects of recent fourteenth amendment decisions by the Court have significance for the point we have been urging: the *Brown* era Supreme Court has found a basis in the fourteenth amendment to give greater protection against discrimination based on race. There is no question that the thirteenth and the fifteenth amendments have no relevance outside of race. Our review with respect to them has shown only that the *Brown* era Court has labored to remove obstacles the earlier Court had interposed to making these amendments effective. However, when we come to the fourteenth amendment, we find the Court continually puzzled by two opposing thrusts—the central core of this amendment (like the thirteenth and fifteenth) is the integration of the former slave race in the American policy and society, and yet the fourteenth amendment is applicable by its terms to "any person." The *Brown* era Court has been convinced that from 1883-1954 its predecessors had virtually ignored the primary racial thrust—and at tremendous cost not only to the black citizens, but to the whole racially divided American society. It sought to reinstate what it conceived as the original intent of the framers of the Civil War Amendments and the nation which adopted them, as elaborated in *Slaughter-House*. On the other hand, this same Court became responsible, as we have seen,¹⁹⁷ for the greatest explosion of individual rights of "any person" in the long history of the Supreme Court.

B. Enforcement Power under the Fourteenth Amendment

Despite the broad language of *Ex Parte Virginia* with respect to the

193. *Gaffney v. Cummings*, 412 U.S. 735 (1973).

194. *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

195. Pub. L. No. 89-110, 79 Stat. 437 (codified at 42 U.S.C. § 1971, 1973).

196. 430 U.S. 144 (1977).

197. See text accompanying notes 96-100 *supra*.

enforcement power of Congress under the Civil War Amendments, Congress' enforcement power under section 5 became essentially a dead letter following the *Civil Rights Cases*. It appeared to receive a lift in the language we have seen from a fifteenth amendment case, *South Carolina v. Katzenbach*.¹⁹⁸ In *Katzenbach v. Morgan*,¹⁹⁹ however, the question that reached the Court was Congress' power to enact requirements under section 5 of the fourteenth amendment to meet the standard of equal protection. Without much preliminary study, Congress enacted an amendment to the Voting Rights Act of 1965 that prohibited the enforcement of a literacy test in New York to restrict Puerto Rican citizens of New York from voting. In *Morgan* in 1966, the Court upheld the Congressional action as within its power under section 5 to enforce the equal protection clause, even though the Supreme Court itself had recently upheld a comparable state literacy test against an equal protection challenge. In support of its view the Court cited the same "enforcement" language from *Ex Parte Virginia*, and the same Marshall test from *McCulloch v. Maryland*²⁰⁰ that we just saw in the fifteenth amendment *South Carolina v. Katzenbach*²⁰¹ decision.

Encouraged by what it perceived as the Court's revival of Congressional power to enforce the fourteenth amendment, in 1969 Congress enacted a statute that purported to give eighteen-year olds the right to vote, not only in national elections, but also (using section 5) in state elections. In 1970, by a five to four vote in *Oregon v. Mitchell*,²⁰² the Court upheld the national election provision. However, the Court, by the same margin, denied that Congress' power under section 5 authorized it to provide for eighteen-year old voting in state elections. Congress, as in *Morgan*, purported to be enforcing the equal protection clause. Justice Black (casting the deciding vote) denied the applicability of the *Morgan* precedent because the Act upheld in *Morgan* involved rectification of a racial discrimination (not one based on age): "Where Congress attempts to remedy racial discrimination under its enforcement powers, its authority is enhanced by the avowed intention of the framers of the [t]hirteenth, [f]ourteenth, and [f]ifteenth [a]mendments."²⁰³ While the authority of this sentence is diminished by the fact that Justice Black was speaking for himself and not for a majority of the Court (Black had been in the majority on both the state and the national voting questions), the result in *Oregon v. Mitchell*²⁰⁴ remains the controlling pronouncement of the Court with respect to the

198. 383 U.S. 301 (1966).

199. 384 U.S. 641 (1966).

200. 17 U.S. (4 Wheat) 316 (1819).

201. 383 U.S. 301 (1966).

202. 400 U.S. 112 (1970).

203. *Id.* at 129.

204. 400 U.S. 112 (1970).

diverse threads of Congress' power under section 5 of the fourteenth amendment, and it is a fair illustration of the preferred place that the *Brown* era Court has given to race in the fourteenth amendment scheme.

One of the post-Civil War civil rights statutes (codified as 42 U.S.C. § 1985(3)²⁰⁵) provided remedies for conspiracies to deprive "any person or class of persons of the equal protection of the laws or of equal privileges and immunities under the laws."²⁰⁶ In 1951 in *Collins v. Hardyman*,²⁰⁷ members of a political club sought damages under this statute against American Legionnaires who had allegedly conspired to break up their meeting, held in opposition to the Marshall Plan for foreign aid. In affirming dismissal of the action, the Supreme Court limited the reach of section 1985(3) to those private conspiracies that dominated or displaced state governments. In fact, said the Court, if this complaint did state a claim that met "the requirements of this Act, it raised constitutional problems of the first magnitude."²⁰⁸ The Court assumed that this Act of April 20, 1871, was subject to the requirement of "state action" imposed by the *Civil Rights Cases*, and that congressional action under section 5 of the fourteenth amendment was limited by those cases to remedying defects resulting from state involvement in the conspiracy, and did not reach ordinary private conspiracies.

In 1971, in *Griffin v. Breckinridge*,²⁰⁹ plaintiffs were black citizens of Mississippi who alleged that defendants, white Mississippians, had on racial grounds privately conspired to deprive them of equal protection, in violation of section 1985(3), and they sought damages. The lower courts dismissed the action on the authority of *Collins v. Hardyman*.²¹⁰ The Supreme Court, speaking through Justice Stewart, found constitutional ground upon which to support an action against private persons (as in *Jones v. Mayer*²¹¹) in the thirteenth amendment, and also in the "fundamental right" to travel, which had been variously rooted in the fourteenth amendment and non-fourteenth amendment sources. The Court, however, put a curious caveat upon its now enlarged interpretation of this statute, which was clearly phrased in the terminology of the fourteenth amendment: "equal protection of the laws or of equal privileges and immunities under the laws."²¹² The Court was determined to reach its result without setting a precedent that would make section 1985(3) an anchor point for the development of an open-ended federal

205. The statute is presently designated 42 U.S.C. 1985(c).

206. *Id.*

207. 341 U.S. 651 (1951).

208. *Id.* at 659.

209. 403 U.S. 88 (1971).

210. 341 U.S. 651 (1951).

211. See text accompanying note 182 *supra*.

212. U.S. CONST. amend. XIV.

law for vindicating personal injuries. Justice Stewart specified that “the language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators’ action.”²¹³ The Court highlighted its preoccupation with the race factor by adding, “We need not decide, given the facts of this case, whether a conspiracy motivated by invidiously discriminatory intent other than racial bias would be actionable under the portion of section 1985(3) before us.”²¹⁴ Although it has had opportunity to do so, the Court has not, to date, expanded its interpretation of this statute to reach a non-racial conspiracy. Even though *Griffin* was a case of statutory interpretation, and not a direct construction of the equal protection clause of the fourteenth amendment, it is a fair illustration of the Court’s recurrent recognition of expanded Congressional power under section 5 where race is its design rather than otherwise.

C. *Equal Protection and Voting Rights*

When Chief Justice Warren was asked to name the most significant decision during his time on the Supreme Court he surprised his interrogator by naming not *Brown v. Board of Education*,²¹⁵ but *Baker v. Carr*,²¹⁶ the 1963 case which led to federal courts’ overseeing the apportionment of state electoral districts. Baker challenged Tennessee officials, claiming that the legislative establishment in 1898 of units for electing state legislators was hopelessly out of date and made his vote worth just a fraction of that of voters in smaller units. For example, assume there are fifty legislative districts for electing fifty members of the legislature in a state with 5,000,000 in population. If twenty of these districts each contain 200,000 population and the other thirty districts have 33,333 each, a voter in the smaller districts obviously has more voting power. The Court held that Baker had been denied equal protection to the extent that his voting power had been diluted. How should his voting power be brought up to par? In the above example absolute equality among voters would have required fifty districts of 100,000 each. This is the standard that the Court established in later cases.²¹⁷ The districts should be apportioned so as to give “one person, one vote.” This voting rights explosion brought an expansion of the general coverage of the equal protection clause, and was *not* linked to racial concerns. However, when the Court came to consider the prob-

213. 403 U.S. at 102 (emphasis added).

214. *Id.* at 102 n.9.

215. 347 U.S. 483 (1954).

216. 369 U.S. 186 (1962).

217. *Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1963).

lem of multimember districts, it recognized once again the special significance of racial factors under the equal protection clause.

After the one-person-one-vote standard had been established, the reapportionment cases were mainly concerned with the percentage of permissible deviation from the norm of equality. Ultimately the question arose as to the permissibility of multimember districts. Assume geographical area *X* is entitled to elect five representatives in the state legislature. Overall in *X*, group *A* has sixty percent voter support and group *B* has forty percent. Assume most of group *B*'s voters reside in two of the five particular districts of *X*. If election is by districts, one would expect *A* to elect three members and *B* to elect two. But if the five members are elected at-large in *X*, as a multimember district, *A*, the majority group, will probably elect all five. When the Supreme Court was asked in 1971 to declare multimember districts an automatic violation of equal protection it declined.²¹⁸ But it inserted an "unless" clause that would later prove crucial: *unless* the multimember scheme "would operate to minimize or cancel out the voting strength of racial or political elements of the voting population."²¹⁹ The caution concerning "political" elements left open whether the Court might later set aside general political gerrymandering. The Court has declined to step in here. But multimember districts which would impinge on "the voting strength of racial"²²⁰ elements proved something else. After initially declining to intervene when a black voter challenged a multimember district on that ground, the Court in *White v. Regester*,²²¹ 1973 case, unanimously struck down multimember districts in Texas. It was enough for the Court that there were findings that in one county the black community had been effectively excluded from participation in the Democratic primary selection process,²²² and that in another county Mexican-Americans had been excluded from effective participation in political life. The Court's opinion relied heavily on the background of "history of official racial discrimination in Texas . . ."²²³

In this line of fourteenth amendment cases then, the *Brown* era Court once again responded more readily to alleged discrimination grounded in racial exclusion than to complaints relying on nonracial grounds.

218. *Whitcomb v. Chavis*, 403 U.S. 124 (1971).

219. *Id.* at 143 (emphasis added). See *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965); *Burns v. Richardson*, 384 U.S. 73 (1966).

220. 403 U.S. at 143.

221. 412 U.S. 755 (1973).

222. *Id.* at 767.

223. *Id.* at 765-68. In *City of Mobile v. Bolden*, 48 U.S.L.W. 4436 (1980) the Court limited *White v. Regester* to cases in which there was a showing of intentional racial discrimination, whether the objection to multimember districts be challenged under the fourteenth or fifteenth amendments. But see *City of Rome v. United States*, 48 U.S.L.W. 4463 (1980).

D. *Intent and "Stigma" in Equal Protection Race Cases*

In the 1960's Congress, like the Court, addressed the urgent problem of a racially divided society in which the descendants of the new black citizens of post-Civil War days were still laboring under the burdens of racial discrimination. We have already noted²²⁴ two of these Acts, the Voting Rights Act of 1965 and the Civil Rights (Housing) Act of 1968. The centerpiece of the legislative effort so far as discrimination is concerned was the Civil Rights Act of 1964. This Act attempted to by-pass the long-standing barrier of the *Civil Rights Cases* to legislation pursuant to section 5 of the fourteenth amendment directed against private discrimination. It did so by resting the Act on Congress' power under the commerce clause, which had been given wide scope by the Roosevelt Court and its successors. The Court promptly sustained the public facilities section (Title II) of the 1964 Act on this commerce ground in two 1964 cases.²²⁵ Another feature of the 1964 Act (Title VII) set up an Equal Employment Opportunity Commission, with a body of law outlawing discrimination in employment on grounds of race, religion, nationality, and sex. In a decisive series of cases,²²⁶ the Supreme Court interpreted this Congressional mandate as constitutionally reaching employment situations in which employment policies that were neutral on the surface, such as educational requirements and plant seniority provisions, had a disproportionate racially (or sexually) discriminatory impact. Another section of the Act (Title VI) banned discrimination on any of these grounds in programs to which federal funds had been contributed. Although Title VI was upheld as constitutional by the Court²²⁷ it had, until *Bakke*, received little attention by the Supreme Court. Side by side with these possible statutory violations remained the possibility that a racial discrimination might be found in violation of the Constitution, under the strict equal protection clause doctrine invoking race as a "suspect classification" already discussed. Curiously, until 1976 the Supreme Court had not directly²²⁸ considered whether an intentional discrimination was required to constitute a violation of equal protection. In that year the Court answered this question in *Washington v. Davis*.²²⁹

In *Davis* unsuccessful black applicants for training as police officers in the District of Columbia Police Department contended that the test

224. See text accompanying notes 184-88 *supra*.

225. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964).

226. *Albemarle Paper Co. v. Moody* 422 U.S. 405 (1975); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

227. *Lau v. Nichols*, 414 U.S. 563 (1964).

228. But in school desegregation cases the Court had distinguished between *de jure* segregation (intentional) and *de facto* segregation (unintentional).

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

given applicants for entry into the training program was a racially-biased violation of equal protection. The test was a general Civil Service Commission examination administered throughout the government to measure verbal aptitude, and the plaintiffs did not allege that it was discriminatory in intent. The district court denied the plaintiffs relief, but the court of appeals reversed, finding that the test violated both the equal protection clause and Title VII of the Civil Rights Act of 1964. The Supreme Court reversed the court of appeals on both constitutional and statutory grounds.

The court of appeals, counsel on both sides, and the several amici curiae assumed, without discussion or argument, that the equal protection standard was identical to the disproportionate impact standard of Title VII. Justice White's opinion for six members of a seven to one Court pointed out that this assumption was wrong. A disproportionate racial impact was insufficient to ground an equal protection violation. There must be shown an intent to discriminate. Even the dissenters, Justice Brennan and Marshall, who disagreed with the Court's statutory conclusion and found a violation under Title VII, and Justice Stevens, concurring, expressed no disagreement with the Court's insistence that a showing of discriminatory purpose was an ingredient of an equal protection violation. The Court conceded that "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact . . . that the law bears more heavily on one race than another."²³⁰ However, Justice White's opinion insisted, "disproportionate impact . . . standing alone" does not "trigger the ['strictest scrutiny'] rule," according to which challenged governmental action is made "justifiable only by the weightiest of considerations."²³¹

The question of what was an invidious racial purpose and whether this purpose was supplied whenever a legislature, for example, deliberately used race in a purposeful manner remained unanswered until *United Jewish Organizations of Williamsburgh, Inc. v. Carey*.²³² The Court once again considered statutory and equal protection constitutional grounds for challenged legislation. In *United Jewish Organizations*, New York State had sought to satisfy the Attorney General of the United States that its planned redistricting complied with section 5 of the Voting Acts of 1965, as amended in 1970. New York was subject to the provisions of that statute because of having used a "discriminatory test or device" in counties where fewer than fifty percent had voted. So when New York wished to change its voting arrangements, it had to secure approval either from the district court of the District of

230. *Id.* at 242.

231. *Id.*

232. 430 U.S. 144 (1977).

Columbia or from the Attorney General. New York took the latter route.

Apparently to satisfy the Attorney General's requirements under section 5, the state used racial criteria to establish substantial non-white majorities in two assembly districts and two senate districts. To achieve a desired sixty five percent of minority (black and Hispanic-American) voters in these districts, the state's 1974 redistricting legislation split a closely-knit community of 30,000 Hasidic Jews (who previously voted together in one senate district and one assembly district) into two senate and two assembly districts. With its voting power thus divided, the Hasidic community allegedly lost its previous capability to elect the one assemblyman and one senator. Members of the Jewish community sought a court judgment that the legislation "would dilute the value of each plaintiff's franchise by halving its effectiveness solely for the purpose of achieving a racial quota and therefore [was] in violation of the [f]ourteenth [a]mendment."²³³ The district court denied relief, and the Supreme Court affirmed in a seven to one decision in which Justice Marshall did not participate.

The Supreme Court considered both constitutional and statutory bases for the challenged legislation. A majority of the Court sustained the legislation against the equal protection challenge. They did not consider any support derived from the statute. However, only four Justices agreed with the portion of Justice White's opinion that upheld the New York statute on grounds of special power derived from the Voting Rights Act. The White opinion as to the equal protection issue, in which Justices Rehnquist and Stevens joined, recognized that "the State deliberately used race in a purposeful manner"²³⁴ in its redistricting plan. The opinion then distinguished between "purposeful" use of a racial criterion and what the opinion called "discriminatory purpose." Since the state's plan "represented no racial slur or stigma with respect to white or any other race . . . we discern no discrimination violative of the [f]ourteenth [a]mendment."²³⁵ Justices Stewart and Powell indicated agreement with these equal protection views in a separate concurrence:

Under the [f]ourteenth [a]mendment the question is whether the reapportionment plan represents purposeful discrimination against white voters. *Washington v. Davis*, 426 U.S. 229 (1976) That the legislature was aware of race when it drew the district lines might also suggest a discriminatory purpose. Such awareness is not, however, the equivalent of discriminatory intent. The clear purpose with which the New York Legislature acted . . . forecloses any finding that it acted

233. *Id.* at 152-53.

234. *Id.* at 165.

235. *Id.*

with the invidious purpose of discriminating against white voters.²³⁶

From *Washington v. Davis*,²³⁷ and cases following it,²³⁸ it was clear that for a racial discrimination under the equal protection clause a discriminatory purpose was required. From *United Jewish Organizations* it seemed clear that not every intentional use of race constituted the required "invidious" "discriminatory purpose." Three Justices at least (White, Rehnquist, and Stevens) identified this "discriminatory purpose" with a "racial slur or stigma with respect to whites or any other race."²³⁹ While the other Justices in the majority (Stewart and Powell) did not use this phrase in their concurrence, it is hard to discern what else they may have had in mind when they found no "invidious purpose of discriminating." Court watchers thought there might be significance in the fact that *United Jewish Organizations* was decided just one week after the grant of certiorari by the Court in *Regents of the University of California v. Bakke*,²⁴⁰ in which a white plaintiff alleged racial discrimination based on equal protection when a state medical school denied his admission at the same time that it reserved 16 of 100 seats for blacks and other minorities in its preferential admissions.

IV. AFFIRMATIVE ACTION: *BAKKE* AND *WEBER*

*Regents of the University of California v. Bakke*²⁴¹ was to have been the most significant constitutional decision in the race area since *Brown*. It might have been. But, it seems after all, that it was not. Five members of a hopelessly divided Court directed that the medical school of the University of California at Davis admit Allan Bakke to its entering class, holding its preferential admissions program illegal. On the other hand, five members of the same Court can be added up for the proposition that race may, under certain (unspecified) circumstances be used as a factor in classification of admissions to medical school, and presumably in classification of distribution of some other governmental benefits.

The impact of the *Bakke* decision upon preferential admissions programs in medical schools and law schools seems to have been extensive. There was fear that the obscurity of the Court's basis for its decision, when finally given more light, might produce a retreat by the Court from the constitutional green light it seemed, in the past, to have given affirmative action programs in less exotic areas than professional edu-

236. *Id.* at 179-80.

237. 426 U.S. 229 (1976).

238. *See, e.g., Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 232 (1977).

239. *United Jewish Organizations v. Carey*, 430 U.S. 144, 165 (1977).

240. 429 U.S. 1090 (1977).

241. 438 U.S. 265 (1978).

cation. The *Weber*²⁴² opinion must be cautiously regarded because of some very special facts. The Court's majority, adding Justice Stewart to the dissenters in *Bakke*, now seems to consider itself still squarely within the *Brown* era, rather than signaling its termination, as some had feared a decision for Weber, and against the voluntary affirmative action training program, would do. These cases call for our closest scrutiny.

In the 1974 term the Supreme Court heard and decided a preferential admissions case, that of Mario DeFunis, who claimed that he had been excluded from the State of Washington's university law school because of its racial preferential minority admissions program. However, the Court's decision was simply not to decide. Since DeFunis was in the last quarter of his final year at law school, the Court held, five to four, that the case was moot and that there was no need to deal with the difficult questions presented on the merits.²⁴³

The preferential admissions question was presented to the Court again three years later, and the Court granted the petition of the Regents of the University of California to review the California Supreme Court's decision that the University of California Medical School at Davis had violated the equal protection clause of the Constitution in denying Allan Bakke a seat, in favor of students with lower point averages who had been admitted to the 16 (out of 100) seats reserved for disadvantaged minorities. Bakke's claim, like DeFunis' before him, was that he was disadvantaged by a state's use of an explicit racial classification, and that this racial classification was either per se bad, or at least required justification under the "strict scrutiny—compelling state interest" test the United States Supreme Court had fashioned for "suspect classification." In the California trial court Bakke secured a judgment that the Medical School had violated both the equal protection clause, and also Title VI of the Civil Rights Act of 1964, which barred discrimination in programs receiving federal funds. However, the California Supreme Court rested its affirmance solely on Bakke's equal protection arguments. The briefs and arguments for both sides in the United States Supreme Court concentrated on the equal protection argument.

In *Bakke*, as in *DeFunis*, the interested lawyers and courts alike seemed convinced that the resolution of the equal protection issue hinged on the methodology (test, formula) which the Supreme Court would adopt as applicable. Was the "strict scrutiny—compelling state interest" test which the Court had framed with a disadvantaged minor-

242. *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979).

243. *DeFunis v. Odegaard*, 416 U.S. 312 (1974). In the Washington court, the case was cited *DeFunis v. Odegaard*, 82 Wash. 11, 507 P.2d 1169 (1973).

ity in mind also applicable to a white citizen claiming "reverse discrimination"? Interestingly, both the Washington Supreme Court which held against DeFunis, and the California Supreme Court which upheld Bakke answered: "Yes." Whereas, the Washington Court went on to find that the "compelling state interest" had been shown in *DeFunis*, the California Supreme Court held that it had not been demonstrated in *Bakke*.

What competing bases for decision were open to the Supreme Court after receiving the briefs of the parties and of an unprecedented number of amici curiae, and after hearing oral arguments in *Bakke*?

1. As did the Washington and California courts, the Supreme Court might determine that the "strict scrutiny-compelling state interest" test was applicable, and decide for or against Bakke depending on whether it viewed the state interests in maintaining preferential racial admissions as "compelling."

2. The Court might determine that, for some reason, the strict test was not applicable, and limit its inquiry to ascertaining whether there was a "rational basis" (light review test) for preferential racial admission.

3. Conceivably, although the "strict scrutiny test" was not applicable, the Court might decide to apply a stricter test to preferential admissions than the light "rational basis" test. The Court seems to have taken this intermediate course in claims of equal protection violation based on sex or illegitimacy.²⁴⁴ The remaining inquiry would be, again, whether the demands of the adopted test had been satisfied in the case before the Court.

4. The Court might decline to reach the constitutional question at all, by holding that the medical school's preferential admissions program was in violation of Title VI of the Civil Rights Act of 1964 preventing racial (and other) discrimination in programs making use of federal funds.

This last alternative was unlikely. The California Supreme Court's opinion had rested solely on the fourteenth amendment equal protection argument, and the parties had briefed only the equal protection issue. Further it was not clear that Title VI gave a private party any rights, or that the Title VI standard of "racial discrimination" was anything different than under "equal protection." Nevertheless, on oral argument, certain Justices showed interest in Title VI and the Court directed the parties to brief the Title VI issue for the Court.

On which of these issues was *Bakke* decided? The hasty answer is: Title VI. Four of the Justices took this position squarely (Stevens, Burger, Rehnquist, and Stewart). But the fifth Justice, whose vote was cru-

244. See text accompanying notes 172-76 *supra*.

cial to sending Allan Bakke to Medical School, Justice Powell, was led into discussion of the fourteenth amendment equal protection issue because, in his view, the scope of "racial discrimination" in Title VI was identical to that of the equal protection clause. The only Justices who discussed the equal protection issue as a bloc (Brennan, White, Marshall, and Blackmun) would have upheld the racial preference program. They were, however, in a minority—except as to one single strand on which Powell agreed with them—that the fourteenth amendment equal protection did not ban every use of race as a factor in admissions. This narrow concession by Justice Powell was widely hailed as saving for another day the fate of affirmative action programs adopted in workplace situations.

The first decision by the Supreme Court explicitly on workplace affirmative action came in *United Steelworkers of America v. Weber*,²⁴⁵ on June 27, 1979. However, this five to two decision of the Court (with Justices Powell and Stevens not sitting) purports to answer the narrowest of questions: "whether Congress, in Title VII of the Civil Rights Act of 1964, as amended . . . left employers and unions . . . free to take such race-conscious steps to eliminate manifest racial imbalances in traditionally segregated job categories."²⁴⁶ The Court's answer: "We hold that Title VII does not prohibit such race-conscious affirmative action plans."²⁴⁷ The question remains, what do *Bakke* and *Weber*, read together, lead us to expect as to equal protection?

The Court majority in *Weber* was made up of the Brennan Four minority bloc in *Bakke*, plus Justice Stewart, who had escaped confronting the equal protection issue in *Bakke* by adhering to the Title VI position. The equal protection clause was not involved in *Weber*, simply because that clause would only reach a situation involving state action, and in *Weber* there was merely a private contract between union and management. In *Weber* Justice Stewart resumed his more usual position, aligned with those who perceive the validity of the *Slaughter-House* view of the Civil War Amendments. Arguably then, any illumination *Bakke* may now give to equal protection law would come from the Brennan Four's "minority" opinion in *Bakke* rather than Justice Powell's opinion for himself alone. True, the Court may eventually adopt the Powell *Bakke* opinion, rather than the Brennan Four's; however, that possibility now seems unlikely.

A. *Bakke*

First we must consider the three key opinions in *Bakke*.

245. 443 U.S. 193 (1979).

246. *Id.* at 197.

247. *Id.*

The first opinion, Justice Stevens', included Justices Burger and Rehnquist, in addition to himself and Stewart. It was this opinion, coupled with Justice Powell's for himself—that sent Allan Bakke to Davis Medical School. Unlike Justice Powell, this bloc rested squarely on Title VI and found no reason to consider whether equal protection was offended. "We need not decide the congruence—or lack of congruence—of the controlling statute (Title VI) and the Constitution since the meaning of the Title VI ban on exclusion is crystal clear: Race cannot be the basis of excluding anyone from participation in a federally funded program."²⁴⁸ Justice Powell felt that the meaning of "discrimination" in Title VI was the same as the scope of "discrimination" under the equal protection clause of the fourteenth amendment. As we shall see, his view of this scope was considerably narrower than that of the Brennan Four. Only these five Justices uttered a line on the equal protection clause in *Bakke*, and of those five the Brennan Four had four votes to one. The question after *Bakke* was, and is, where will the members of the Stevens Four line up when forced to face the equal protection argument on affirmative action?

The second key opinion was that of the Brennan Four. Its equal protection analysis, in terms of the questions we posed at the outset, settled on formulating a new test. Davis Medical School's special minority admissions program did not use race in such a way as to trigger the "strict scrutiny-compelling state interest" standard as a "suspect classification." On the other hand, the burden of preferential admissions on whites, such as Bakke, was sufficiently great to warrant more than the light judicial review attributed to the "rational basis" standard. Courts should use a more strict standard, an intermediate one such as the Court applies to classifications burdensome to women, or to illegitimates. The Brennan Four denied that Title VI could resolve the case. There was "one fixed purpose" of Title VI: "to give the Executive Branch of Government clear authority to terminate federal funding of private programs that use race as a means of disadvantaging minorities in a manner that would be prohibited by the Constitution if engaged in by government."²⁴⁹ They agreed with Justice Powell, then, that the standard of an offense against Title VI was the same as that of an offense against equal protection. They disagreed with him (and with the Stevens Four) that Title VI gave any right of action to an individual in a private suit. So the Brennan Four, like Powell, faced the constitutional question: What, if any, rights can Bakke derive from the equal protection clause of the fourteenth amendment? The following four points outline their analysis:

248. 438 U.S. at 417.

249. *Id.* at 329.

1. The use of race in a governmental classification was not always (per se) bad. They cited the cases we have considered, and two others in which a race classification was deliberately used in a school assignment plan to combat segregation. A deliberate use of race might be justified by some sort of "overriding statutory" purpose.

2. Clearly, Bakke's claim does not fit into categories that previously claimed a "strict scrutiny-compelling state interest" analysis.

(a) He claims no recognized "fundamental right."

(b) Bakke doesn't fit into a class with any of the traditional indicia of suspectness: "saddled with such disabilities, subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."²⁵⁰

(c) Nor did the University "contravene the cardinal principle that racial classifications that stigmatize . . . are invalid without more."²⁵¹

3. However, simply because the preferential admissions facts do not require "strict scrutiny" as a "suspect classification," the case need not be analyzed "by applying the very loose rational basis standard of review that is the very least that is always applied in equal protection cases."²⁵²

4. The preferential admissions situation is comparable to classifications based on sex (gender) and illegitimacy "because of the significant risk that racial classifications established for ostensibly benign purposes can be misused, causing effects not unlike those created by invidious classifications."²⁵³

Accordingly, the Brennan opinion establishes a twofold test for preferential racial admissions: (1) "[a]n important and articulated purpose for its use must be shown." (The intermediate standard of the sex cases),²⁵⁴ and (2) "[a]ny statute must be stricken that stigmatizes any group or that singles out those least represented in the political process to bear the brunt of a benign program."²⁵⁵ The opinion goes on to find that the Davis program met these tests, and accordingly, was constitutional against equal protection attack. The "articulated purpose of remedying the effects of past societal discrimination"²⁵⁶ was sufficiently important "to justify the use of a race-conscious admissions program"²⁵⁷ but only under the specific circumstances, found here: "[A] sound basis for concluding that minority underrepresentation is substantial and chronic, and that the handicap of past discrimination is

250. *Id.* at 357, *quoting* *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

251. *Id.*

252. *Id.* at 358.

253. *Id.* at 361.

254. *Id.*

255. *Id.*

256. *Id.* at 362.

257. *Id.*

impeding access of minorities to the medical school.”²⁵⁸ As we shall see, Justice Powell’s disagreement with these criteria is substantial. Is it noteworthy that no other member of the Court was willing to join in his opinion? Or is it more noteworthy that the Brennan opinion failed to attract the fifth Justice that would have denied Bakke entrance to Davis Medical School?

Finally, we come to the third major opinion in *Bakke*—that of Justice Powell. As already noted, the Powell opinion proceeds on the assumption that the standards of Title VI and those of the equal protection clause are identical. In this regard Powell agrees with the Brennan Four. However, because of his narrower view of the permissible scope of affirmative action under the equal protection clause, he joins the Stevens Four, who rely totally on Title VI, to affirm the California court and direct Bakke’s admission. Seemingly Powell’s sole agreement with the equal protection analysis of the Brennan Four was to reverse that portion of the California court judgment which enjoined the Medical School “from according any consideration to race in its admissions process. . . .”²⁵⁹ The margin of consideration Powell would allow race in admission was narrow indeed. If his version of equal protection were to become Court doctrine, the permissible scope of affirmative action would become severely constricted. The drift of Powell’s opinion may be seen in the format of questions he poses and answers:

1. Q. Does a right of action for private parties exist under Title VI?
- A. In view of the fact that this question was “neither argued nor decided in either of the courts below . . . [w]e do not address this difficult issue We assume only for the purposes of this case that respondent [Bakke] has a right of action under Title VI.”²⁶⁰

In other words there were not five Justices on the Court—only the Stevens Four—who *held* that a private right of action under Title VI existed. According to the Stevens Four, it was Title VI alone, and according to Powell it was the equal protection clause (which to him, as to the Brennan Four, measured the scope of Title VI) which entitled Bakke to admission:

2. Q. Is “the guarantee of equal protection to *all* persons” to be interpreted in view of the *Slaughter-House* conception “of its primary function as bridging the vast distance between members of the Negro race and the white ‘majority’ ”?
- A. No. “It is far too late to argue that the guarantee of equal protection to *all* persons permits the recognition of special wards entitled to a degree of protection greater than that ac-

258. *Id.*

259. *Id.* at 272.

260. *Id.* at 283.

corded others." "The fourteenth amendment is not directed solely against discrimination due to a 'two-class theory'—that is, based upon differences between 'white' and Negro."²⁶¹

Powell was aware, of course, that no one was contending that the fourteenth amendment was "solely" directed in favor of the new black citizens. He conceded that "[t]he Court's initial view of the fourteenth amendment was that its 'one pervading purpose' " was "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made free man and citizen from the oppressions of those who had formerly exercised dominion over him"²⁶² (citing *Slaughter-House Cases*). As we have seen, even the *Slaughter-House Cases* conceded that equality of others than blacks was assured by the equal protection clause. But Powell argued that with the expansion of equal protection to cover basic rights "it was no longer possible to peg the guarantees of the [f]ourteenth [a]mendment to the struggle for equality of one racial minority."²⁶³ He grants that in the past thirty years "the landmark decisions in this area arose in response to the continued exclusion of Negroes from the mainstream of American society," and that "they could be characterized as involving discrimination by the 'majority' white race against the Negro minority."²⁶⁴ But Powell refuses either to read them that way, or to recognize that decisions in this period have themselves pointed out a continuing broader scope to equal protection when considered in the context of that traditional black-white discrimination. He concludes that "it is the individual who is entitled to judicial protection against classifications based upon his racial or ethnic background because such distinctions impinge upon personal rights, rather than the individual only because of his membership in a particular group"²⁶⁵

3. Q. What is the equal protection test when "political judgements regarding the necessity for [a] particular classification . . . touch upon an individual's race or ethnic background"?

A. "[H]e is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest. The Constitution guarantees that right to every person regardless of his background."²⁶⁶

Justice Blackmun (a member of the Brennan Four) in a separate dissenting opinion agreed with Powell that "fourteenth amendment rights are personal, that racial and ethnic distinctions where they are stereo-

261. *Id.* at 295.

262. *Id.* at 291.

263. *Id.* at 292. Justice Powell here cited *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

264. 438 U.S. at 294.

265. *Id.* at 299.

266. *Id.*

types are inherently suspect and call for exacting judicial scrutiny," and that "the [f]ourteenth [a]mendment has expanded beyond its original 1868 conception and now . . . embraces a 'broader principle.'"²⁶⁷ However, he then sharply criticizes Powell's conclusion:

This enlargement does not mean for me, however, that the [f]ourteenth [a]mendment has broken away from its moorings and its original intended purposes. Those original aims persist. And that, in a distinct sense, is what 'affirmative action,' in the face of proper facts, is all about. If this conflicts with idealistic equality, that tension is original [f]ourteenth [a]mendment tension, constitutionally conceived and constitutionally imposed, and it is part of the [a]mendment's very nature until complete equality is achieved in the area. In this sense, constitutional equal protection is a shield.²⁶⁸

The basic issue in *Bakke*, and in future affirmative action cases, will probably never be more clearly drawn than in this exchange. The only question remaining for Justice Powell was how the traditional "strict scrutiny" test would be applied to the *Bakke* facts.

In discussing earlier the decisions of the California and Washington state courts on preferential admissions in *Bakke*, and in *DeFunis*, we saw that both courts had concluded, as did Justice Powell, that the "strict scrutiny-compelling state interest" should be applied to test the constitutionality of preferential racial admissions. Whereas the Washington court had found a compelling state interest had been shown, the California court in *Bakke* did not. Justice Powell sorted out what he conceived to be the strongest arguments to justify preferential admissions in *Bakke*, and agreed with the California Court that they did not constitute a sufficiently substantial basis for upholding the "suspect classification" of race. Powell's analysis here is worth pursuing for its relevance to future Supreme Court decisions in this area.

At the outset Powell identified the version of "strict scrutiny" that he would employ: "[T]o justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary to the accomplishment' of its purpose or the safeguarding of its interest."²⁶⁹ He then identified four possible chief purposes of the preferential admissions program:

- A. "[R]educing the historic deficit of traditionally favored minorities in medical schools and the medical profession."²⁷⁰

Following his analysis that what would be bad if done for whites is bad if done for blacks, Powell stated that "such a purpose must be re-

267. *Id.* at 405.

268. *Id.*

269. *Id.* at 305.

270. *Id.* at 306.

jected not merely as insubstantial but as facially invalid.”²⁷¹ His proposition was categorical: “Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake.”²⁷²

B. “[C]ounteracting the effects of societal discrimination.”²⁷³

In what may prove to be the most durably persuasive part of his opinion, Justice Powell concedes that the state has “a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination.”²⁷⁴ He points out that in the school integration cases, race-conscious relief was given to “redress the wrongs worked by specific instances of racial discrimination.”²⁷⁵ That race-conscious relief followed upon judicial determination of constitutional discrimination. There had been no contention in *Bakke* that deliberate discrimination at Davis Medical School preceded the institution of the preferential racial admissions program. The faculty’s justification for the program was that there had been a general “societal discrimination” against blacks, and other beneficiaries. To Powell “societal discrimination” is an “amorphous concept of injury that may be ageless in its reach into the past.”²⁷⁶ And yet, somewhat surprisingly, he does not reject it out of hand. “We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations.”²⁷⁷ Even if the Davis faculty had made such findings of “societal discrimination” prior to instituting its preferential admissions program, this would not have sufficed to meet Powell’s test. The findings must be made, he says, if not by the courts or legislature, then by high executive authority with broad policy-making authority.

C. “[I]ncreasing the number of physicians who will practice in communities currently underserved.”²⁷⁸

Such a reason, Powell holds, would be sufficiently substantial, if proved. “But there is virtually no evidence in the record indicating that petitioner’s special admissions program is either needed or geared to promote that goal.”²⁷⁹

D. “[O]btaining the educational benefits that flow from an ethnically diverse student body.”²⁸⁰

271. *Id.* at 307.

272. *Id.*

273. *Id.* at 306.

274. *Id.* at 307.

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.* at 306.

279. *Id.* at 310.

280. *Id.* at 306.

Here, and here alone, Powell finds a possible basis upon which race might be used as a factor—if one among several—in connection with an admissions program. Tantalizingly, even here Powell does not make the concession without calling into his equation special considerations of academic freedom that derive from the first amendment. Of course, the Davis preferential racial admissions program does not satisfy Powell's requirements—because clearly race was the single factor which excluded plaintiff, Bakke, from being admitted to the sixteen reserved seats in Davis' Medical School. "The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element."²⁸¹ Powell quoted as an example the Harvard College admissions program:

In recent years Harvard College has expanded the concept of diversity to include students from disadvantaged economic, racial and ethnic groups. Harvard College now recruits not only Californians or Louisianians but also blacks and Chicanos and other minority students In practice, this new definition of diversity has meant that race has been a factor in some admission decisions. When the Committee on Admissions reviews the large middle group of applicants who are 'admissible' and deemed capable of doing good work in their courses, the race of an applicant may tip the balance in his favor just as geographic origin or a life spent on the farm may tip the balance in other candidates' cases.²⁸²

These considerations are, at most, modest concessions by Powell.

In his special dissent Justice Blackmun found fault with Powell here again:

I am not convinced, as Mr. Justice Powell seems to be, that the difference between the Davis program and the one employed by Harvard is very profound or constitutionally significant. The line between the two is a thin and indistinct one The cynical, of course, may say that under a program such as Harvard's one may accomplish covertly what Davis concedes it does openly.²⁸³

Powell takes account of this jibe, and rejects it. "A facial intent to discriminate . . . is evident in petitioner's [Davis'] preference program and not denied in this case. No such facial infirmity exists in an admissions program where race or ethnic background is simply one element—to be weighed fairly against other elements—in the selection process."²⁸⁴ Again, there surfaces the meaning in equal protection context of "discriminate." To Blackmun "despite its two-track aspect, the Davis program, for me, is within constitutional grounds, though per-

281. *Id.* at 315.

282. *Id.* at 316.

283. *Id.* at 406.

284. *Id.* at 318.

haps barely so. I am not unwilling to infer a constitutional violation."²⁸⁵

Powell's entire opinion swings about his refusal to concede that equal protection today could be construed in light of an original central purpose to advance black integration in American society. New non-racial aspects of equal protection (fundamental rights) erased that earlier vision, he says, and the emergence of deprived minority groups other than blacks made it impossible to maintain intelligibly.

When the Supreme Court handed down its complex judgment and discordant opinions in *Bakke*, general comment about the case often proceeded as if Justice Powell's opinion was the controlling word from the Court about the equal protection clause in an affirmative action context. Certainly university admissions officers have been strongly disposed to follow the nooks and crannies of the Powell opinion in severely restricting their preferential racial admissions. This result may benignly be attributed to natural indisposition to make oneself a target to be another Davis, when confronted by another Bakke. Certainly lower federal courts are under no such restraints. Should they, at least, not now feel freer, in light of the 1979 *Weber*²⁸⁶ case, to underscore that in *Bakke* Powell spoke for only one member of the Court, where Brennan spoke for four?

V. *WEBER*: AFFIRMATIVE ACTION IN LIGHT OF TITLE VII

Is there a significant interrelation between *Bakke* and *Weber*? This question should be considered in the light of numerous possible disclaimers. As we have seen, *Bakke* may be viewed, partially at least, as a constitutional equal protection decision, or alternatively, as a statutory decision based on Title VI of the Civil Rights Act of 1964. It may be viewed as a constitutional decision to the extent that the Brennan Four failed by one vote to secure a constitutional basis for preferential racial admissions, and to the extent that Justice Powell's key vote, as part of a five to four majority favoring Bakke, was based squarely on his view of the fourteenth amendment. Arguably, *Bakke* is in part a Title VI decision because that was the sole ground on which the Stevens Four, favoring Bakke, relied. But there was not a solid majority in *Bakke* rooted in either Title VI or in equal protection, save for a single point: Justice Powell agreed with the Brennan Four that the equal protection clause did not prevent the Davis Medical School "from according *any* consideration to race in its admission process."²⁸⁷

Weber clearly does not decide a constitutional issue. It concerns the

285. *Id.* at 406.

286. *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979).

287. 438 U.S. at 272.

interpretation to be accorded a statute passed by Congress, Title VII of the Civil Rights Act of 1964. Title VII deals exclusively with regulation by Congress under its commerce clause power to regulate conditions of employment in interstate commerce. Its general thrust is to prevent discrimination in employment on the basis of race, sex, national origin, and religion. Of all the titles of the 1964 Civil Rights Act, it has the most precise and extensive legislative history. Title VI, considered in *Bakke*, prevents discrimination in programs using federal funds. Although it is part of the same statute, unlike Title VII it "was an exercise of federal power over a matter in which the Federal Government was already directly involved."²⁸⁸ This federal power lay in Congress' right "to assure federal funds would not be used in an improper manner."²⁸⁹ Because Title VII "was enacted pursuant to the commerce power to regulate purely private decisionmaking," it was "not intended to incorporate and particularize the commands of the [f]ifth and [f]ourteenth [a]mendments."²⁹⁰ So it cannot be said that any decision made in *Bakke*, or elsewhere, concerning Title VI or the equal protection clause of the fourteenth amendment, would govern a Title VII case such as *Weber*.

The strongly held differences expressed by the Court in *Weber* shall be set out, and the place of the decision within other discrimination law under Title VII shall be considered. Whether the *Weber* decision offers a basis for a solid conjecture as to the present position of the Supreme Court on the question left so jumbled in *Bakke*, the constitutional equal protection limits on affirmative action programs, shall also be considered.

Until 1974, Kaiser Aluminum & Chemical Corporation's plant in Gramercy, Louisiana, hired its craft workers only among persons with extensive prior craft experience. Few blacks had this experience, and consequently only 5 of 273 craft workers at Gramercy (1.83%) were black. Under stimulus from the United States Department of Labor's Office of Contract Compliance (hereinafter referred to as OFCC), Kaiser entered into a master collective bargaining agreement with the United Steelworkers of America covering employment conditions at Gramercy and fourteen other Kaiser plants. Among its provisions was the establishment of black craft hiring goals equal to the percentage of blacks in the local work force, which in the Gramercy area was thirty-nine percent black. The Kaiser-Steelworkers contract agreed to the establishment of on-the-job training programs to help meet the craft hiring goals. Instead of recruiting already skilled craft workers, the plants

288. *United Steelworkers of America v. Weber*, 443 U.S. 193, 206 n.6 (1979).

289. *Id.*

290. *Id.*

would teach unskilled workers already employed at the plants the necessary skills for employment as craft workers. The labor agreement provided that fifty percent of the openings in these on-the-job training programs would be reserved for black workers. The plan would continue until a number of black craft workers achieved representation equal to the black component of the local work force, that is, thirty-nine percent black. At Gramercy during 1974, seven of the thirteen craft trainees selected were black, six white. The white applicants were selected on the basis of seniority, but several white workers who were rejected had more seniority than some blacks who were taken into the program in accordance with the fifty percent black quota arrangement. Brian Weber, one of the whites not accepted, sued Kaiser and the union in the United States District Court, charging that his exclusion from the on-the-job training programs solely because of race constituted a violation of Title VII of the Civil Rights Act of 1964. One need only read the express words of section 703(a) of the statute to see that his contention was a strong one:

(a) It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; (2) to limit or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individual's race, color, religion, sex or national origin.²⁹¹

Section 703(d) of Title VII was even more to the point:

(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.²⁹²

Section 703(j) went right to the issue of preferences to avoid racial (and other) imbalances in the job force:

(j) Nothing in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or

291. Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(a), 78 Stat. 255 (codified at 42 U.S.C. § 2000e-2(a) (1976)).

292. Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(d), 78 Stat. 256 (codified at 42 U.S.C. § 2000e-2(d) (1976)).

percentage of persons of any race, color, religion, sex or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.²⁹³

The statutory language was reinforced by a 1976 Supreme Court decision in *McDonald v. Santa Fe Trail Transportation Co.*²⁹⁴ that the anti-discrimination mandate of Title VII applied to "any individual"—white or black.

The *McDonald* opinion expressly left open whether Title VII banned voluntary affirmative action plans. However, its extensive survey of the legislative history of Title VII did not suggest any exception that would appear to withstand the strong statutory language just quoted.

Noting that the Kaiser plan was voluntary, and not required, the *Weber* Court held that "Title VII does not prohibit such race-conscious affirmative action plans."²⁹⁵ Writing for the majority was Justice Brennan. He was joined by the three Justices (Blackmun, Marshall, and White) who had joined him in *Bakke*, and by Justice Stewart, who had been teamed with the Stevens Four in *Bakke*, which decided that case on the sole basis of Title VI. Not included among the seven members of the Court who decided *Weber* were writers of two of the three key opinions in *Bakke*, Justice Stevens (who disqualified himself, presumably because Kaiser Aluminum, a former client, was a chief litigant) and Justice Powell (whose illness prevented his presence at the Court, but who had been expected to participate in the decision after hearing the arguments on tape).

Justice Brennan framed narrowly the question to be decided by the Court: "[w]hether Congress, in Title VII . . . left employers and unions in the private sector free to take such race-conscious steps to eliminate racial imbalances in traditionally segregated job categories."²⁹⁶ The Court's answer was also sharply honed: "We hold that Title VII does not prohibit such race-conscious affirmative action plans."²⁹⁷

The Court's opinion offered two bases for sustaining the voluntary affirmative action program. The primary reason given was a frank resort to what the Court called the "spirit" of the statute. Conceding that *Weber's* argument from the express statutory language (cited above) "is

293. Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(j), 78 Stat. 257 (codified at 42 U.S.C. § 2000e-2(j) (1976)).

294. 427 U.S. 273 (1976).

295. 443 U.S. at 197.

296. *Id.*

297. *Id.*

not without force.”²⁹⁸ Justice Brennan contended that his “reliance upon a literal construction of [sections] 703(a) and (d) is misplaced.”²⁹⁹ Noting that *McDonald* had reserved the specific question now before the Court, Brennan argued that these sections of the statute must “be read against the background of the legislative history of Title VII and the historical context from which the Act arose.”³⁰⁰ The Court concluded that “[e]xamination of those sources makes clear that an interpretation of the sections that forbade all race-conscious affirmative action would ‘bring about an end completely at variance with the purpose of the statute’ and must be rejected.”³⁰¹ To the majority:

Congress’ primary concern in enacting the prohibition against racial discrimination in Title VII . . . was with ‘the plight of the Negro in our economy.’ . . .

Congress feared that the goals of the Civil Rights Act—the integration of blacks into the mainstream of American society—could not be achieved unless [the] trend [of increasing black unemployment] were reversed. And Congress recognized that that would not be possible unless blacks were able to secure jobs ‘which have a future.’³⁰²

This last reference was to the aim of the craft training program at Kaiser to qualify blacks for more advanced jobs. Given this background the majority “cannot agree . . . that Congress intended to prohibit the private sector from taking effective steps to accomplish the goal that Congress designed Title VII to achieve.”³⁰³ Finally, the Court added:

It would be ironic indeed if a law triggered by a Nation’s concern over centuries of racial injustice and intended to improve the lot of those who had ‘been excluded from the American dream for so long’ . . . constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.³⁰⁴

After this broadside, the Court’s second and “reinforcing” reason seems tame, and almost a makeweight. The Court purported to see in the Congressional language and the legislative history of section 703(j) that Congress had deliberately declined to ban voluntary “racially preferential integration efforts.”³⁰⁵ Congress had written in section 703(j) that “[n]othing in this subchapter shall be interpreted to *require* any employer [or others] . . . to grant [racially] preferential treatment to . . . any apprenticeship or other training program. . . .”³⁰⁶ But, said

298. *Id.* at 201.

299. *Id.*

300. *Id.*

301. *Id.* at 201-02.

302. *Id.* at 202-03.

303. *Id.* at 204.

304. *Id.*

305. *Id.* at 205.

306. *Id.* at 205 n.5.

Brennan, Congress did not say that it refused to “*permit*” such a private affirmative action program.³⁰⁷

The Court’s decision was a narrow one. It was limited to voluntary affirmative action plans “designed to eliminate conspicuous racial imbalance in traditionally segregated job categories.”³⁰⁸ It warned that the plan here approved “does not unnecessarily trammel the interests of white employees.”³⁰⁹ The Kaiser plan did not require discharge of white workers in favor of blacks. Half of those included in the training program were whites. The plan was temporary—it would end when the black participants “approximate” the thirty-nine percentage of blacks in the local work force. The target of this plan was not “to maintain racial balance”; it was “simply to eliminate a manifest racial imbalance.”³¹⁰ Nevertheless, as we have seen, the untraditional statutory analysis employed by the Court did not feature a close construction of the statute’s language, or of its legislative history. Rather it frankly reached out to what the Court saw as the basic sweeping purpose of the statute. It adjusted “difficult” statutory language to fit with the goal of the Civil War Amendments cited in the *Slaughter-House Cases* which, according to the Court, had been renewed by Congress in the 1964 Civil Rights Act—“the integration of blacks into the mainstream of American society.”³¹¹

Both Chief Justice Burger and Justice Rehnquist wrote sharp dissents. Rehnquist argued that the specifics of Congressional debate reinforced and explained the statutory language of sections 703(a) and (d). It was so clear as not to require explanation. Justice Blackmun, who joined Brennan’s opinion for the Court, wrote separately: “I share some of the misgivings expressed in Mr. Justice Rehnquist’s dissent . . . concerning the extent to which the legislative history of Title VII clearly supports the result the Court reaches today.”³¹² Still he joined in the Court’s opinion and judgment. In explaining his conclusion, Blackmun surfaced reasons, omitted from the Brennan opinion, that had been prominent in the litigation of the case in the courts below and in the Supreme Court itself. “I believe that additional considerations, practical and equitable, only partially perceived, if perceived at all by the [Eighty-Eighth] Congress [in 1964], support the conclusion reached by the Court today”³¹³ The “practical” consideration was that the dissent would place “voluntary compliance with Title VII in

307. *Id.*

308. *Id.* at 209.

309. *Id.* at 208.

310. *Id.*

311. *Id.* at 202.

312. *Id.* at 209.

313. *Id.*

profound jeopardy.”³¹⁴ If an employer (even under pressure of the federal Office of Contract Compliance) decided to attempt some form of affirmative action, he would be subject to suit by white employees, such as Weber. On the other hand if he declined to take such steps, he might be subject to suit by blacks for past discrimination. But more interesting was Blackmun’s suggestion that “[s]trong considerations of equity support an interpretation of Title VII that would permit private affirmative action to reach where Title VII itself does not.”³¹⁵ To Justice Blackmun it was “unfair” for Weber to argue that “the asserted scarcity of black craftsmen in Louisiana, the product of historic discrimination, makes Kaiser’s training program illegal because it ostensibly absolves Kaiser of all Title VII liability.”³¹⁶ By this he meant that Kaiser could not be held a discriminator for failing to hire non-existent black craftsmen. To Blackmun “[t]he bargain struck in 1964 with the passage of Title VII guaranteed equal opportunity for white and black alike, but where Title VII provides no remedy for blacks, it should not be construed to foreclose private affirmative action from supplying relief.”³¹⁷ Blackmun offers a formula to capsule this view: “Absent compelling evidence of legislative intent, I would not interpret Title VII itself as a means of ‘locking in’ the effects of segregation for which Title VII provides no remedy. Such a construction, as the Court points out, . . . would be ‘ironic,’ given the broad remedial purposes of Title VII.”³¹⁸

Justice Blackmun refers to a “high tightrope without a net beneath them”³¹⁹ that the employer and the union must walk if voluntary affirmative action plans are barred. To understand their dilemma it is necessary to look briefly at the body of discrimination law under Title VII. The Supreme Court from the start had given strong support to the broad language of section 703(a) making it an unlawful employment practice for an employer “to limit or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee,”³²⁰ particularly in matters concerning racial discrimination. A showing of “discriminatory impact” on a basis of race was held to violate Title VII (*Griggs v. Duke Power Co.*,³²¹ 1971), and apparently neutral practices that had a disproportionate impact upon blacks were held barred. A strong showing

314. *Id.* at 210.

315. *Id.* at 214.

316. *Id.* at 214-15.

317. *Id.* at 214.

318. *Id.* at 215.

319. The phrase was Judge Wisdom’s, dissenting, in the Court of Appeals. *Id.* at 210.

320. *Id.* at 199 n.2.

321. 401 U.S. 424 (1971).

was required to come within the statutory exception of business necessity (*Albemarle Paper Co. v. Moody*,³²² 1975). Strong remedies for past discrimination were approved by the Court, including back pay and sometimes insertion of a discriminatee into the place he or she would have had except for the racial discrimination. The lower federal courts had indicated that this might go so far as to permit displacement of seniority rights of white workers in favor of black discriminatees. In 1977 this impression was corrected by the Supreme Court in *Teamsters v. United States*,³²³ an opinion by Justice Stewart that soundly rejected displacement of white workers' seniority rights as a remedy for past discrimination. However, after a showing of past discrimination, some lower federal courts, without reproof from the Supreme Court, did use the remedy of affirmative action in the sense of race-conscious job quotas. The litigants and lower courts in *Weber* assumed that there may be remedial use by a court of job quotas once a court found past discrimination in violation of Title VII. But this point was not crucial since the lower courts found that Kaiser had not been guilty of past racial discrimination. The point of the case was that the Kaiser-Steelworkers' job training plan was voluntary even though it was instituted arguably to forestall a later suit by blacks. All members of the Court in *Weber* assumed: (1) that Title VII barred any governmental action to *require* a race-conscious affirmative action plan; and (2) that after findings of past discrimination, courts may (despite the statute) order a race-conscious quota. The question open in *Weber* was whether a voluntary agreement by private parties could use race-conscious quotas despite Title VII's bar to government-compelled racial quotas and in the absence of a court's finding of past discrimination. The Court's answer in *Weber* was yes, provided that the voluntary affirmative action plan was "designed to eliminate conspicuous racial imbalances in traditionally segregated job categories."³²⁴

Three factors suggest that *Weber* is a highly significant bellweather of where the Court is headed in matters of racial discrimination, whether statutory under the Civil Rights Acts or constitutional under the equal protection clause: the actual result, the extraordinary way in which it was reached, and the presence in the Court's five man majority of Justice Stewart.

A. *The Actual Result*

Despite *Bakke's* doctrinal inconclusiveness, which we discussed earlier, its result wreaked havoc upon the will of university administrators

322. 422 U.S. 405 (1975).

323. 431 U.S. 324 (1977).

324. 443 U.S. at 209.

to proceed with racial affirmative action admission plans. If *Weber* had outlawed voluntary employment plans, judicial and administrative use of affirmative action quotas as remedies for past discrimination would be greatly reduced, if not eliminated (short of Congressional amendment of Title VII). Even in *Weber* the Court seems to be serving notice that it will carefully scrutinize court-approved job quotas in remedial cases. However, even with judicial and administrative use of job quotas as affirmative action remedying past discrimination, no court-oriented or administrative program can succeed without reinforcement by voluntary action. Enforcement solely by individual court cases brought by discriminatees is inadequate—cases proceed too slowly and are too costly. Clearly, as Justice Blackmun, at least, acknowledged, the voluntary plan is the linchpin of success in turning back discrimination in employment. *Weber* now makes that possible, but only in appropriate cases (“conspicuous racial imbalance in traditionally segregated job categories”).³²⁵

The most important aspect of *Weber* is its result. Had the Court gone the other way, on whatever reasoning, the days of affirmative job action were numbered. Justice Powell’s clarion call in *Bakke* for an end to the *Slaughter-House* preferred position for blacks in equal protection would seem to be Court doctrine of the future. The result in *Weber* assures that the *Brown* era continues with additional modulations. At Justice White’s hand the Court, in *Washington v. Davis*³²⁶ (1976), had insisted upon intentional violation to ground an equal protection violation. At Justice Stewart’s hand, the Court in *Teamsters v. United States*³²⁷ (1977) had curtailed the remedy for past discrimination short of displacing vested seniority rights of white workers. In *Bakke* the Court (by whatever combination of reasons) had balked at a straight racial quota for educational admissions without a stronger justification than that record showed. In *Bakke*, even the Brennan Four had stipulated that to justify constitutionally a racial quota there must be shown a “substantial relation to an important governmental interest.”³²⁸ Finally, in *Weber* Justice Brennan warns that the Court’s opinion does not “define in detail the line of demarcation between permissible and impermissible affirmative action plans.”³²⁹ In holding the Kaiser plan “permissible,” he stresses the Court’s continued regard (as in *Teamsters* and *Bakke*) for fairness to “the interests of the white employees.”³³⁰ And, as just noted, he further limits private sector dis-

325. *Id.*

326. 426 U.S. 229 (1976).

327. 431 U.S. 324 (1977).

328. 438 U.S. at 361.

329. 443 U.S. at 208.

330. *Id.*

cretion to "affirmative action plans designed to eliminate conspicuous racial imbalance in traditionally segregated job categories."³³¹

The result in *Weber* signals continuation of the *Brown* era, with its reawakened consciousness of the goal of the Civil War Amendments and Civil Rights Acts—"the integration of blacks into the mainstream of American society."³³² However, as in *Davis*, *Teamsters*, and *Bakke* itself, this goal would be pursued with a refined awareness of fairly asserted rights of whites and others.

B. *The Court's Reasoning*

Few more acerbic dissents can be found than Justice Rehnquist's in *Weber*. He calls the decision Orwellian, (recalling 1984), representing a "dramatic and equally unremarked switch in this Court's interpretation of Title VII."³³³ Rehnquist cites Supreme Court decisions that found that the legislative history makes it "clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for *each* applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force."³³⁴ Now, he says, "We are told that the legislative history of Title VII shows that employers are free to discriminate on the basis of race."³³⁵ Reminding the Court of "the oft-stated principle that our duty is to construe rather than to rewrite legislation,"³³⁶ he ridicules the Court's resort to the "familiar rule, that a thing may be within the letter of the statute and yet not within the intention of its makers."³³⁷ It is only by a "*tour de force* reminiscent not of jurists such as Hale, Holmes and Hughes, but of escape artists such as Houdini, [that] the Court eludes clear statutory language."³³⁸ Rehnquist does not content himself with rhetoric; he patiently and freshly explores the Congressional debates and Committee Reports and cites them in support of his position. Far from replying in kind, both Justice Brennan (in the Court's opinion) and Justice Blackmun (in his concurrence) seem sensitive to Rehnquist's frustration. Brennan: "Respondent's argument [much like Rehnquist's] is not without force."³³⁹ Blackmun: "I share some of the misgivings expressed in Mr. Justice Rehnquist's dissent . . . concerning the extent to which the legislative history of Title VII clearly sup-

331. *Id.* at 209.

332. In *Weber* this purpose was ascribed to the Civil Rights Act of 1964. *Id.* at 202.

333. *Id.* at 220.

334. *Id.* at 221, *quoting* *Furnco Constr. Co. v. Waters*, 438 U.S. 567, 579 (1978).

335. *Id.*

336. *Id.*

337. *Id.* at 201, *quoting* *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892).

338. *Id.* at 222.

339. *Id.* at 201.

ports the result the Court reaches today.”³⁴⁰ Clearly, an opinion supporting Weber’s position would have been easier to write. The fact that the Court went out of its way to avoid doing so, and the reasons it gave for so doing, are almost as important as the result reached. As we have seen, in *Weber* the Court takes as its categorical imperative the aim of the Civil War Amendments, and the Civil Rights Acts enacted by Congress: “the integration of blacks in the mainstream of American society”; and the specific aim of the Congress which enacted Title VII in 1964 pursuant to the commerce power: “to open employment opportunities for Negroes in occupations which have been traditionally closed to them”³⁴¹ Interestingly, as a secondary argument, the Court’s opinion does resort to a rather narrow point of statutory interpretation (concerning section 703(j)).³⁴² But it frankly bases its result primarily on the overriding principle of black integration.

Nor does the Court opinion take the narrowest possible ground for the restrictive formula that it finally pronounces. Justice Blackmun would have preferred the course proposed by Judge Wisdom in his dissent in the court of appeals. Wisdom would have permitted a voluntary race-conscious quota only to the extent that “employers and unions who had committed ‘arguable violations’ of Title VII should be free to take reasonable responses without fear of liability to whites.”³⁴³ In order to defend a voluntary quota they must show: (1) without conceding that their past conduct had been discriminatory that it was at least arguably so; and (2) that their response was “reasonable” in light of the arguable violation.³⁴⁴ The Court’s formula, on the other hand, requires only a showing that the plan (1) was designed to eliminate “conspicuous racial imbalance,” and (2) in “traditionally segregated job categories.”³⁴⁵ Both these conditions were clearly met here, said the Court: (1) The black employment at Gramercy was only 1.83% in an area whose work force was 39% black; (2) “Judicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice.”³⁴⁶ In addition, as we have seen, the Court warned that the plan approved in *Weber* “does not unnecessarily trammel the interests of the white employees.”³⁴⁷ As Justice Blackmun notes, the Court’s approach substantially expands upon the “arguable violation” situation. Yet he found it “acceptable” and joined in the Court’s opinion. The Court’s formula permits a vol-

340. *Id.* at 209.

341. *Id.* at 203, *quoting* Senator Humphrey, one of the managers of the bill in the Senate.

342. *See* text accompanying note 292 *supra*.

343. 443 U.S. at 211.

344. *Id.*

345. *Id.* at 209.

346. *Id.* at 198 n.1.

347. *Id.* at 208.

untary plan even though there is a mere statistical showing of "purposeful exclusion of blacks from the job category, resulting in a persistent disparity between the proportion of blacks in the labor force and the proportion of blacks who hold jobs within the category."³⁴⁸ This is mere societal history, and does not require any showing of potential liability of this employer, as would an "arguable violation" theory.

Both in the overall principle by which the Court justified its decision, and in the relatively expansive formula which it adopted to measure permissibility of a voluntary race quota, the Court reestablished its commitment to the promise held out in the Civil War Amendments, the ensuing civil rights legislation, and the early Supreme Court pronouncements in *Slaughter-House*. The Court reaffirmed its immediate predecessors' rededication to this principle in *Brown* and subsequent cases. And the Court seems, in *Weber*, to dispel fears stirred by *Bakke*, that the Court was entering a new era of constitutional and statutory interpretation in the spirit of Justice Powell's *Bakke* opinion.³⁴⁹ The margin in *Weber* was narrow—only five Justices joined the majority. The question remains whether this majority will remain solid. To answer that question we must look at the position in race cases of the Court member whose allegiance to the Brennan Four (of *Bakke*) constituted the five Justice majority in *Weber*—Mr. Justice Potter Stewart.

VI. JUSTICE STEWART AND THE NEW MAJORITY

In a sense, following the Supreme Court is an art form rather than the pursuit of a science (law) or of a philosophy (justice). For the comments just made about the importance of the result in *Weber*, and of the means used to reach it, depend on one fact—the adherence of Justice Stewart to the Brennan Four (of *Bakke*) to constitute a Court majority in *Weber*. Since the significance of *Weber* as an indicator of future Court action in the race discrimination field depends to a great extent upon the permanence and solidity of that majority, an inquiry is in order as to the judicial positioning of Justice Stewart on racial issues. Justice Holmes once defined "the law" as simply "prophecies of what the courts will do in fact."³⁵⁰ To those who agree with Holmes, the constitutional and statutory law on racial issues may well depend on what Mr. Justice Stewart will do in fact. Can one predict that he will remain with Justices Brennan, White, Marshall, and Blackmun as a working Court majority on racial matters, notably those centering on

348. *Id.* at 212.

349. See text accompanying notes 259-82 *supra*.

350. Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 461 (1897).

equal protection and affirmative action? Stewart's history would suggest "yes."

Since we have already discussed most of the relevant cases, our analysis can be brief. Justice Stewart came to the Court in 1958, four years after *Brown v. Board of Education*.³⁵¹ Like other members of the Warren Court, he joined in the opinions on school desegregation that remained unanimous until 1971. Later, he softened limitations of the Burger court in crucial concurring opinions.³⁵²

One of the bars to enforcing civil rights for blacks has been, as we have seen, the requirement of state action. For a time the Supreme Court lowered this barrier by an increasingly widened view of what constituted state action. In this sequence Justice Stewart resisted a concept of state action which would enlarge federal control over state affairs in nonracial matters. However, in race cases Stewart labored to find some specific element that might be singled out as state involvement. Thus, in *Burton v. Wilmington Parking Authority*,³⁵³ perhaps the most expansive Court formula extending state action, Stewart concurred on the ground that a permissive state statute (ignored by the Court) was itself enough to constitute state action. *United States v. Guest*³⁵⁴ was a prosecution of whites in Georgia under the Civil Rights Act of 1871, for conspiracy to deprive blacks of their constitutional rights. The indictment was challenged on grounds (citing the *Civil Rights Cases*³⁵⁵) that the provision of the Civil Rights Act of 1871 on which the indictment relied was beyond Congress' power to enact. Six Justices in this case (writing in separate concurring opinions) were prepared to overrule the *Civil Rights Cases*; Justice Stewart found a way in his opinion for the Court to sustain the indictment without taking this step. First, he found that this statute was simply an enforcement of rights secured by the equal protection clause itself; and second, since the equal protection clause could not be invoked without showing some state action, Justice Stewart, contrary to the argument of the litigants, found an element in the indictment he deemed sufficient to constitute state action. The indictment alleged that one of the means used in the conspiracy was "causing the arrest of Negroes by means of false reports."³⁵⁶ Stewart conjectured that this was broad enough to "cover a charge of active connivance by agents of the State in the making of the 'false reports'"³⁵⁷ The indictment was thus upheld, and Con-

351. 347 U.S. 483 (1954).

352. See, e.g., *Milliken v. Bradley*, 418 U.S. 717, 755 (1974).

353. 365 U.S. 715 (1961).

354. 383 U.S. 745 (1966).

355. 109 U.S. 3 (1883).

356. 383 U.S. at 756.

357. *Id.*

gress' enforcement power under the fourteenth amendment was left circumscribed by the *Civil Rights Cases*.

In 1966 Stewart acquiesced in upholding of the Voting Rights Act of 1965 under fifteenth amendment power.³⁵⁸ However, in the same year he joined Justice Harlan's dissent to the expansive use of section 5 of the fourteenth amendment in *Katzenbach v. Morgan*,³⁵⁹ as "tantamount to allowing the [f]ourteenth [a]mendment to swallow the State's constitutionally ordained primary authority in this field."³⁶⁰ Justice Stewart has been reserved concerning expansion of Congress' powers under the fourteenth amendment; yet in the celebrated cases we discussed earlier, *Jones v. Mayer*³⁶¹ (1968) and *Griffin v. Breckinridge*³⁶² (1971) Justice Stewart found a means to sustain civil rights racial statutes by means of a broad reinterpretation of the thirteenth amendment (enlarged to embrace "badges of servitude," reversing *Civil Rights Cases* and *Plessy v. Ferguson*³⁶³ on this point). Stewart was the Court leader here.

Justice Stewart joined with the majority in *DeFunis v. Odegaard*³⁶⁴ in refusing on grounds of mootness to pass on the constitutionality of Washington's preferential admissions program. He joined with Justice White's opinion for the Court in *Washington v. Davis*³⁶⁵ (1976) which specified that intentional discrimination was an ingredient of the fourteenth amendment equal protection. Stewart's opinions in the Title VII area strongly enforced that statute. In 1971 he joined Chief Justice Burger's firm interpretation of Title VII in *Griggs v. Duke Power Co.*³⁶⁶ as reaching non-intentional racial discrimination, and wrote the even narrower interpretation of the "business necessity" defense in *Albemarle Paper Co. v. Moody*.³⁶⁷ Not until *Teamsters v. United States*³⁶⁸ (1977), when Stewart's opinion for the Court refused to displace seniority rights of white employees, was he counted on a side that drew a line on enforcement of Title VII rights. He did not join in Justice White's opinion in *United Jewish Organizations of Williamsburgh v. Carey*³⁶⁹ that made "stigma" a distinguishing factor in the intention required for an equal protection violation. However, his concurring opinion in that case, joined by Justice Powell, seemed to accept all except the word "stigma."

358. See text accompanying notes 187-92 *supra*.

359. 384 U.S. 641 (1966).

360. *Id.* at 671.

361. 392 U.S. 409 (1968).

362. 403 U.S. 88 (1971).

363. 163 U.S. 537 (1896).

364. 416 U.S. 312 (1974).

365. 426 U.S. 229 (1976).

366. 401 U.S. 424 (1971).

367. 422 U.S. 405 (1975).

368. 431 U.S. 324 (1977).

369. 430 U.S. 144 (1977).

In this continuously supportive, and often leadership role upholding black discrimination claims, Justice Stewart plainly could be identified at the time of the *Bakke* argument in 1978 as a Justice likely to be aligned with what proved to be the Brennan Four. However, he stood aloof and did not join them. Neither did he join Justice Powell (with whom he is frequently aligned). He joined the “ducking quartet” led by Justice Stevens, who rested their votes in *Bakke* strictly on the Title VI (federal funds) provision.

When *Weber* was argued, it was clear that the Brennan Four must recruit a vote from among Justices Powell, Stewart, Stevens, Burger, and Rehnquist. The last two were most unlikely candidates. Justice Powell, whose differences with the Brennan Four were posted in his *Bakke* opinion, was an improbable recruit. It developed that he did not attend the argument because of illness, although he kept open the possibility that he might participate in the decision. Justice Stevens had not made his race views clear, but a pronouncement in a recent sex discrimination case³⁷⁰ might seem to tilt him away from the Brennan Four. In fact, he disqualified himself from judging *Weber*, presumably for what he conceived as a conflict of interest, Kaiser being a former client. That left Justice Stewart. He did, as we see, join the Court’s *Weber* opinion without demurring to a single line.

The question in these discussions has been whether his alignment with them on this race issue is casual, or is it on a principled basis and likely to be enduring? His track record, as set forth above, suggests that his *Bakke* alignment, if anything, was the deviation. His *Weber* vote seems in line with his consistent, yet cautious, advancement of the *Slaughter-House/Brown* black integration position. He will not accept uncritically every affirmative action program, but within the cautious formula of the *Weber* majority, affirmative action seems safe with him. With perhaps some further adjustments of terminology, Justice Stewart could also be at home with the equal protection formulation of the Brennan Four.³⁷¹ If so, Justice Powell’s solo effort in *Bakke* will have been a one day’s wonder that is not likely to affect the current history of the Court.

VII. THE FUTURE OF THE CONSTITUTION AS “HIGHER LAW”

We have seen, with some attention to historical detail, how the Supreme Court has used judicial review in two major areas of its work, due process and equal protection (with a special focus on race), where

370. See *Los Angeles v. Manhart*, 435 U.S. 702 (1978) (a Title VII sex discrimination case).

371. But see Justice Stewart’s plurality opinion in *City of Mobile v. Bolden*, 48 LW 4436 (1980), discussed in note 223 *supra*. Of course, the fragile *Weber* majority is obviously subject to fracture by any change of membership on the Court.

it has reached, and what twisting course it has pursued. But the question remains, are there standards furnished by the American constitutional system as to how the Supreme Court should operate? Must we be satisfied with Justice Hughes' aphorism: "We live under a constitution. But the constitution is what the judges say it is."³⁷² Or with a version of Justice Holmes' definition of "law" as "the prophecies of what the courts will do in fact."³⁷³ Or with the art of predicting whether five Justices will seize a principled position, or any position, and hold to it.

The notion that judicial review rests upon a view of the Constitution as a "higher law" that is binding on Justices is not a unanimous opinion among constitutional scholars. Professor Lawrence Tribe is content with the functional view that the Constitution allocates power to the Court to decide as best it can in areas committed to it, without objective substantive control from the Constitution itself, or past "principles" or decisions.³⁷⁴ The late Professor Alexander Bickel rejects what he calls the "contractarian" (Lockean) view of constitutional interpretation that presupposes fixed principles as inherent in the Constitution itself. Bickel does not renounce the view that the Court's decisions should be founded in principles it has discerned from the constitutional and decisional materials. However, he calls these "middle distance principles" which can be discarded by the Court as it deems appropriate, and new ones fashioned in their place.³⁷⁵

Clearly, the Constitution initially institutionalized slavery. Equally clearly, after a bitter war one generation of Americans amended the Constitution to wipe out slavery and began to repair the damage it wrought on black citizens of many generations. It is hard to identify a more deliberately adopted and enunciated principle in our history than this one. Yet, after initially identifying it and embracing it (*Slaughter-House*), the Court soon departed from it (*Civil Rights Cases*, *Plessy*). Seventy years later the Court returned to it (*Brown*). The effort of Jus-

372. C. HUGHES, ADDRESSES OF CHARLES EVANS HUGHES 185-86 (2d ed. 1916).

373. Holmes, *supra* note 350.

374. Tribe's most recent formulation of this position makes an interesting reference to *Bakke*: In this period of national questioning and self-doubt, it may be that the most likely consensus for the Court would be a fairly reactionary one. In a divided nation, the Court's task often becomes one of pragmatic statecraft. Given the absence of a more enlightened and liberating consensus, it is perhaps best that the Court proceed by leaving open possibilities for more constructive constitutional development—even at the price of further doctrinal disarray. Far from lamenting the inconclusiveness of the Court's *Bakke* decision, for example, I am inclined to applaud the way in which the Court there cleared the path to progressive future results while accommodating the reservations deeply felt by many with respect to preferential treatment.

L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1 (Supp. 1979).

375. A. BICKEL, THE MORALITY OF CONSENT 3-25 (1975). Bickel's central theme is that "process" as distinguished from "content" is "what the law of the Constitution is about." *Id.* at 142.

tice Powell in *Bakke* to bury it again, as outdated, is in line with Bickel's (and Tribe's) constitutional theory. This functional-pragmatic view may seem harmless (if uncreative) in the Court's development of due process; its sheer nihilism is apparent in the equal protection history of racial discrimination. The Supreme Court's standing in public confidence survives, stronger perhaps than that of Congress and the Presidency in this day. But that confidence rests more on the notion that its decisions are consistent, coherent, rationally explained, *and principled*, than on the favor one Monday's decision finds with one Monday's public. The message of *Weber* may be that this Supreme Court is reestablishing this concern. Possibly it is also valuing the view that while constitutional interpretation must have suppleness, every credible system of justice must be, in some sense, "contractarian."

POSTSCRIPT

On July 3, 1980, after this article was in type and the presses about to roll on it for the final time, the Supreme Court handed down a further, important word on affirmative action—*Fullilove v. Klutznick*.³⁷⁶ In this case the Court made good on its hint in *Weber* that we are still in the *Brown* era, and that *Bakke* was an aberration. At stake in *Fullilove* was the constitutionality (against an equal protection challenge) of congressional legislation providing that ten percent of all contracts awarded under a public contracts program (of \$4,000,000,000) should go to "minority business enterprises."

The Court's six to three decision upholding the affirmative action provision was the product of two opinions. One, written by Justice Brennan and joined by Justices Marshall and Blackmun, followed the analysis of these Justices in both *Bakke* (dissenting) and *Weber*. The second opinion was written by Chief Justice Burger and joined by Justices Powell and White. Dissenting, as was predictable from *Bakke* and *Weber*, was Justice Rehnquist. With him, not unexpectedly,³⁷⁷ was Justice Stevens. The third dissenter — underscoring the flimsiness, even for practicing lawyers, of Justice Holmes' definition of law—³⁷⁸ was Justice Stewart. Which brings us back to the question raised at the outset, "whether the nine supreme decision-makers rely on law, on accepted principle, or on unreasoned and unpredictable personal preference. . . ." ³⁷⁹

376. 48 U.S.L.W. 4979 (July 2, 1980).

377. See text accompanying note 370 *supra*.

378. "[P]rophecies of what the courts will do in fact." Holmes, *supra* note 350.

379. See pp. 3-4 *supra*.