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## THE NATURE OF THE CONSTITUTIONAL PROCESS: EQUAL PROTECTION AND THE BURGER COURT

ALBERT BRODERICK\*

This issue memorializes the contributions of the Warren Court to the jurisprudence of equal protection. My task is to appraise developments since the appointments of Chief Justice Burger in 1969 and of Justice Blackmun in 1970—the beginnings of what has been inevitably identified as the Burger Court.

Such an appraisal requires a review of the leading equal protection decisions of the Burger Court (Part I), and placement of its individual Justices (Part II). It also invites a glance to the Court's immediate future (Part III). Once such predictions are attempted a new and larger question emerges: What is the currently accepted process of constitutional decision-making? (Part IV). Finally, what criteria are available for subjecting this process and its products to fair criticism? (Part V). The Burger Court's equal protection decisions furnish an interesting launching pad for these more general inquiries. The Burger Court's<sup>1</sup> decade of effort has been characterized by a surprisingly mild application of brakes to some thrusts of its predecessor, by some controversial answers to difficult questions that the Warren Court had not directly addressed,<sup>2</sup> and by an internal fragmentation on some critical issues.

The Burger Court has operated in a public atmosphere considerably less congenial to civil rights than that of the 1960's, and some may appraise its record with that in mind. Others may choose to emphasize that the leadership of Chief Justice Warren and his Court from the mid-1950's helped spark the Civil Rights Revolution of the mid-1960's, and that no comparable leadership may be claimed for the contemporary Burger Court. Its decisions relating to equal protection will be considered under six headings: *Racial Segregation in Public Schools*,

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1. Of those who sat on the Warren Court, four Justices remained until Justice Stewart's resignation at the end of the 1980 Term: Brennan, White, Marshall and Stewart. Three other Justices later joined those just named: Justices Powell and Rehnquist in 1972, and Justice Stevens in 1975. On September 21, 1981 Justice Sandra D. O'Connor was confirmed by the Senate to fill the Stewart vacancy. This article addresses the work of the Court through the 1980 Term.

2. Notably, affirmative action and the companion problem of de facto (non-state mandated) public school desegregation, the interpretation of Title VII of the Civil Rights Act of 1964, and the "finalization" of equal protection methodology.

*The "Purposeful" Discrimination Requirement—Washington v. Davis,<sup>3</sup> Equal Protection Methodology, Sex Discrimination, The Enforcement Clauses of the Fourteenth and Fifteenth Amendments, and Affirmative Action.* A review of the Burger Court's performance in these selected categories may suggest to some that its work product in equal protection has been in some respects surprisingly good, and in others not as restrictive as might have been expected given the uncongenial national atmosphere.

## I. THE DECISIONS (1970-1981)

### A. *Racial Segregation in Public Schools*

For a time in the course of the decade, it seemed that the Burger Court was on the verge of calling a halt to the proudest undertaking of the Warren Court—its program for eliminating the dual system of racial schools that was the product of the Supreme Court's "separate but equal" aberration from 1896-1954.<sup>4</sup> But no such conclusion can fairly be reached today.

The Warren Court's desegregation agenda evolved slowly after the watershed decision in *Brown v. Board of Education*<sup>5</sup> (*Brown I*) in 1954 decreed that segregation in public education was inherently unequal. In the following year the Court ruled in *Brown II*<sup>6</sup> that the lower federal courts should use their equitable powers to supervise the desegregation of offending school districts "with all deliberate speed." The Court's insistence upon the total elimination of a dual system became explicit in 1968, when in *Green v. County School Board*<sup>7</sup> it unanimously held that public school boards were "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."<sup>8</sup> The Warren Court was concerned only with segregation compelled by state law, *de jure* segregation; it never faced up to the largely northern question of schools that were in fact racially segregated but without overt state compulsion, *de facto* segregation.<sup>9</sup>

Chief Justice Burger's opinion for a unanimous Court in *Swann v.*

3. 426 U.S. 229 (1976).

4. From *Plessy v. Ferguson*, 163 U.S. 537 (1896) to *Brown v. Board of Educ.*, 347 U.S. 483 (1954), racial segregation was maintained in public schools by virtue of *Plessy*'s "separate but equal" interpretation of the equal protection clause.

5. 347 U.S. 483 (1954).

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

7. 391 U.S. 430 (1968).

8. *Id.* at 437-38.

9. "[T]he differentiating factor between *de jure* segregation and so-called *de facto* segregation . . . is purpose or intent to segregate." *Keyes v. School Dist. No. 1*, 413 U.S. 189, 208 (1973).

*Charlotte-Mecklenburg Board of Education*<sup>10</sup> in 1971 reaffirmed the *Green* resolve, and for the first time the Court upheld a court-mandated busing remedy as "one tool of school desegregation."<sup>11</sup> In *Keyes v. School District No. 1*<sup>12</sup> in 1973 the Court addressed for the first time alleged racial discrimination in a northern school system which had no background of state-legislated segregation. Although the Court refused to find that de facto segregation constituted a constitutional violation, as such, it held that a showing of intentional segregation in one part of a school district created a rebuttable presumption that the entire school district was unconstitutionally segregated.<sup>13</sup> This was a significant forward step. However, in a series of school cases after *Keyes*, the force of *Brown II* and *Green* seemed to have been spent. In *Milliken v. Bradley*<sup>14</sup> in 1974 the Court refused to uphold a lower court order directing an interdistrict remedy combining de jure segregated schools of Detroit with adjacent suburban ones in which no purposeful segregation had been found. The desegregation movement lost further momentum in cases handed down in 1976<sup>15</sup> and 1977.<sup>16</sup>

However, a pair of cases decided by the Court in 1979, *Columbus Board of Education v. Penick*<sup>17</sup> and *Dayton Board of Education v. Brinkman*<sup>18</sup> (*Dayton II*), may prove to be the most sweeping post-*Brown* victories won by desegregation forces. While adhering to the Court's previous position that only purposeful (de jure) segregation constituted the constitutional violation that would justify race-conscious remedies, the Court determined that a finding of purposeful segregation as of 1955 (when *Brown II* was decided) in a significant part of a school district created a presumption that the segregative purpose continued, unless effectively rebutted by school board officials.<sup>19</sup> With *Columbus* and *Dayton II* the Burger Court gave desegregation forces an effective litigating tool, although not equalizing the loss of interdistrict remedies which *Milliken* had denied them.

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10. 402 U.S. 1 (1971).

11. *Id.* at 30.

12. 413 U.S. 189 (1973).

13. *Id.* at 201.

14. 418 U.S. 717 (1974).

15. In *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424 (1976), the Supreme Court in an opinion by Justice Rehnquist reversed, as an abuse of discretion, a lower court's remedies for desegregation.

16. In *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406 (1977) the Court held that the evidence as to constitutional violations was not sufficient to justify the systemwide busing remedy decreed by the district court. *But see* text accompanying notes 17-19 *infra*.

17. 443 U.S. 449 (1979).

18. 443 U.S. 526 (1976).

19. *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 458, 467 (1979); *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 538 (1979).

B. The "Purposeful" Discrimination Requirement—  
*Washington v. Davis*

A suit challenging on racial grounds the recruiting practices of the Washington Metropolitan Police Department produced the most restrictive decision of the Burger Court in the equal protection field. In *Washington v. Davis*<sup>20</sup> the Court held that to establish constitutional violation of equal protection plaintiffs must prove that the challenged governmental action was intentional, purposeful discrimination. In *Davis* both the lower courts and the extensive briefs in the Supreme Court had assumed that a showing of "discriminatory impact" was sufficient to put the burden of justification upon the governmental parties, as the Court had ruled with respect to employment discrimination suits under Title VII of the Civil Rights Act of 1964.<sup>21</sup> The *Washington v. Davis* decision distinguished the Title VII cases,<sup>22</sup> and the Court promptly reaffirmed its *Davis* position in a series of equal protection cases concerning both racial<sup>23</sup> and sexual discrimination.<sup>24</sup>

Although the *Washington v. Davis* line of cases left open the possibility that the required discriminatory purpose might be inferred from a sufficiently gross pattern of discriminatory effects, there has been neither fruitful nor consistent suggestion from the Court as to what evidence is required to permit this inference of "purpose."<sup>25</sup> The Court found such a predicate for purposeful inference in the school desegregation setting in the *Columbus* and *Dayton II* cases.<sup>26</sup> But in *City of Mobile v. Bolden*<sup>27</sup> in 1980 a divided Court declined to find such an inference justified in a racial voting rights context. And in *Bolden* the Court seems to have extended the *Washington v. Davis* "purposeful" requirement to the fifteenth amendment.<sup>28</sup>

20. 426 U.S. 229 (1976).

21. In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) and *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1977), the Court held that discriminatory impact upon minorities of employment requirements or practices was sufficient to constitute a violation of Title VII, absent a showing that the practice had a "manifest relationship to the employment in question." 401 U.S. at 432.

22. In *Washington v. Davis* plaintiffs sought relief on two grounds: (1) A constitutional violation under the equal protection component of the fifth amendment; and (2) a violation of 42 U.S.C. § 1981 (1976), which has been construed as in *pari materia* with Title VII. 426 U.S. at 233.

23. *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977).

24. *Personnel Adm'r v. Feeney*, 442 U.S. 256 (1979).

25. Justice Powell's opinion for the Court in *Arlington Heights* purported to establish criteria for purposeful discrimination, but they have been erratically applied. The complaint of Judge Goldberg of the Court of Appeals for the Fifth Circuit in *Jones v. City of Lubbock*, 640 F.2d 777, 777-79 (5th Cir. 1980) illustrates judicial frustration with the problem. See note 259 *infra*.

26. See notes 17 and 18 *supra*.

27. 446 U.S. 55 (1980).

28. 446 U.S. at 63. Although Justice Stewart's opinion for the Court was a plurality opinion, some courts of appeal have construed the several opinions as establishing a Supreme Court majority on this point. See *Jones v. City of Lubbock*, 640 F.2d 777 (5th Cir. 1980).

### C. *Equal Protection Methodology*

In a rather unplanned way the Warren Court breathed life into the equal protection clause which, prior to *Brown I*,<sup>29</sup> had been "the usual last resort of constitutional arguments,"<sup>30</sup> and a usually ineffective one at that. Aside from one out-of-line opinion of Justice Douglas in 1942,<sup>31</sup> the Court usually tested challenges to statutes on equal protection grounds with a very deferential rational basis review.<sup>32</sup> However, building on a suggestion of Justice Black in *Korematsu v. United States*<sup>33</sup> and on an earlier dictum of Justice Stone,<sup>34</sup> the Warren Court developed an equal protection doctrine that classifications based on race were "suspect," requiring strict judicial scrutiny and the showing of a "compelling state interest" in order to pass constitutional muster.<sup>35</sup> Another series of cases stipulated similar "strict scrutiny" when certain "fundamental rights" or "interests" were impinged upon by governmental action.<sup>36</sup> Thus the material for what would be called the two-tier theory of equal protection review was already well in place at the outset of the Burger Court.

#### 1. *The Two-Tier Theory and the Burger Court*

A 1973 decision by the Burger Court gave the two-tier theory its first formal approval. At the same time the Court curtailed the expansion of both the "suspect classification" and "fundamental interest" categories. In *San Antonio Independent School District v. Rodriguez*,<sup>37</sup> the Court was asked to strike down a scheme of financing public schools that was keyed to the economic wealth of individual school districts. Justice Powell's opinion for the Court rejected plaintiff's argument that such financing constituted a "suspect classification" because it was based on the wealth, or the poverty, of individual school districts.<sup>38</sup>

29. *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

30. This was Justice Holmes' observation in *Buck v. Bell*, 274 U.S. 200, 208 (1927).

31. In *Skinner v. Oklahoma*, 316 U.S. 535 (1942), the Court subjected a state sterilization statute to "strict scrutiny" because the legislation impinged on "one of the basic civil rights of man." *Id.* at 541.

32. See, e.g., *McGowan v. Maryland*, 366 U.S. 420 (1961); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

33. 323 U.S. 214 (1944). Justice Black's opinion for the Court first suggested that classifications based on race or nationality were "suspect." *Id.* at 216.

34. In his influential footnote to *United States v. Carolene Prod. Co.*, 304 U.S. 144 (1938), not expressly directed to equal protection, Justice Stone suggested a variety of concerns which might justify "more exacting scrutiny." *Id.* at 152 n.4.

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

36. *Shapiro v. Thompson*, 394 U.S. 618 (1969) (interstate travel); *Williams v. Rhodes*, 393 U.S. 23 (1968) (access to ballot); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (voting); *Douglas v. California*, 372 U.S. 353 (1963) (access of indigents to courts).

37. 411 U.S. 1 (1973).

38. *Id.* at 18-29.

The 5-4 opinion also denied that education was a "fundamental right" which would trigger the "compelling state interest" test.<sup>39</sup> Since neither "suspect class" nor "fundamental right" was in question, the "upper tier," which entailed strict judicial scrutiny and the showing of "compelling state interest," was not applicable. The Court then considered the Texas statute under the deferential rational basis test, the "lower tier," and found this standard satisfied.<sup>40</sup>

Since *Rodriguez* the Court has identified no other "fundamental rights" for equal protection purposes.<sup>41</sup> Nor has it added to the spare list of "suspect classifications."<sup>42</sup> There has been, as we shall see,<sup>43</sup> a partial breakdown of the two-tier theory. Sex or gender based classifications now seem to be treated by the Court in a category of their own, intermediate to the "compelling state interest" and "rational basis" tiers.<sup>44</sup> And, less explicitly, classifications based on illegitimacy have also been made a special case.<sup>45</sup>

The message of *Rodriguez* had been that what was not in the "upper tier" must necessarily be treated by the deferential rational basis formula.<sup>46</sup> For a time, some opinions suggested that the Burger Court would call for a more rigorous means-end inquiry under the rational basis test than had the Warren Court, by requiring the legislature (state or Congress) to "articulate" the governmental purpose which was to be "rationally furthered by the legislation."<sup>47</sup> However, in closely divided decisions in 1981, the Court reaffirmed the Warren Court notion of a most deferential rational basis test, dropping the need to "articulate."<sup>48</sup>

39. *Id.* at 29-39.

40. *Id.* at 40-44.

41. The "fundamental rights" or "fundamental interests" for equal protection purposes are distinguished from other "fundamental rights" which the Court has identified as rooted in other provisions of the Constitution. "The distinctive feature in most of the fundamental interests . . . equal protection cases . . . is that the justification for heightened scrutiny stems *entirely* from equal protection itself, not from any independent source elsewhere in the Constitution." G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 908 (10th ed. 1980).

42. In an ill-starred sortie in *Graham v. Richardson*, 403 U.S. 365 (1971) the Burger Court added alienage to race and nationality as a "suspect class" that requires "compelling state interest" justification. The Court has since back-pedaled a good way from this decision. See *Amback v. Norwick*, 441 U.S. 68 (1979); *Foley v. Connelie*, 435 U.S. 291 (1978).

43. See text accompanying notes 76-78 *infra*.

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

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

46. 411 U.S. at 17.

47. Justice Powell had given careful consideration to this notion in *Rodriguez*. *Id.* at 28.

48. Justice Rehnquist's opinion for the Court in *United States R. Retirement Bd. v. Fritz*, 449 U.S. 166 (1980) marked this development: "Where, as here, there are plausible reasons for Congress' action, our inquiry is at an end. It is, of course, 'constitutionally irrelevant whether this reasoning in fact underlay the legislative decision,' because this Court has never insisted that a legislative body articulate its reasons for enacting a statute." *Id.* at 461 (citations omitted). See also *Schweiker v. Wilson*, 101 S. Ct. 1074 (1981).

## 2. *The Two-Race or "Two-Class" Theory*

The two-tier theory must not be confused with the two-race theory of equal protection review which emanates from the *Slaughter-House Cases*<sup>49</sup> of 1873. Justice Powell later called it the "two-class" theory.<sup>50</sup>

There was never any question but that the equal protection clause, like the entire fourteenth amendment, was by its terms applicable to "any person."<sup>51</sup> However, in *Slaughter-House*, rejecting an equal protection argument against a state-imposed monopoly, Justice Miller stated for the Court:

We doubt very much whether any action of a State not directed by way of discrimination against the negroes 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.<sup>52</sup>

It is arguable whether overall the Warren Court had advanced or retarded this two-race notion. True, many of its broadest applications of equal protection, starting with the school cases, involved the rights of black citizens.<sup>53</sup> On the other hand, the Warren Court sponsored the most extensive protection given to "any person,"<sup>54</sup> as such, in the history of the equal protection clause: the far-reaching legislative reapportionment cases protecting the vote of "any person" from "dilution"<sup>55</sup> and the special "fundamental rights" cases triggering strict equal protection scrutiny, such as equal right to vote<sup>56</sup> and to have access to the ballot as candidates in elections,<sup>57</sup> the right of access to courts,<sup>58</sup> and the right to travel free from burdensome residence requirements.<sup>59</sup> All these equal protection interests affected "any person," not just the black citizen for whom *Slaughter-House* had noted a special regard. In many cases the Warren Court did show that special regard.<sup>60</sup> Yet often, in fostering the civil rights of black citizens, it resorted to the thirteenth amendment (which is almost exclusively keyed

49. 83 U.S. (16 Wall.) 36 (1873).

50. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 295 (1978).

51. In *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) the equal protection clause was cited as the basis for reversing a conviction of Chinese aliens on grounds of discrimination "against a particular class of persons." *Id.* at 373.

52. 83 U.S. (16 Wall.) at 81.

53. See text accompanying notes 5-9 *supra*; cases cited note 35 *supra*.

54. U.S. CONST. amend. XIV, § 1: "[N]or 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."

55. *Baker v. Carr*, 369 U.S. 186, 230-31, 247 (1962).

56. *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966).

57. *Williams v. Rhodes*, 393 U.S. 23 (1968).

58. *Douglas v. California*, 372 U.S. 353 (1963) (indigent entitled to counsel when first appeal from criminal conviction is permitted by state law).

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

60. See text accompanying notes 5-9 *supra*; cases cited note 35 *supra*.



to race)<sup>61</sup> and to congressional power under the enforcement clause (section 5) of the fourteenth amendment,<sup>62</sup> rather than to the equal protection clause.

Some early cases of the Burger Court gave a broader scope to equal protection in situations involving black citizens than in comparable situations where race was not a factor.<sup>63</sup> But a vigorous, if not terminal, blow was struck against the two-race theory by Justice Powell in his crucial solo opinion in *Regents of the University of California v. Bakke*.<sup>64</sup> He acknowledged the *Slaughter-House Cases* as the source of what he called a "two-class theory"<sup>65</sup> and 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.'"<sup>66</sup> He also conceded that "[o]ver the past 30 years, this Court has embarked upon the crucial mission of interpreting the Equal Protection Clause with the view of assuring to all persons 'the protection of equal laws,' in a Nation confronting a legacy of slavery and racial discrimination."<sup>67</sup> But Justice Powell then simply swept aside the two-race theory as an anachronism: "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 accorded others."<sup>68</sup>

In his *Bakke* concurrence, Justice Blackmun met Justice Powell's position head-on:

[T]he Fourteenth Amendment has [not] broken away from its moorings and its original intended purposes. Those original aims persist. . . . If

61. U.S. CONST. amend. XIII:

Section 1. Neither slavery nor involuntary servitude, except as a 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.

The crucial Warren Court decision here is *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

62. See *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

63. Compare *White v. Regester*, 412 U.S. 755 (1973) with *Gaffney v. Cummings*, 412 U.S. 735 (1973). *Griffin v. Breckenridge*, 403 U.S. 88 (1971) put life into the moribund civil rights conspiracy statute, 42 U.S.C. § 1985(c), with respect to conspiracies in which there was "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." 403 U.S. at 102. But *Griffin* did not reach the constitutional equal protection question; it was rested on the thirteenth amendment and the right to interstate travel. Conversely, the Burger Court gave narrower scope to equal protection and to Congress' enforcement power under section 5 of the fourteenth amendment in situations that did not involve racial factors. Compare *James v. Valtierra*, 402 U.S. 137 (1971) with *Hunter v. Erickson*, 393 U.S. 385 (1969) and *Oregon v. Mitchell*, 400 U.S. 112 (1970) with *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

64. 438 U.S. 265, 269 (1978).

65. *Id.* at 295.

66. *Id.* at 291.

67. *Id.* at 293-94 (citation omitted).

68. *Id.* at 295. Justice Powell suggested that even if the *Slaughter-House* position was still tenable on historical grounds, it was difficult to put it in practical effect, or indeed to justify its application, with respect to the new racial minorities. He opted for the "any person" approach. *Id.* at 295-99. See text accompanying notes 190-91 *infra*.

this conflicts with idealistic equality, that tension is original Fourteenth Amendment tension, constitutionally conceived and constitutionally imposed, and it is part of the Amendment's very nature until complete equality is achieved in the area.<sup>69</sup>

In his 1980 opinion in *Fullilove v. Klutznick*,<sup>70</sup> Justice Powell seemed to soften the absoluteness of his *Bakke* position as he expressly recognized the heavy responsibility of the Supreme Court itself for racial discrimination in America:

Indeed, our own decisions played no small part in the tragic legacy of government-sanctioned discrimination. See *Plessy . . . Dred Scott*. . . . At least since the decision in *Brown* . . . , the Court has been resolute in its dedication to the principle that the Constitution envisions a Nation where race is irrelevant. The time cannot come too soon when no governmental decision will be based upon immutable characteristics of pigmentation or origin. But in our quest to achieve a society free from racial classification, we cannot ignore the claims of those who still suffer from the effects of identifiable discrimination.<sup>71</sup>

The problem of the two-race theory, in the *Slaughter-House* sense, does not seem to have been resolved by the Court. The solution is concededly complicated by the presence on the current scene of other disadvantaged minorities which were not envisaged as special beneficiaries of equal protection at the time of the Civil War Amendments, but whose claims to fair consideration obviously cannot be ignored.<sup>72</sup>

#### D. Sex Discrimination

Despite the inclusion of sex as a forbidden basis for discrimination under the Civil Rights Act of 1964,<sup>73</sup> the Warren Court had marked sex classifications for no special constitutional treatment. From its decision in *Reed v. Reed*<sup>74</sup> in 1971 the Burger Court clearly required more than routine rational basis scrutiny where a constitutional equal protection claim was based on alleged sex discrimination. The bid to recognize sex as a "suspect class" failed for want of a single vote in *Frontiero v.*

69. 438 U.S. at 405.

70. 448 U.S. 448 (1980).

71. *Id.* at 516 (citations omitted).

72. This consideration clearly influenced Justice Powell in *Bakke*, although it did not prevent his upholding a ten percent minority (identified as "citizens of the United States who are Negroes, Spanish-speaking, Orientals, Eskimos and Aleuts") set-aside in *Fullilove*, 448 U.S. at 517. On the other hand, it continues to be a major barrier to Justice Stevens. See text accompanying notes 180-81 *infra*.

73. Pub. L. No. 88-352, 79 Stat. 255; Pub. L. No. 92-261, 86 Stat. 109 (codified at 42 U.S.C. § 2000e-2 (1976)). For example, § 2000e-2(a) provides: "It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual . . . because of such individual's race, color, religion, sex, or national origin . . . ."

74. 404 U.S. 71 (1971).

*Richardson*<sup>75</sup> in 1973. Finally, in 1976, the Court seemed to settle upon a compromise—sex classifications were to be tested neither by the strict scrutiny test, nor by the traditional rational basis test, but in a specially constructed intermediate category all by itself.<sup>76</sup> To justify a classification on the basis of sex the state or federal government must show that the use of sex as a classifier had a substantial relation to an important governmental interest.<sup>77</sup> This came to be known as the *Craig v. Boren* test. It is applicable whether the gender classification is directly burdensome to women or benignly favorable to them as a compensation for past discrimination.<sup>78</sup>

#### E. *The Enforcement Clauses of the Fourteenth and Fifteenth Amendments*

A notable legacy of the Warren Court was its conclusion that Congress had the power under the enforcement clauses of the fourteenth and fifteenth amendments to ban conduct that would not have violated the specific provisions of section 1 of those amendments. In two 1966 cases interpreting the Voting Rights Act of 1965, *South Carolina v. Katzenbach*<sup>79</sup> and *Katzenbach v. Morgan*,<sup>80</sup> the Court gave the enforcement clauses a broad scope that had been denied them since the restrictive *Civil Rights Cases*<sup>81</sup> of 1883. *Katzenbach v. Morgan* presented the question whether congressional legislation to outlaw state literacy tests with respect to New York City's Puerto Rican community was constitutional.<sup>82</sup> The Court held that the only limitation on the congressional "enforcement" power was that the legislation be "appropriate" within the broad sense of *McCulloch v. Maryland*.<sup>83</sup> This entailed only three inquiries: (1) whether the statute "may be regarded as an enactment to enforce the Equal Protection Clause"; (2) "whether it is 'plainly adapted to that end'"; and (3) "whether it is not prohibited but is consistent with 'the letter and spirit of the constitution.'"<sup>84</sup> In his opinion in *Morgan* for a 7-2 Court Justice Brennan upheld the congres-

75. 411 U.S. 677 (1973).

76. *Craig v. Boren*, 429 U.S. 190, 197 (1976).

77. "[C]lassification by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." *Id.*

78. *Craig v. Boren* was itself a "benign discrimination" case. The applicability of the standard to both invidious and benign discrimination was made clear in *Orr v. Orr*, 440 U.S. 268, 279 (1979) and *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980).

79. 383 U.S. 301 (1966). In *South Carolina v. Katzenbach* the Court upheld the constitutionality of the various provisions of the Voting Rights Act of 1965 as an "appropriate" exercise of congressional power under section 2 of the fifteenth amendment. 383 U.S. 301 (1966).

80. 384 U.S. 641 (1966).

81. 109 U.S. 3 (1883).

82. 384 U.S. at 643-44.

83. 17 U.S. (4 Wheat.) 316 (1819).

84. 384 U.S. at 651.

sional act on two distinct grounds. First, the legislation was a remedy enforcing a constitutional right already recognized by the Court: enhancing the voting power of large segments of the Puerto Rican community would be instrumental in their "gaining nondiscriminatory treatment in public services."<sup>85</sup> There seemed to be no problem here. But Justice Brennan offered a second basis for upholding the legislation. Congress could appropriately determine that outlawing literacy tests would foster "the elimination of an invidious discrimination in establishing voter qualifications."<sup>86</sup> Here there was a difficulty. In a 1959 case<sup>87</sup> (which the Court declined to overrule in either *South Carolina*<sup>88</sup> or *Morgan*),<sup>89</sup> the Court had refused to strike down state literacy tests for voting as per se unconstitutional. Thus, the second ground of the Brennan opinion seemed to recognize Congress' power under the enforcement clauses to give its own expanded version of the content of equal protection even in the face of a contrary prevailing opinion by the Court.<sup>90</sup> This second (substantive) ground for *Morgan* came under heavy attack in the literature.<sup>91</sup> It has never been rejected by the Supreme Court.<sup>92</sup> But in two cases, 10 years apart, the Burger Court may have confined this congressional "enforcement" power to "remedial" legislation, rather than extending it to "substantive" legislation which would reinterpret the content of equal protection rights.

In *Oregon v. Mitchell*<sup>93</sup> in 1970 the Court unanimously upheld congressional legislation that extended the ban on literacy tests nationwide. However, a sharply-divided Court rejected Congress' purported determination on the second (substantive) *Katzenbach v. Morgan* the-

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85. *Id.* at 652.

86. *Id.* at 653-56.

87. *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45 (1959). In *Lassiter* a unanimous Court rejected a black citizen's equal protection challenge to a North Carolina literacy test.

88. *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

89. *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

90. Justice Harlan, joined by Justice Stewart, dissented:

In view of . . . *Lassiter*, I do not think it is open to Congress to limit the effect of that decision as it has undertaken to do by § 4(e). In effect the Court reads § 5 of the Fourteenth Amendment as giving Congress the power to define the *substantive* scope of the Amendment. If that indeed be the true reach of § 5, then I do not see why Congress should not be able as well to exercise its § 5 "discretion" by enacting statutes so as in effect to dilute equal protection and due process decisions of this Court.

384 U.S. at 668. Justice Brennan rejected this suggestion in his opinion for the Court: "[Section] 5 grants Congress no power to restrict, abrogate, or dilute these guarantees [which the Court had identified in the fourteenth amendment by its decisions]." 384 U.S. at 651 n.10.

91. Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603 (1974-75); Burt, *Miranda and Title II: A Morganatic Marriage*, 1969 SUP. CT. REV. 81.

92. Justice Rehnquist vigorously contended in *City of Rome v. United States*, 446 U.S. 156, 206 (1980) (Rehnquist, J., dissenting) that the Civil Rights Cases, 109 U.S. 3 (1883), continue to stand for the proposition that Congress' power under section 5 of the fourteenth amendment is "remedial" only. 446 U.S. at 220.

93. 400 U.S. 112 (1970).

ory as under section 5 that the states' denial of voting to 18-year-olds infringed equal protection. The literacy test enactment was upheld as remedial. But the 18-year-old vote, according to five Justices, was substantive legislation beyond the congressional enforcement power.<sup>94</sup> In *City of Rome v. United States*<sup>95</sup> in 1980, the Court again faced the question of the scope of congressional power to enforce the equal protection clause. A provision of the Voting Rights Act of 1965 prevented municipalities in states covered by the Act from making changes in their electoral system without approval by either the Attorney General or a federal district court. The city of Rome sought to change from district to at-large voting, and apparently convinced the district court that it had not been guilty of purposeful (i.e., unconstitutional) discrimination against black voters for almost twenty years. Nevertheless, the Supreme Court found in *South Carolina*,<sup>96</sup> *Morgan*,<sup>97</sup> and *Mitchell*<sup>98</sup> (as to literacy tests) ample basis to deny Rome's requested change: "[E]ven if § 1 of the [15th] Amendment prohibits only purposeful discrimination . . . Congress may . . . pursuant to § 2, outlaw voting practices that are discriminatory in effect."<sup>99</sup> *Rome* was expressly a fifteenth amendment case. However, the Court made clear that the same "appropriate" standard of *McCulloch v. Maryland* would be applicable under section 5 of the fourteenth amendment.<sup>100</sup> The Court viewed the congressional statute in question in *Rome* as "remedial" and not "substantive."<sup>101</sup> The present viability of Justice Brennan's second (substantive) ground in *Morgan* is dubious, but in view of the very extended sense given "remedial" in *Rome* the point might seem almost moot.<sup>102</sup>

#### F. Affirmative Action

With the still unfinished business of affirmative action, sometimes loosely referred to as "benign discrimination," the Burger Court has faced up to hotly controversial social issues that the Warren Court had not addressed.<sup>103</sup> As we have seen, the Court has consistently refused

94. *Id.* at 118, 129.

95. 446 U.S. 156 (1980).

96. *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

97. *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

98. *Oregon v. Mitchell*, 400 U.S. 112 (1970).

99. 446 U.S. at 173.

100. *Id.* at 176-77.

101. *Id.* at 182.

102. See G. GUNTHER, *supra* note 41, at 1097. But the legislation presently under consideration in Congress to define when life begins for purpose of abortion (*Roe v. Wade*, 410 U.S. 113 (1973)) would, if passed, bring again before the Court the extent of Congress' "substantive" power under section five of the fourteenth amendment. See text accompanying notes 410-16 *infra*.

103. See note 2 *supra*.

to view sex as a "suspect classification."<sup>104</sup> Decisions dealing with sex discrimination, including the "benign" (affirmative action) variety, evolved an intermediate constitutional test that was neither "strict scrutiny" nor "rational basis."<sup>105</sup> However, when affirmative action cases dealing with race, which *is* a "suspect classification,"<sup>106</sup> reached the Court, the argument was made that any use of race to benefit, as well as to disadvantage, a "discrete and insular"<sup>107</sup> minority constituted the "suspect classification" which triggered the exacting "strict scrutiny—compelling state interest" test. If such "benign" use of race was indeed "suspect," the question to be litigated was simply whether the state could show justifying reasons that were "compelling." If the "benign" use of race *was not* "suspect" where it only incidentally disadvantaged non-minority persons, little difficulty was anticipated in the state's showing a rational basis for the classifications.<sup>108</sup> The question whether benign use of race was "suspect" first came to the Court in cases challenging the preferential minority admissions programs that state universities had used to bring about increased minority participation in professional schools, *DeFunis v. Odegaard*<sup>109</sup> and *Regents of the University of California v. Bakke*.<sup>110</sup> The Court avoided decision on this difficult and controversial problem in *DeFunis*, ruling *DeFunis'* suit "moot" because he had been provisionally admitted to the University of Washington Law School after commencement of his legal action and would graduate whatever the outcome.<sup>111</sup> The problem would not go away, and in 1977 the Supreme Court granted certiorari to review the California Supreme Court's determination that Alan Bakke, a white student disadvantaged by a preferential admissions program, should be admitted to the state medical school at Davis, and that Cali-

104. See text accompanying notes 73-78 *supra*.

105. See *Craig v. Boren*, 429 U.S. 190, 197 (1976). The test was most recently reformulated in *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142 (1980): "[G]ender-based discriminations must serve important governmental objectives and . . . the discriminatory means employed must be substantially related to the achievement of those objectives." *Id.* at 150.

106. See text accompanying note 35 *supra*.

107. This phrase is from Justice Stone's footnote in *United States v. Carolene Prod. Co.*, 304 U.S. 144, 152 n.4 (1938). See note 34 *supra*. It had also been accepted as a measure of a "suspect classification" by Justice Powell in his opinion for the Court in *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973). See text accompanying notes 37-46 *supra*.

The counter argument, of course, is that the whole point of the "suspect classification" was to protect or compensate the "discrete and insular" minority. This was the very center of the dispute before the Court in both *DeFunis v. Odegaard*, 416 U.S. 312 (1974) and *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), which are discussed immediately below.

108. The premise here is the two-tier theory of *Rodriguez*, 411 U.S. 1 (1973). See text accompanying notes 37-46 *supra*.

109. 416 U.S. 312 (1974).

110. 438 U.S. 265 (1978).

111. 416 U.S. at 319-20.

fornia could not use race as a criterion for admissions.<sup>112</sup>

The Court's 5-4 decision in *Bakke* yielded the narrowest possible agreement on two conclusions: (1) *Bakke* should be admitted in light of the illegality of the Medical School's preferential admissions program which reserved sixteen of a hundred seats for minority applicants; and (2) use of race as a factor in admissions was *not* per se unconstitutional.<sup>113</sup> But there was no agreement within the Court as to the basis for its decision, or as to the proper constitutional formula for adjudicating the constitutionality of affirmative action.<sup>114</sup> Only five members of the Court reached the constitutional question at all—Justices Brennan, White, Marshall, and Blackmun (the Brennan Four), for whom the Davis program survived the equal protection challenge, and Justice Powell for whom it did not.<sup>115</sup> Powell's vote added to those of Justices Stevens, Stewart, Rehnquist, and Chief Justice Burger (the Stevens Four), who found the Davis program in violation of Title VI of the Civil Rights Act of 1964,<sup>116</sup> insured *Bakke's* admission and the invalidation of Davis' admissions program.<sup>117</sup> However, Justice Powell, after finding "suspect classification" the appropriate category to test the constitutional claim of a "majority" plaintiff, recognized that securing a diverse student body might be a "compelling state interest" that would justify using race as one among several criteria for admissions.<sup>118</sup> He also seemed to suggest that appropriate "findings" by the legislature, courts, or administrative bodies that an affirmative action program would remedy the effects of past discrimination could justify a less strident use of race than the sixteen-seat set-aside in *Bakke*.<sup>119</sup> The doctrinal confusion left by the Court in *Bakke* was compounded by the fact that the

112. *Bakke v. Regents of the Univ. of Cal.*, 18 Cal. 3d 34, 553 P.2d 1152 (1976), *cert. granted*, 429 U.S. 1090 (1977), *aff'd in part and rev'd in part*, 438 U.S. 265 (1978).

113. 438 U.S. 265, 271-72 (1978).

114. Justice Powell ruled that any use of race constituted a "suspect classification" requiring that "a State must show that its purpose or interest is both constitutionally permissible and substantial" and "necessary . . . to the accomplishment of its purpose or the safeguarding of its interest." *Id.* at 305. Justice Powell used the words "substantial" and "compelling" interchangeably. *Id.* at 309, 314. By insisting upon the showing of "necessity" he invoked a most stringent version of the "compelling state interest" test. *See* text accompanying notes 37-46 *supra*. The Brennan Four categorically rejected this view, and proffered a constitutional test never before used in the racial context. 438 U.S. at 369-74. *See* text accompanying note 123 *infra*.

115. Although Justice Powell found the Davis program unconstitutional, he declined to uphold the California courts' "enjoining petitioner from according any consideration to race in its admissions process." 438 U.S. at 272. To Powell, "the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin." *Id.* at 320. According to Justice Powell, considering race as one among several factors in determining admissions was a far cry from a specific set-aside of sixteen out of a hundred seats on grounds of race alone. *Id.* at 315.

116. 42 U.S.C. § 2000d (1976).

117. 438 U.S. at 271.

118. *Id.* at 315.

119. *Id.*

only Justices besides Powell who addressed the constitutional issue identified neither the "strict scrutiny-compelling state interest" test, nor the "rational basis" test as applicable.<sup>120</sup> Instead the Brennan Four, who would have upheld the Davis program, said that the "intermediate" *Craig v. Boren* test<sup>121</sup> requiring a "substantial relation to an important state interest"<sup>122</sup> was the measure of the constitutionality of affirmative action as to race as well as sex.<sup>123</sup> Subsequent courts, both state and federal, called upon to deal with the constitutional dimensions of *Bakke* must discern whether a challenged program survives both the Powell and the Brennan Four tests.<sup>124</sup>

Since *Bakke* two other affirmative action cases—each dealing with congressional legislation—have somewhat sharpened the contours of the Burger Court's stance on affirmative action. The first of these cases, *United Steelworkers v. Weber*<sup>125</sup> involved a "voluntary" private affirmative action craft training program in a contract between a labor union and an employer, with equal places reserved for blacks and whites. The Court did not consider it as a constitutional case; the most pressing question in *Weber* was whether such a voluntary program was made illegal by the express terms of the Civil Rights Act of 1964.<sup>126</sup> Holding that it was not, a 5-2 Court (Justices Powell and Stevens not sitting) emphasized the overriding policy of the Civil Rights Act:

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. . . .<sup>127</sup>

However, the Court recognized that there was a "line of demarcation between permissible and impermissible affirmative action plans."<sup>128</sup> The plan in *Weber* survived because it did not "unnecessarily trammel the interests of white employees,"<sup>129</sup> because it was temporary,<sup>130</sup> and because it was "designed to eliminate conspicuous racial imbalance in

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120. See note 114 *supra*.

121. See text accompanying notes 73-78 *supra*.

122. Their proposal would constitute a further deviation from the rigid two-tier theory of *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973). See text accompanying notes 37-46 *supra*.

123. 438 U.S. at 359.

124. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 305-06, 359-62 (1978). *E.g.*, *DeRonde v. Regents of the Univ. of Cal.*, 172 Cal. Rptr. 677, 625 P.2d 220 (1981).

125. 443 U.S. 193 (1979).

126. *Id.*

127. *Id.* at 204 (citations omitted).

128. *Id.* at 208.

129. *Id.*

130. *Id.*



traditionally segregated job categories."<sup>131</sup>

The second post-*Bakke* affirmative action case, *Fullilove v. Klutznick*,<sup>132</sup> sheds a bit more light on the equal protection obstacle to affirmative action. But the 6-3 majority upholding a federal affirmative action program did not tip its hand as between the *Bakke* approaches of the Brennan Four and Powell. The challenge in *Fullilove* was to a congressionally enacted program which "set aside" up to 10% of the \$4,200,000,000 appropriation of the Public Works Employment Act of 1977<sup>133</sup> for "minority business enterprises" (MBE). Justices Marshall, Brennan, and Blackmun rested their approving votes on the ground that the program passed the affirmative action test they had identified in *Bakke* ("substantial relation to an important governmental interest," the *Craig v. Boren* test).<sup>134</sup> However, the other three approving Justices, Chief Justice Burger, and Justices White and Powell marked out still another approach which constitutes *Fullilove's* special contribution to the Court's developing "line of demarcation" for "permissible" affirmative action.<sup>135</sup>

Chief Justice Burger's *Fullilove* opinion merits detailed study because it furnishes necessary information as to the basis upon which three members of a six-Justice majority of the Court upheld an affirmative action program in which "Congress for the first time in the Nation's history has created a broad legislative classification for entitlement to benefits based solely on racial characteristics."<sup>136</sup> If the *Bakke* tests are still relevant, then why the special interest in the Burger opinion in *Fullilove*? The interest lies in the opinion's stress that the affirmative action program under consideration "was the product of the exercise of congressional power, especially under the enforcement clause of the fourteenth amendment, upon renewed recognition that such congressional power is subject to equal protection limitations deriving from the fifth amendment,"<sup>137</sup> and upon the reiteration that equal

131. *Id.* at 209.

132. 448 U.S. 448 (1980).

133. Pub. L. No. 95-28, 91 Stat. 116, amending Local Public Works Capital Development and Investment Act of 1976, Pub. L. No. 94-369, 90 Stat. 999 (codified at 42 U.S.C. § 6701 (1976)).

134. "[T]he proper inquiry is whether racial classifications designed to further remedial purposes serve important governmental objectives and are substantially related to achievement of those objectives." 448 U.S. at 519.

135. "We need not today define in detail the line of demarcation between permissible and impermissible affirmative action plans." *United Steelworkers v. Weber*, 442 U.S. 193, 208 (1979).

136. 448 U.S. at 549 (1980) (Stevens, J., dissenting). Justice Powell also filed a separate opinion in which he largely reiterated his *Bakke* criteria, but with some interesting modifications. See text accompanying notes 159-63 *infra*. Justice White, who had joined the Brennan Four in *Bakke*, added no further word here, but the closing paragraphs of Chief Justice Burger's opinion suggest that Justice White also adhered to his position in *Bakke*. See text accompanying notes 230-33 *infra*.

137. 448 U.S. at 473. Since *Bolling v. Sharpe*, 347 U.S. 497 (1954), the Court has accepted that

protection furnishes less restraint upon Congress "enforcing" under section 5 than it does upon other forms of governmental action.<sup>138</sup>

### 1. *The Source of Congressional Power Enacting MBE*

The Burger Three found adequate congressional power to enact MBE, insofar as it bears upon private contractors, in the spending power and the commerce power.<sup>139</sup> However, MBE also reached contractors in state and local government and so, mindful of *National League of Cities v. Usery*,<sup>140</sup> as to these state and local governmental contractors, there is resort to the enhanced power of Congress deriving from section 5 of the fourteenth amendment. Using the *McCulloch v. Maryland* "appropriate" test,<sup>141</sup> as made applicable to section 5 in *South Carolina, Morgan, Mitchell, and Rome*,<sup>142</sup> Chief Justice Burger found adequate congressional evidence designing MBE as an "appropriate" remedial means to eliminate the discriminatory end that the equal protection clause was designed to address. But the *McCulloch v. Maryland* test also requires that congressional legislation not violate the "letter" of the Constitution.<sup>143</sup> There must be inquiry whether the equal protection rights of "any person," presumably those contractors disadvantaged by MBE, are curtailed by the MBE provision. Hence, judicial review of MBE, as affirmative action, in light of some equal protection test is relevant.

### 2. *The Equal Protection Review*

The starting point for the Burger opinion was recognition that Congress' authority to legislate under section 5 extends "beyond the prohibition of purposeful discrimination to encompass state action that has discriminatory impact perpetuating the effects of past discrimination."<sup>144</sup> Congress had adequate basis before it to conclude that "minority businesses have been denied effective participation in public contracting opportunities by procurement practices that perpetuated the effects of prior discrimination,"<sup>145</sup> and Congress could reasonably determine that elimination of "barriers to minority firm access to public contracting opportunities generated by the 1977 Act was appropriate

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there is an equal protection component contained in the due process clause of the fifth amendment.

138. 448 U.S. at 473-78. See text accompanying notes 79-102 *supra*.

139. 448 U.S. at 477.

140. 426 U.S. 833 (1976) (state governments, as employers, held not subject to federal minimum wage requirements). See notes 301, 313 & 316 *infra*.

141. See text accompanying notes 83 & 84 *supra*.

142. See text accompanying notes 80-102 *supra*.

143. See text accompanying note 84 *supra*.

144. 448 U.S. at 477.

145. *Id.* at 477-78.

to ensure that those businesses were not denied equal opportunity to participate in federal grants to state and local governments, which is one aspect of the equal protection of the laws."<sup>146</sup> To this point the opinion was treating the aspect of the *McCulloch* formula dealing with "let the end be legitimate. . . ."<sup>147</sup> It then considered the means used to accomplish the "legitimate" end. The means, as we have just seen, could not violate the "letter" of the Constitution. In this context, this meant that the legislative classifications must "not violate the equal protection component of the Due Process Clause of the Fifth Amendment."<sup>148</sup> Here, in the strict sense, the equal protection review begins.

When the means used is "racial or ethnic criteria" to remedy "the present effects of past discrimination" the congressional program must be "narrowly tailored to the achievement of that goal."<sup>149</sup> According to the Burger opinion, the MBE program satisfied this requirement. There was a goal of 10% participation by MBEs (who need not be "the lowest competitive bidders"). However, only MBEs who were qualified MBEs would benefit, and then only those whose higher bids reflected "the present effects of prior disadvantage and discrimination."<sup>150</sup> Further, the program provided relief by administrative waiver from the 10% set-aside when a grantee's last efforts failed to identify bona fide MBEs. Furthermore, the congressional program established an administrative "complaint procedure" designed to exclude from the program "minority firms whose access to public contracting opportunities is not impaired by the effects of prior discrimination."<sup>151</sup>

The Burger Three found no equal protection infirmity in the "incidental" denial to some non-minority firms of access to some public contracts as a result of the 10% set-aside: "such 'a sharing of the burden' by innocent parties is not impermissible," especially where, as here, the burden on "nonminority firms is relatively light."<sup>152</sup> Equal protection was not denied because of "underinclusiveness"—specifying only certain minority groups, rather than remedying the "effects of disadvantage or discrimination" as to all deprived businesses.<sup>153</sup> Nor was it denied by "overinclusiveness"—bestowing some benefits that cannot be tied into "present effects of identified prior discrimination." The MBE administrative program of waiver and exception "provides a reasonable assurance that application of racial or ethnic criteria will be

146. *Id.* at 478.

147. See text accompanying notes 83 & 84 *supra*.

148. 448 U.S. at 480.

149. *Id.*

150. *Id.* at 481.

151. *Id.* at 482.

152. *Id.* at 484.

153. Congress "may take one step at a time to remedy only part of the broader problem." *Id.* at 485.

limited to accompanying the remedial objectives. . . ."<sup>154</sup>

In sum, although the Burger Three suggested that the MBE program pressed "the outer limit of congressional authority," it was "narrowly tailored," with sufficient flexibility to "give reasonable assurance" that it "will function within constitutional limitations."<sup>155</sup> It thus survived the "most searching examination." It would pass muster under either *Bakke* formula, that of the Brennan Four or that of Justice Powell, neither of which, however, the opinion adopted, "either expressly or implicitly."<sup>156</sup>

The Burger opinion stressed that the remedial authority of Congress was broader than that of a federal court,<sup>157</sup> that there was here the functional equivalent of congressional "findings," and that the challenge was mounted to the constitutionality of the MBE provision on its face, without any showing that "as applied in identified situations the MBE provision violated the constitutional or statutory rights of any party to this case."<sup>158</sup>

Joining in the Burger opinion, Justice Powell also wrote separately and upheld MBE on a somewhat mellowed version of his *Bakke* analysis.<sup>159</sup> In *Bakke* Justice Powell had said, and reiterated, that where a racial classification was used the governmental interest must be compelling or substantial, and the use of a racial classification must be "necessary" to promote that interest.<sup>160</sup> In *Fullilove*, Justice Powell expressly affirmed that "ameliorating the disabling effects of identified discrimination" was a compelling governmental interest.<sup>161</sup> He then allowed that race-conscious remedies might be used if they were "equitable and reasonably necessary to the redress of identified discrimination."<sup>162</sup> This was a conscious toning down, five times repeated in his opinion, of the usual requirement of a "compelling state interest" justification—that there be no less drastic means of achieving the goal.<sup>163</sup>

154. *Id.* at 487.

155. *Id.* at 490.

156. *Id.* at 492.

157. *Id.* at 483, 485-86.

158. *Id.* at 480.

159. *Id.* at 495-517.

160. 438 U.S. at 305, 320.

161. 448 U.S. at 496, 497. Justice Powell adhered to his *Bakke* view that "the legitimate interest in creating a race-conscious remedy is not compelling unless an appropriate governmental authority has found that [a constitutional or statutory] violation has occurred." *Id.* at 498.

162. *Id.* at 510.

163. In *Bakke* Justice Powell had explicitly reserved the question of the extent of review of "legislation by Congress pursuant to its powers under § 2 of the Thirteenth Amendment and § 5 of the Fourteenth Amendment to remedy the effects of prior discrimination." *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 302 n.41 (1978). In *Fullilove*, Powell, alone among the Justices, cited § 2 of the thirteenth amendment as a source of congressional power for the MBE legislation. 448 U.S. at 508.

Justice Marshall, with whom Justices Blackmun and Brennan joined, upheld the MBE set aside by simply applying the Brennan Four *Bakke* test: "the racial classifications . . . are substantially related to the achievement of the important and congressionally articulated goal of remedying the present effects of past racial discrimination."<sup>164</sup>

Putting together the Burger and Marshall opinions in *Fullilove*, affirmative action programs initiated by Congress that are expressly designed to remedy the effects of past racial discrimination in a reasonably specified setting seem secure. But there are three caveats: (1) the program must not burden non-minorities excessively; (2) there must be flexibility of design adequate to forestall granting of benefits to minority persons who are not in fact disadvantaged by past discrimination; and (3) there must be evidence before Congress (not necessarily "findings" as such) from which Congress could reasonably conclude "that traditional . . . practices when applied to minority businesses could perpetuate the effects of past discrimination."<sup>165</sup>

## II. THE COURT AND THE JUSTICES

What has been set out is a narrative outline of the work of the Burger Court with respect to several themes of equal protection. A look to the future requires a more judgmental account that brings to the fore less favorable aspects of its product and process.

Much less than the Justices of the Warren Court can the members of the Burger Court be perceived as a collective unit. This is evidenced by the great number of cases decided without the benefit of majority opinions. Between the ascent of Chief Justice Burger in 1969 and the end of the 1979 Term, eighty-eight cases were decided without a majority agreement as to the reasons for the decision.<sup>166</sup> This exceeds the total number of plurality opinions handed down in the entire prior history of

164. 448 at 521.

165. *Id.* at 478.

166. Kraft, *Business of the Court* . . . , Washington Post, June 25, 1981, § A, at 23, col. 1.

A classic example is the pair of fourth amendment cases handed down at the end of the 1980 Term, *Robbins v. California*, 101 S. Ct. 2841 (1981) and *New York v. Belton*, 101 S. Ct. 2860 (1981), concerning warrantless seizure of evidence contained in closed packages in the interior of an automobile. In one case the package was in the trunk of the car, in the other in the interior passenger space. Six Justices agreed that both cases should be decided the same way. But they were not. In *Robbins* the Court did not produce a majority; the four-Justice plurality was joined by Chief Justice Burger concurring without opinion, and Justice Powell concurring with an opinion in which he reminded himself: "We have an institutional responsibility not only to respect *stare decisis* but also to make every reasonable effort to harmonize our views on constitutional questions of broad practical application." 101 S. Ct. at 2851 n.4. See also the Court's notation in its grant of certiorari in *United States v. Ross*, 50 U.S.L.W. 3278 (U.S. Oct. 13, 1981) (No. 80-2209): "The parties are directed to address the question whether the Court should reconsider *Robbins v. California*, 453 U.S. — (1981)."

the Supreme Court.<sup>167</sup> The Burger Court has also featured the continuing dissent of several Justices, often with little regard for matters most recently decided.<sup>168</sup> An earlier Court tradition found the most vigorous antagonists willing to accept as settled law decisions to which they had previously dissented.<sup>169</sup>

Rather than blocs on the Court, one perceives nine highly individual Justices who stubbornly maintain their particularized views even when they cannot convince a majority to accept them. These general observations raise the question, what are the central notions in the area of equal protection of the nine Justices who constituted the Supreme Court at the end of the 1980 Term? We commence with the five appointees of Presidents Nixon and Ford.

*Rehnquist.* From the outset of his tenure, with remarkable persistency, Justice Rehnquist has sought, sometimes successfully,<sup>170</sup> more often in dissent, to reverse the nationalizing tendencies of the Warren Court and its immediate predecessors. In the area of equal protection, his opinions press for the narrowest review of both federal and state legislation that allegedly abridge individual rights.<sup>171</sup> His dissents have sounded impassioned resistance to those Burger Court decisions that have supported affirmative action and remedies for past discrimination.<sup>172</sup>

167. *Id.* The Warren Court contributed to this tendency to plurality decisions. Of the 87 plurality decisions handed down prior to 1969, over 40 were by the Warren Court, *id.*, many in the first amendment obscenity cases.

168. Justices Brennan, Marshall, and Rehnquist are frequently within this category. On the other hand, Justice Stevens, and often Justice Stewart, have been inclined to accept recent prior decisional law with which they disagreed, for *stare decisis* reasons. In an unexpected way, however, the Burger Court has stood by the criminal justice due process decisions of the Warren Court, even the much-maligned *Miranda v. Arizona*, 384 U.S. 436 (1966). And in the 1981 Term the Court went so far as to give an expansive reading to *Miranda*. *Edwards v. Arizona*, 101 S. Ct. 1880 (1981). See *Estelle v. Smith*, 101 S. Ct. 1866 (1981).

169. Again, the Burger Court did not originate the deviations from this tradition. Justices Black and Douglas continually reaffirmed their absolutist position on the scope of the first amendment and refused to accept the new doctrine of merely prospective constitutional decision deriving from *Linkletter v. Walker*, 381 U.S. 618 (1965). See text accompanying note 369 *infra*.

170. In *National League of Cities v. Usery*, 426 U.S. 833 (1976), Justice Rehnquist persuaded the Court to overrule the comparatively recent decision of *Maryland v. Wirtz*, 392 U.S. 183 (1968), with respect to the extent of Congress' power under the commerce clause in regulating activities of state governments as employers. And in *Edelman v. Jordan*, 415 U.S. 651 (1974), he persuaded a Court majority to reinvigorate state immunity under the eleventh amendment.

171. See, e.g., *United States R. Retirement Bd. v. Fritz*, 449 U.S. 166 (1980), in which he brought the Burger Court back to the minimal rational basis review of an equal protection challenge to denial of some railroad retirement benefits. See note 48 *supra*. See also *Schweiker v. Wilson*, 101 S. Ct. 1074 (1981), in which the Court applied this new rational basis line to supplemental security benefits to patients in public mental hospitals in face of a four-Justice dissent written by Justice Powell.

172. *Fullilove v. Klutznick*, 448 U.S. 448, 522 (1980) (joined Stewart, J., dissenting); *City of*

*Stevens*. Perhaps the most original, and hardest to peg, Justice Stevens is also the Burger Court Justice most self-consciously committed to *stare decisis* as a prime high court value. On this ground alone he has adhered to later court reaffirmations of decisions with which he did not originally agree.<sup>173</sup> Still, he has been outspoken against the *Washington v. Davis*<sup>174</sup> "purpose" requirement in equal protection and fifteenth amendment cases,<sup>175</sup> advocating that a rule be framed in terms of objective impact.<sup>176</sup> And he would prefer to the two-tier methodology a single standard of review in all equal protection cases.<sup>177</sup> He prefers that "rights" or "interests" be asserted only on behalf of individuals, rather than being identified in terms of "group" or "class." This view was made explicit in a Title VII sex discrimination case,<sup>178</sup> but it seems to carry over to his analysis of affirmative action race

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Rome v. United States, 446 U.S. 156, 206 (1980); United Steelworkers v. Weber, 443 U.S. 193, 219 (1979).

The conclusions reached as to Justice Rehnquist's first four Terms on the Court in Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293 (1976) remain valid. Shapiro concluded that Justice Rehnquist's criteria for constitutional decision-making could be reduced to three basic propositions:

- (1) Conflicts between an individual and the government should, whenever possible, be resolved against the individual;
- (2) Conflicts between state and federal authority, whether on an executive, legislative or judicial level, should, whenever possible, be resolved in favor of the state; and
- (3) Questions of the exercise of federal jurisdiction [including Article III questions, such as standing, mootness, and political questions], whether on the district court, appellate court or Supreme Court level, should, whenever possible, be resolved against such exercise.

*Id.* at 294.

173. In *Florida Dep't of Health and Rehab. Serv. v. Florida Nursing Home Ass'n*, 101 S. Ct. 1032 (1981), the Court, in a per curiam decision, reversed the court of appeals on the ground that retroactive monetary relief against a state organization was barred by the eleventh amendment interpretation of *Edelman v. Jordan*, 415 U.S. 651 (1974). Justices Brennan, Marshall, and Blackmun, who had all dissented in *Edelman*, dissented again in this case, adhering to their opinion that *Edelman* was wrongly decided. Justice Stevens had not been on the Court when *Edelman* had been decided, but he stated his agreement that *Edelman* had been incorrectly decided. He then concurred in the per curiam reversal: "For me, the adverse consequences of adhering to an arguably erroneous precedent in this case are far less serious than the consequences of further unraveling the doctrine of *stare decisis*." 101 S. Ct. at 1036. In *Runyon v. McCrary*, 427 U.S. 160, 190-91 (1976) he concurred on the same ground.

174. 425 U.S. 229 (1976). See text accompanying notes 21-28 *supra*.

175. *Mobile v. Bolden*, 446 U.S. 55, 91 (1980) (Stevens, J., concurring); *Washington v. Davis*, 426 U.S. 229, 253 (Stevens, J., concurring). His elaborate efforts to avoid facing up to the questions whether the "purpose" requirement applied to the thirteenth amendment and 42 U.S.C. § 1982 led to his contrived and restrictive opinion for the Court in *City of Memphis v. Greene*, 101 S. Ct. 1584 (1981).

176. "I do not believe that it is appropriate to focus on the subjective intent of the decisionmakers . . . . [A] proper test should focus on the objective effects of the political decision rather than the subjective motivation of the decisionmaker." *Mobile v. Bolden*, 446 U.S. 55, 90 (1980) (Stevens, J., concurring). See *Washington v. Davis*, 426 U.S. 229, 253 (1976) (Stevens, J., concurring).

177. *But see* *Craig v. Boren*, 429 U.S. 190 (1976). "Whatever criticism may be leveled at a judicial opinion implying that there are at least three [equal protection] standards applies with the same force to a double standard." *Id.* at 212.

178. *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978).

cases.<sup>179</sup> He recognizes that great damage has been done to blacks as a class as a result of past discrimination;<sup>180</sup> however, to him the two-race theory of the fourteenth amendment deriving from *Slaughter-House* does not justify extension of special relief to newly emerged minority groups.<sup>181</sup> From this he concludes that special relief should be withheld from all and that the Constitution must presently be interpreted in terms of what he sees as its original "ideals"—colorblindness and individual rather than group rights.<sup>182</sup>

*Powell*. In an insightful concurring opinion in *Keyes*,<sup>183</sup> Justice Powell professed to see no reason to distinguish the northern de facto segregation from the southern de jure situation.<sup>184</sup> However, he dissented from the Court's effective acceptance of this position six years later as he pressed for cessation of judicial enforcement of remedial desegregation decrees.<sup>185</sup> His opinion for a 5-4 Court in *Rodriguez*<sup>186</sup> formulated the restrictive two-tier theory that has controlled equal protection practice through most of the Burger Court years.<sup>187</sup> Yet he took a leading role in pressing for a stronger than rational basis review of cases involving classifications based on illegitimacy.<sup>188</sup> And he seems ultimately to have acknowledged that an "intermediate" level of review had been accepted by the Court in sex discrimination cases.<sup>189</sup> In his controlling opinion in *Bakke*, Justice Powell flatly renounced the two-race theory

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179. *Cf. Fullilove v. Klutznick*, 448 U.S. 448, 552-54 (1980) (Stevens, J., dissenting) (Congress should identify the characteristic that justifies special treatment to a class of persons).

180. *Id.* at 537.

181. "Quite obviously, the history of discrimination against black citizens in America cannot justify a grant of privileges to Eskimos or Indians." *Id.*

182. His conclusion was advanced pragmatically as to the 10% set-aside in *Fullilove*: "It is unfortunately but unquestionably true that irrational racial prejudice persists today and continues to obstruct minority participation in a variety of economic pursuits, presumably including the construction industry." *Id.* at 544. Yet he found the Act unconstitutional: "It . . . seems clear to me that this Act cannot be defended as an appropriate method of reducing racial prejudice." *Id.* at 545.

The Constitution does not identify itself as "colorblind"—that conception derives from Justice Harlan's dissent in *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896). The remedial design of the fourteenth amendment equal protection clause, and the enforcement power given Congress under section 5, rather suggest a color-awareness.

183. *Keyes v. School Dist. No. 1*, 413 U.S. 189, 217 (1973).

184. "There is . . . no reason as a matter of constitutional principle to adhere to the de jure/de facto distinction in school desegregation cases. In addition, there are reasons of policy and prudent judicial administration which point strongly toward the adoption of a uniform national rule." *Id.* at 232. "[W]e should acknowledge that whenever public school segregation exists to a substantial degree there is prima facie evidence of a constitutional violation by the responsible school board." *Id.* at 235.

185. *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 479-84 (1979).

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

187. *Id.* at 4-59. See text accompanying notes 37-46 *supra*.

188. *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175-76 (1972).

189. *Parham v. Hughes*, 441 U.S. 349, 359 (1979).



of fourteenth amendment analysis in race cases, admitting that it once had justification, but it had become outdated by subsequent judicial developments.<sup>190</sup> His strident language in *Bakke* on this point seems somewhat softened by his *Fullilove*<sup>191</sup> concurrence upholding congressional action to remedy past racial discrimination. And in both *Bakke* and *Fullilove*, alone among members of the Court, he cited the thirteenth amendment as a partial justification for remedial congressional affirmative action.<sup>192</sup> While this approach would by-pass the equal protection clause, it leaves Justice Powell more open than his *Bakke* opinion would suggest to the possibility of federal affirmative action in racial cases when there is congressional initiative. However, it keeps relatively limited the possibility of state-initiated or voluntary affirmative action, and does not extend to sex discrimination.<sup>193</sup>

*Blackmun*. The chief independent contribution of Justice Blackmun to equal protection analysis was his ill-starred opinion adding alienage to the "suspect classification" category.<sup>194</sup> The Court has so seriously qualified the *Graham* decision<sup>195</sup> as to leave doubt in the minds of one leading equal protection scholar whether the alienage addition is still viable law.<sup>196</sup>

As to affirmative action in the racial area, Justice Blackmun, alone among the Burger era appointees, has avowedly proclaimed the two-race theory of equal protection.<sup>197</sup> He adhered to the Brennan Four opinion in *Bakke*, which would have upheld the Davis preferential admissions program using an "intermediate" test comparable to that recently fashioned by the Court for gender classifications. In a separate opinion in *Bakke*, he expressly rejected Justice Powell's pronouncement that the two-race theory was outdated.<sup>198</sup> To Justice Blackmun the promise of *Slaughter-House*<sup>199</sup> remains unfulfilled and binding.

*Burger*. Chief Justice Burger wrote opinions for a unanimous Court in 1971 that upheld busing as a remedy for de jure segregation<sup>200</sup> and

190. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 291 (1978). See text accompanying notes 64-68 *supra*.

191. *Fullilove v. Klutznick*, 448 U.S. 448 (1980). See text accompanying note 71 *supra*.

192. See note 163 *supra*. 448 U.S. at 508; 438 U.S. at 302 n.41.

193. Without ratification of the equal rights amendment (ERA), sex discrimination can be reached only under the equal protection clause of the fifth amendment. See note 358 *infra*.

194. *Graham v. Richardson*, 403 U.S. 365 (1971).

195. See cases cited in note 42 *supra*.

196. G. GUNTHER, *supra* note 41, at 89.

197. See text accompanying note 64 *supra*.

198. 438 U.S. 265, 402-08 (1978).

199. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873). See text accompanying notes 50-52 *supra*.

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

held that "discriminatory impact," without a showing of discriminatory intent, could constitute a violation of Title VII, the equal employment section of the Civil Rights Act of 1964.<sup>201</sup> However, two crucial 5-4 decisions of the Court in 1973<sup>202</sup> and 1974<sup>203</sup> "brought school desegregation to a halt in metropolitan areas where . . . the ghetto core of the cities is black or some other racial minority, and the surrounding suburbs, in separate districts, white."<sup>204</sup> In each of these decisions Chief Justice Burger was in the restrictive majority.<sup>205</sup> In *Bakke* he was in the Stevens Four, which rejected the preferential admissions plan without reaching the constitutional equal protection issue. In *Weber* he joined Justice Rehnquist's dissent, on statutory interpretation grounds.<sup>206</sup> Until *Fullilove*,<sup>207</sup> in 1980, it was thus difficult to identify Chief Justice Burger's constitutional position with respect to affirmative action. Putting that opinion together with *Griggs*<sup>208</sup> it seems that, without taking a clear stance on equal protection, he is prepared to uphold certain specific congressional action expressly taken to remedy the effects of past racial discrimination.

What of the Justices who had also served on the Warren Court—Justices Brennan, Stewart, White, and Marshall?

*Brennan.* In Warren Court days perhaps no Justice made it more difficult to insist upon the two-race theory of equal protection than Justice Brennan, who launched the "one person, one vote" wave of equal protection litigation in 1962 in *Baker v. Carr*.<sup>209</sup> In the same vein was Justice Brennan's determined, but ultimately unsuccessful, effort to have sex raised to the level of "suspect classification."<sup>210</sup> Each of these thrusts detracted from the *Slaughter-House* proposition that equal protection was primarily, though not exclusively, related to racial discrimination.<sup>211</sup> In *United Jewish Organizations v. Carey*<sup>212</sup> in 1977, on the eve of *Bakke*, Justice Brennan voiced his misgivings about "benign discrimination."<sup>213</sup> And in *Bakke* his opinion required a higher standard

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201. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

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

203. *Milliken v. Bradley*, 418 U.S. 717 (1974).

204. W. DOUGLAS, *THE COURT YEARS* 119 (1980).

205. See text accompanying note 68 *supra*.

206. *United Steelworkers v. Weber*, 443 U.S. 193, 219 (1979).

207. *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

208. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

209. 369 U.S. 186 (1962).

210. *Frontiero v. Richardson*, 411 U.S. 93 (1973) (plurality opinion).

211. See text accompanying note 52 *supra*.

212. 430 U.S. 144 (1977).

213. *Id.* at 172-75.

than "rational basis" to justify the Davis affirmative action program.<sup>214</sup> However, his ringing justification of the voluntary affirmative action program in *Weber* called upon the *Slaughter-House* principle without reciting the two-race concept of equal protection.<sup>215</sup> Ultimately, it seems, Justice Brennan was successful in persuading the Court to accept an intermediate level of justification for a gender classification.<sup>216</sup> However, he has to date been unable to rally more than four Justices to the same intermediate test for an affirmative action classification in matters of race.<sup>217</sup>

*Stewart.* As suggested in another article in this issue,<sup>218</sup> Justice Stewart has throughout his long tenure on the Court found various judicial means for circumventing discrimination based upon race. These have included resort to the thirteenth amendment,<sup>219</sup> to the right of interstate travel,<sup>220</sup> and to detecting the presence of subtle state action.<sup>221</sup> Although he sidestepped the equal protection issue in *Bakke* by joining the Stevens Four opinion,<sup>222</sup> he joined the majority opinion in *Weber* which upheld a voluntary affirmative action plan including "race-conscious steps to eliminate manifest racial imbalances in traditionally segregated job categories."<sup>223</sup> This track record led a recent author in this *Journal* to the incautious speculation that Justice Stewart was a prime candidate to supply the fifth vote necessary to make the Brennan Four opinion in *Bakke* the equal protection rule of the Supreme Court with respect to affirmative action.<sup>224</sup> In three opinions in the 1979 Term Justice Stewart layed that speculation to rest. Despite his generous views with respect to the sweep of the thirteenth amendment in racial matters, his perception of the range of the equal protection clause, and of Congress' power under section 5 of the fourteenth amendment, as to racial (as well as other) matters, is as restricted as that of any Justice on the Court. In all three of these cases he spoke with Justice Rehnquist.<sup>225</sup>

214. 438 U.S. at 358-62.

215. *United Steelworkers v. Weber*, 443 U.S. 193, 202 (1979).

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

217. Justices White, Blackmun, and Marshall joined in his *Bakke* opinion. See note 224 *infra*.

218. See V. Broderick, *Mr. Justice Stewart*, pp. 305-11 *supra*.

219. *Griffin v. Breckenridge*, 403 U.S. 88 (1971); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

220. *Griffin v. Breckenridge*, 403 U.S. 88 (1971).

221. *United States v. Guest*, 383 U.S. 745 (1966).

222. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. at 408-21.

223. *United Steelworkers v. Weber*, 443 U.S. at 209.

224. Broderick, *Bakke, Weber and Mr. Justice Stewart*, 11 N.C. Cent. L.J. 3, 71 (1979).

225. *City of Rome v. United States*, 446 U.S. 156, 206 (1980) (Rehnquist, J., dissenting); *Mohile v. Bolden*, 446 U.S. 55, 58 (1980) (plurality opinion); *Fullilove v. Klutznick*, 448 U.S. 448, 522 (1980) (Stewart, J., dissenting). In *Minnick v. California Dep't of Corrections*, 101 S. Ct. 2211, 2223 (1981), Justice Stewart's dissent made clear his disaffection with affirmative action: "So far as the Constitution goes, a private person may engage in any racial discrimination he wants, cf.

*White.* To the penetrating comments made earlier in this issue<sup>226</sup> on Justice White's opinions while sitting on the Burger Court only a few words need be added. Justice White seems disturbed with the overextended use that the Court has recently given his "purpose" requirement in *Washington v. Davis*<sup>227</sup> for an equal protection violation. In *City of Mobile v. Bolden*<sup>228</sup> he dissented because the Court was unwilling to accept the lower courts' ruling "that an invidious discriminatory purpose could be inferred from the totality of facts in this case."<sup>229</sup> However, in that dissent he did not challenge Justice Stewart's extension of the *Washington v. Davis* "purpose" requirement to the fifteenth amendment. Justice White's adherence to Chief Justice Burger's opinion in *Fullilove*,<sup>230</sup> rather than to Justice Marshall's opinion in that case,<sup>231</sup> does not seem to represent a departure from his *Bakke* views (when he joined the Brennan Four). White has repeatedly accented the enhanced power of Congress when it relies upon section 5 of the fourteenth amendment<sup>232</sup>—the root of the Burger opinion in *Fullilove*. Furthermore, the Burger opinion, which White joined, expressly recited that "our analysis demonstrates that the MBE provision would survive judicial review under either 'test' articulated in the several *Bakke* opinions."<sup>233</sup> This passage was obviously designed to accommodate both concurrees—Justice Powell and Justice White.

*Marshall.* In a series of opinions commencing with his dissent in *San Antonio Independent School District v. Rodriguez*,<sup>234</sup> Justice Marshall inveighed against the rigid two-tier (compelling state interest or rational basis) equal protection analysis which the Court institutionalized in that case.<sup>235</sup> He opted for a sliding scale approach:

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United Steelworkers v. Weber, 443 U.S. 193, (1979) but under the Equal Protection Clause of the Fourteenth Amendment a sovereign state may never do so. And it is wholly irrelevant . . . whether the discrimination is called 'affirmative action' or by some less euphemistic term."

226. Daye, *Justice Byron R. White*, pp. 260-78 *supra*.

227. 426 U.S. 229 (1976).

228. 446 U.S. 55 (1980).

229. *Id.* at 95.

230. 448 U.S. at 453.

231. *Id.* at 517.

232. See, e.g., *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 212 (1972) (White, J., concurring).

233. 448 U.S. at 492.

234. 411 U.S. 1, 70 (1973) (Marshall, J., dissenting).

235. I must once more voice my disagreement with the Court's rigidified approach to equal protection analysis. The Court apparently seeks to establish today that equal protection cases fall into one of two neat categories which dictate the appropriate standard of review—strict scrutiny or mere rationality. But this Court's decisions in the field of equal protection defy such easy categorization. A principled reading of what this Court has done reveals that it has applied a spectrum of standards in reviewing discrimination allegedly violative of the Equal Protection Clause. This spectrum clearly comprehends variations in the degree of care with

The task in every case should be to determine the extent to which constitutionally guaranteed rights are dependent on interests not mentioned in the Constitution. As the nexus between the specific constitutional guarantee and the nonconstitutional interest draws closer, the nonconstitutional interest becomes more fundamental and the degree of judicial scrutiny applied when the interest is infringed on a discriminatory basis must be adjusted accordingly.<sup>236</sup>

In *Rodriguez* this should have led the Court, said Justice Marshall, to give more than a rational basis scrutiny to the educational interests disadvantaged by the Texas legislation.<sup>237</sup>

Although Justice Marshall has been the most relentless advocate on the Court of the *Slaughter-House* two-race analysis of equal protection, he was also in the forefront of the Court's enhancement of equal protection interests that concerned "any person" without reference to race. He supported the apportionment decisions with their one-person-one-vote,<sup>238</sup> the raising of alienage to a "suspect classification,"<sup>239</sup> and Justice Brennan's unsuccessful effort to raise sex to the level of a "suspect classification."<sup>240</sup> When this last effort failed Justice Marshall persisted in striving to have sex and illegitimacy, and even age, given more than the deferential "rational basis" review.<sup>241</sup> Yet Justice Marshall has continually reminded the Court of its *Slaughter-House* heritage. In 1976, in a dissent arguing for protection of the elderly against job termination, he said: "Of course, the Court is quite right in suggesting that distinctions exist between the elderly and traditional suspect classes such as Negroes, and between the elderly and 'quasi-suspect' classes such as women or illegitimates."<sup>242</sup> Justice Marshall's sliding scale analysis of equal protection was never accepted by the Court, but he was ultimately vindicated by the breakdown of the rigid two-tier

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which the Court will scrutinize particular classifications, depending, I believe, on the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn.

*Id.* at 98-99 (citations omitted).

236. *Id.* at 102-03.

237. *Id.* at 109-10, 129-30.

238. Although Justice Marshall was not on the Court when the early reapportionment cases, *Baker v. Carr*, 369 U.S. 186 (1962) and *Reynolds v. Sims*, 377 U.S. 553 (1964), were decided, he joined the majority in such prominent later reapportionment cases as *Avery v. Midland County*, 390 U.S. 474 (1968), *Hadley v. Junior College Dist.*, 397 U.S. 50 (1970), *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969), and *Abate v. Mundt*, 403 U.S. 182 (1971), in which he wrote the majority opinion.

239. *Graham v. Richardson*, 403 U.S. 365 (1971). He dissented from the Court's retreat from this doctrine in *Foley v. Connelie*, 435 U.S. 291, 302 (1978) and in *Ambach v. Norwick*, 441 U.S. 68, 81 (1979) where he joined Justice Blackmun's dissent.

240. *Frontiero v. Richardson*, 411 U.S. 677 (1973) (plurality opinion).

241. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 317 (1976) (Marshall, J., dissenting).

242. *Id.* at 325.

analysis in gender and illegitimacy cases, at least.<sup>243</sup>

We will probably have to await disclosures from subsequent biographies and autobiographies of the Justices to learn the full impact *within the Court* of Justice Marshall's eloquent separate opinion in *Bakke*.<sup>244</sup> But reference is already appropriate to some of its passages:

I do not agree that petitioner's admission program violates the Constitution. For it must be remembered that, during most of the past 200 years, the Constitution as interpreted by this Court did not prohibit the most ingenious and pervasive forms of discrimination against the Negro. Now, when a State acts to remedy the effects of that legacy of discrimination, I cannot believe that this same Constitution stands as a barrier.<sup>245</sup>

. . . The position of the Negro today in America is the tragic but inevitable consequence of centuries of unequal treatment.<sup>246</sup>

. . . In light of the sorry history of discrimination and its devastating impact on the lives of Negroes, bringing the Negro into the mainstream of American life should be a state interest of the highest order. To fail to do so is to ensure that America will forever remain a divided society.<sup>247</sup>

Noting the Supreme Court's past rejection of the *Slaughter-House* promise, Justice Marshall added:

Most importantly, had the Court been willing in 1896, in *Plessy v. Ferguson*, to hold that the Equal Protection Clause forbids differences in treatment based on race, we would not be faced with this dilemma in 1978. . . . The majority of the Court rejected the principle of color-blindness, and for the next 58 years, from *Plessy* to *Brown v. Board of Education*, ours was a Nation where, *by law*, an individual could be given "special" treatment based on the color of his skin. . . .

It is because of a legacy of unequal treatment that we now must permit the institutions of this society to give consideration to race in making decisions about who will hold the positions of influence, affluence, and prestige in America. . . .

. . . .  
 I fear that we have come full circle. After the Civil War our Government started several "affirmative action" programs. This Court in the *Civil Rights Cases* and *Plessy v. Ferguson* destroyed the movement toward complete equality. For almost a century no action was taken, and this nonaction was with the tacit approval of the courts. Then we had *Brown v. Board of Education* and the Civil Rights Acts of Congress, followed by numerous affirmative-action programs. *Now*, we have this Court again stepping in, this time to stop affirmative-action programs

243. See text accompanying notes 44 & 45 *supra*.

244. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 387 (1978).

245. *Id.* at 387.

246. *Id.* at 395.

247. *Id.* at 396.

of the type used by the University of California.<sup>248</sup>

Following this plea, the Supreme Court in 1979 in *Weber* and in 1980 in *Fullilove* upheld affirmative action programs, but with careful reservations.<sup>249</sup> We have noted that Justice Powell in somewhat modifying his harsh *Bakke* ban of the two-race theory, actually borrowed Justice Marshall's words of blame for the Supreme Court as part of the problem.<sup>250</sup>

But Justice Marshall's strongest warning to the Court attacked the plurality opinion in *City of Mobile v. Bolden*,<sup>251</sup> which purported to extend to the fifteenth amendment the "purposeful" requirement of *Washington v. Davis*<sup>252</sup> and declined to infer racially discriminatory "purpose" from a "totality of facts" as to local electoral practices. In *Bolden* the Supreme Court reversed the lower federal courts' holding that multi-member legislative districts unconstitutionally diluted the voting strength of black citizens in the Alabama municipality.<sup>253</sup> "The right to vote is granted in form, but denied in substance," concluded Justice Marshall.

It is time to realize that manipulating doctrines and drawing improper distinctions under the Fourteenth and Fifteenth Amendments . . . [make] this Court an accessory to the perpetuation of racial discrimination. . . . If this Court refuses to honor our long-recognized principle that the Constitution 'nullifies sophisticated as well as simple-minded modes of discrimination', it cannot expect the victims of discrimination to respect political channels of seeking redress. I dissent.<sup>254</sup>

### III. THE CURRENT PRODUCT—AND BEYOND?

It is time to summarize, and to risk a few predictions.

#### A. Schools

The *Columbus* and *Dayton II*<sup>255</sup> cases promise a continuation of court-supervised desegregation in the schools, both north and south.

248. *Id.* at 401-02.

249. See text accompanying notes 125-58 *supra*.

250. *Fullilove v. Klutznick*, 448 U.S. 448, 566 (1980). See text accompanying notes 159-63 *supra*.

251. 446 U.S. 55 (1980).

252. 426 U.S. 229 (1976).

253. In *Mobile* the issue was purely constitutional, unlike the Court's companion decision in *City of Rome v. United States*, 446 U.S. 156 (1980), which involved interpretation of section 4(a) of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973, in which Justice Marshall wrote the majority opinion for the Court. In the constitutional case, unlike the statutory one, the Court held the *Washington v. Davis* purposeful discrimination must be shown. 446 U.S. at 62.

254. 446 U.S. at 55, 141 (citations omitted).

255. See text accompanying note 19 *supra*.

But the deprivation of multi-district remedies<sup>256</sup> and of equality in school district financing<sup>257</sup> makes significant progress unlikely in many metropolitan areas.

### B. *Discriminatory Purpose Requirement*

Since *Washington v. Davis*,<sup>258</sup> an equal protection violation requires the showing of a discriminatory purpose. While purpose may, in theory, be inferred from an egregious set of objective facts there is no adequate guide in the decisions as to what facts will suffice, and proof of subjective discriminatory intent is remarkably difficult to come by. The obstacle is immense. The bewilderment is dense even in the courts of appeal.<sup>259</sup>

### C. *Equal Protection Methodology*

The two-tier theory has been expanded to include a third, intermediate tier.<sup>260</sup> The top tier of strict scrutiny and compelling state interest has been severely confined.<sup>261</sup> The suspect classifications are limited to race and nationality, and alienage. But alienage has become questionable.<sup>262</sup> The fundamental rights part of the top tier seems rigidly limited to voting rights, access to courts and a right to interstate travel.<sup>263</sup> The new intermediate tier certainly includes sex,<sup>264</sup> but the Court's inconsistent applications of its illegitimacy standard defy analysis.<sup>265</sup> In the lower catch-all tier of equal protection the Court seems to have settled upon the most deferential possible formula, "rational relation to a legitimate state interest," after several years of speculating about a more demanding test.<sup>266</sup>

256. *Milliken v. Bradley*, 418 U.S. 717 (1974).

257. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973). See text accompanying note 204 *supra*.

258. 426 U.S. 229 (1976). See text accompanying notes 20-28 *supra*.

259. E.g., *Jones v. City of Lubbock*, 640 F.2d 777 (5th Cir. 1980) (Goldberg, J., specially concurring). Judge Goldberg's exasperation, "mine is not to make reply, mine is not to reason why," *id.* at 777, was directed to the Supreme Court's "indecisive opinion [sic] and amorphous holding" in *City of Mobile v. Bolden*. 640 F.2d at 779. However, he took measured aim at the "subjective intent to discriminate standard" of *Washington v. Davis* and *Arlington Heights*, *id.* at 778 n.6, and concluded that "[w]ithout guidance from above, the lower courts are sentenced to a term of confusion." *Id.* at 779.

260. See text accompanying note 14 *supra*.

261. See text accompanying notes 41 & 42 *supra*.

262. See text accompanying note 42 *supra*.

263. This category remains close to the content received from the Warren Court. See note 36 *supra*. But the "access to courts" has been generalized. *Bounds v. Smith*, 430 U.S. 817 (1977). See *Younger v. Gilmore*, 404 U.S. 15 (1971).

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

265. Compare *Trimble v. Gordon*, 430 U.S. 762 (1967) with *Lalli v. Lalli*, 439 U.S. 259 (1978). See text accompanying notes 45 & 188 *supra*.

266. See note 48 *supra*.



The Court, as a Court, has not specifically rejected out of hand the *Slaughter-House* notion that equal protection has a more intense application in matters of race.<sup>267</sup> But Justice Powell's prediction in *Bakke* that it is *passé*<sup>268</sup> still looms large, despite the flat rejection of his view by four members of the current Court.<sup>269</sup>

#### D. Sex

Until the 1980 Term the Court seemed clearly to have settled upon the *Craig v. Boren*<sup>270</sup> formula ("substantial relation to an important state interest") as the intermediate constitutional standard for testing classifications based on sex. It may be suggested that two cases in that Term have shaken this assurance. While both the statutory rape case, *Michael M. v. Superior Court*,<sup>271</sup> and the better known draft case, *Rostker v. Goldberg*,<sup>272</sup> by-passed the intermediate test, they each proceeded upon special considerations and *Craig v. Boren* is probably alive, if not as well as before. More threatening to the firmness of *Craig v. Boren* is the incongruity of the Court's prevailing standards in benign discriminations as to sex and race. One defending a benign sex discrimination, under *Craig v. Boren*, must show only a substantial relation to an important governmental interest. However one defending a benign race discrimination must show, under the *Bakke* opinion of Justice Powell, a compelling governmental interest. This disparity, in light of the *Slaughter-House* tradition, is obviously irrational and awaits future correction by the Court (of what sort, who can say).

#### E. The Enforcement Clauses

The Burger Court seems to have institutionalized the Warren Court's effort to reinvigorate section 5, the enforcement clause of the fourteenth amendment, and section 2 of the fifteenth as well.<sup>273</sup> More than likely, when the issue is squarely tested, the Court will look more favorably upon congressional action under section 5 that deals with remedies, than upon congressional redefinition of the "substantive" content of fourteenth amendment rights.<sup>274</sup> But *City of Rome v. United States*<sup>275</sup> suggests that "remedial" will be construed broadly by the Court.<sup>276</sup>

267. See text accompanying note 72 *supra*.

268. See text accompanying notes 64-68 *supra*.

269. Justices Brennan, Blackmun, Marshall, and White. See text accompanying note 123 *supra*.

270. 429 U.S. 190 (1976).

271. 101 S. Ct. 1200 (1981).

272. 101 S. Ct. 2646 (1981).

273. See text accompanying notes 79-102 *supra*.

274. See text accompanying notes 93-102 *supra*.

275. 446 U.S. 156 (1980).

276. *Id.* at 182. See text accompanying note 102 *supra*.

F. *Affirmative Action*

*Fullilove* gave a qualified green light to federal affirmative action. Far less clear is the future of non-congressional affirmative action programs. State or local government programs must, of course, comply with the equal protection limitation of the fourteenth amendment. For the moment, at least, that seems to entail compliance with both *Bakke* formulas.<sup>277</sup> This, indeed, is the course taken by the California Supreme Court in recently upholding the post-*Bakke* special admissions program of the University of California at Davis Law School.<sup>278</sup> A strictly voluntary program by a non-private employer would presumably be subject to the message in *Weber*: a voluntary affirmative action plan "designed to eliminate conspicuous racial imbalance in traditionally segregated job categories"<sup>279</sup> would be legal provided it was limited as to time and did not "unnecessarily trammel" the rights of others.<sup>280</sup> But there is no guarantee in *Weber* that a voluntary private plan in the employment category beyond this close-knit framework would survive the decision in *McDonald v. Santa Fe Trail*<sup>281</sup> that Title VII bans all racial discrimination in employment—against whites as well as blacks. Of course, a voluntary, private sector affirmative action plan outside of the employment area (the coverage of Title VII) generally would not be within reach of the Federal Constitution or laws.

As the above analysis of *Bakke*, *Weber*, and *Fullilove*<sup>282</sup> suggests, the Court has approached affirmative action cautiously, neither rejecting it out of hand, nor giving assurance of its survival beyond demonstrably remedial situations.

Such modest predictions may be tentatively extrapolated from our narrative of what the Burger Court has done. On the other hand, from the individuating tendencies which we have attributed to the particular Justices no firm principled consensus as to equal protection is available, given the present membership of the Court. One expects movement, but knows not where, or why. A Burger Court watcher may seek reassurance in Heraclitus' notion that all is in flux.<sup>283</sup> But when the Court's formula of the day is left to the chance of who writes a particular opin-

277. 438 U.S. 265 (1978). See text accompanying notes 115-24 *supra*.

278. *DeRonde v. Regents of the Univ. of Cal.*, 28 Cal. 3d 875, 625 P.2d 220, 172 Cal. Rptr. 677 (1981).

279. *United Steelworkers v. Weber*, 443 U.S. 193, 209 (1979).

280. *Id.* at 208.

281. 427 U.S. 273 (1976).

282. See text accompanying notes 113-65 *supra*.

283. Recent extrajudicial contributions of Justices and former Justices offer minimal illumination as to criteria for the Court's constitutional decision-making. See Goldberg, *Reflections About the United States Supreme Court*, 5 NOVA L.J. 159 (1981) (discussing "myths about the Court"); Rehnquist, "All Discord, Harmony Not Understood," *The Performance of the Supreme Court of the United States*, 22 ARIZ. L. REV. 973 (1981) (defending dissents and concurrences as part of the

ion,<sup>284</sup> or it is so phrased as to invite erratic interpretation, the effect is unsettling on the lower courts, on practitioners advising clients, on teachers presenting "the law" to their students, and, above all, on persons and groups in the society whose rights are at stake.

This uncomfortable realization leaves us with Professor Tribe's rumination in face of the *Bakke* decision: better chaos and uncertainty that doesn't do too much harm than consistent and principled decision-making which reaches an undesirable result (leaving it to each reader to supply his or her definition of "undesirable").<sup>285</sup>

Does the constitutional process as it has developed give us any basis for expecting more principled certainty from the Court? This question cannot be answered without achieving a measure of agreement as to the nature of the constitutional process.

#### IV. THE NATURE OF THE CONSTITUTIONAL PROCESS

Sixty years ago Benjamin Cardozo, a state appellate judge, delivered a series of law school lectures and published them as a classic volume in judicial method—*The Nature of the Judicial Process*.<sup>286</sup> Much in that volume was prophetic, much is dated, but little is obsolete. In advance of most of his contemporaries, Cardozo spoke confidently of the judge as a "legislator."<sup>287</sup> He recognized that this role was occasional in an ordinary court, frequent for a constitutional judge.<sup>288</sup> But his illustrations of constitutional process were only occasional.<sup>289</sup> Later, Judge Cardozo became Justice Cardozo of the United States Supreme Court, but beyond his opinions he left no special treatment of the constitutional process. If he had, this treatment would likely be in need of

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"check and balance" of the federal judicial system, while conceding that "we may overdo dissent and separate concurrences," *id.* at 986).

284. Compare *Kirchberg v. Feenstra*, 101 S. Ct. 1195 (1981) with *Michael M. v. Superior Court*, 101 S. Ct. 1200 (1981) (two sex classification cases decided on March 23, 1981). In *Kirchberg* the Court in a 7-2 opinion written by Justice Marshall routinely applied the *Craig v. Boren* intermediate formula for gender classification. The plurality opinion written by Justice Rehnquist in *Michael M.* (joined by the Chief Justice and Justices Stewart and Powell) raises serious question as to the Court's continued commitment to the *Craig v. Boren* test. See 101 S. Ct. at 1207 n.10.

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

In a divided nation, the Court's task often becomes one of pragmatic statecraft. Given the absence of a more enlightened liberating consensus, it is perhaps best 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.

286. B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921) [hereinafter cited as CARDOZO].

287. *Id.* at 115.

288. *Id.* at 17, 71.

289. *Id.* at 17-18, 76-94.

drastic updating, so great have been the developments in the generations since he left the court.

What follows assumes that there is today an identifiable constitutional process. In many particulars it dates from the time of the Roosevelt Court.<sup>290</sup> In subsection A, I undertake a tentative description. In subsection B, I inquire whether the suggested analysis is predictive of how the Supreme Court is likely to decide some pressing current issues. In subsection C, I consider whether the analysis helps to understand what the Burger Court has done in some areas discussed earlier. Finally, in subsection D, I inquire whether the suggested process is normative<sup>291</sup>—that is, a basis for criticizing results reached by the Court.

A. *Constitutional Morality, a Description: Tensions, Leading Ideas, Factors of Constitutional Process*

There are provisions of the Constitution that are explicit,<sup>292</sup> or as to which case precedent is clear and acceptable.<sup>293</sup> With such specimens we are not here concerned. But, as Cardozo pointed out,<sup>294</sup> other constitutional language is vague and inconclusive, and for the content of constitutional law we rely almost completely upon the elaboration of the Supreme Court. Obvious examples are due process of law, commerce among the several states, and the clause which this volume has memorialized, equal protection of the laws. To say that the Supreme Court in elaborating these general clauses serves like a legislator is, to a certain extent, illuminating.<sup>295</sup> But we cannot rest with this insight. For the Supreme Court remains a judicial body, and it is fair to expect that all its work be done according to standards. What are the elements of constitutional process and policy—what we may fairly call constitu-

290. President Roosevelt's first appointment to the Court was Justice Black in 1937. By 1941 he had appointed seven of the nine sitting Justices, not including promotion of Justice Stone to Chief Justice. The Court consisted of a majority of Roosevelt appointees until the death of Justice Jackson in 1954, shortly after President Eisenhower appointed Chief Justice Warren.

291. The distinction between descriptive, predictive, and normative intended here is traditional. It is explained at text accompanying notes 509-23 *infra*.

292. *E.g.*, art. I, § 3: "The Senate of the United States shall be composed of two Senators from each State . . . and each Senator shall have one vote."

293. Although there is no express provision in the Constitution authorizing the Supreme Court to declare unconstitutional an act of Congress it deems in violation of the Constitution, such has been the accepted law since *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

294. *CARDOZO*, *supra* note 286, at 85-87.

295. Cardozo drew heavily on Holmes here, quoting a celebrated passage from Holmes, *The Path of the Law*, 10 HARV. L. REV. 466 (1897):

I think that the judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage. The duty is inevitable, and the result of the often proclaimed judicial aversion to deal with such considerations is simply to leave the very ground and foundation of judgments inarticulate, and often unconscious.

*Id.* at 467, quoted in *CARDOZO*, *supra* note 286, at 118-19.

tional morality<sup>296</sup>—that guide the Court to its elaborations of constitutional law? That is the immediate inquiry.

Constitutional process, in the sense of an accepted basis by which the Supreme Court arrives at its decisions in these open areas, goes beyond a judicial methodology. It includes an awareness of the major tensions<sup>297</sup> contained in the Constitution and an identification of its leading or fundamental ideas.<sup>298</sup> Constitutional process also embraces certain factors that the Court considers in dealing with the tensions and fundamental ideas presented by a specific case. I shall deal with the tensions, fundamental ideas, and factors integral to the constitutional process in that order.

### 1. *Tensions*

Tensions in the sense used here are conflicts between pairs of interests which a society legitimates without giving permanent predomi-

296. What really matters is this, that the judge is under a duty, within the limits of his power of innovation, to maintain a relation between law and morals, between the precepts of jurisprudence and those of reason and good conscience. . . . The constant insistence that morality and justice are not law, has tended to breed distrust and contempt of law as something to which morality and justice are not merely alien, but hostile.

CARDOZO, *supra* note 286, at 133-34. And, Cardozo adds: "[T]his power of interpretation must be lodged somewhere, and the custom of the constitution has lodged it in the judges. If they are to fulfill their function as judges, it could hardly be lodged elsewhere." *Id.* at 135-36.

I use the term "constitutional morality" in this paper in a special sense that borrows more from Hart and Sacks, *see* note 531 *infra*, and H.L.A. Hart, *see* note 523 *infra*, than from Cardozo or Fuller. What are the understandings upon which the American constitutional system is based, both structural and processwise? Once identified, I suggest, it is the essence of constitutional morality to follow them, and not to proceed ad hoc. I tentatively suggest that the basic ingredients include certain tensions built into the constitutional system, certain fundamental or leading ideas, and some factors of process.

Professor Fuller, smarting under the positivist separation of morality from law, was content to argue for a legal morality that was almost strictly procedural. *See* L. FULLER, *THE MORALITY OF LAW* (1964).

This limited comment in no way disparages the brilliant, but largely unsuccessful, efforts by Professor Fuller to counter the predominance of positivism and realism. *See* Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 349 (1978); Eisenberg, *Participation, Responsiveness and the Consultative Process: An Essay for Lon Fuller*, 92 HARV. L. REV. 410 (1978); Summers, *Professor Fuller's Jurisprudence and America's Dominant Philosophy of Law*, 92 HARV. L. REV. 433 (1978). The latter study sponsors the unhelpful redesignation of the American legal realists (with the addition of John Dewey) as "pragmatic instrumentalists," which the author then, perhaps correctly, proclaims as "America's dominant philosophy of law." He adds that "for most adherents of pragmatic instrumentalism, law serves simply as means to external goals. It thus consists essentially of instruments." *Id.* at 437. It is against such impoverishment that Ronald Dworkin has been struggling. *See* text accompanying note 535 *infra*.

297. Discussed in text accompanying notes 299-344 *infra*.

298. Discussed in text accompanying notes 345-555 *infra*. A caution as to my terminology is necessary. I use the terms fundamental ideas and leading ideas interchangeably. What I have in mind is discussed in the text accompanying notes 345-55 *infra*. At the outset I must make clear that I do not identify these terms with "fundamental rights" or "fundamental interests" as used by the Supreme Court in due process and equal protection contexts, *see* text accompanying notes 36-41 *supra*, although there will be of necessity some overlapping.

nance to one over the other. Constitutional tensions reflect tensions in the society itself. Every significant constitutional case implicates one or more of these pairs. To recognize the major tensions, the pairs of interests in conflict, in any constitutional case is only a first step. Beyond the tensions are the fundamental ideas that are at stake—perhaps also in conflict—in the particular case. These too must be identified before adjudicating the competing personal claims according to an accepted process of constitutional dispute resolution.<sup>299</sup>

Some tensions were deliberately enshrined in the Constitution at the outset; others developed later.<sup>300</sup> The tension of nation vs. states is at the core of the notion of federalism,<sup>301</sup> the most original contribution of the American Constitution to governmental theory. The tension of courts vs. legislature<sup>302</sup> (and for that matter legislature vs. executive, and courts vs. executive)<sup>303</sup> was also written into the original Constitution. The tension of national government vs. individual was sharpened by the adoption of the first ten amendments (the Bill of Rights) in 1791.<sup>304</sup> Individual tension with state governments became a major constitutional concern only with the adoption of the post-Civil War amendments (thirteenth, fourteenth, and fifteenth) in 1866-1870.<sup>305</sup> As

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299. A theory of constitutional tensions rejects as unacceptable the notion that constitutional judges are restricted to determining the meaning of constitutional provisions by the traditional judicial interpretative guides of text, context, and legislative history. Even in statutory interpretation, courts, on occasion, resort to ascertaining the "spirit" of a statute. See text accompanying note 481 *infra*.

300. The constitutional framers left many questions unresolved, some by choice, and some, perhaps, as a result of deliberate compromise. The same can be said of the Congress which adopted the Bill of Rights, the first ten amendments, in 1791 and the most significant subsequent amendment, the fourteenth, in 1868. Such tensions I refer to as "deliberate." See text accompanying notes 301-06 *infra*. Another set of tensions emerged as a result of developments in the society, and new awarenesses, subsequent to the adoption of the Constitution and these major amendments. These I refer to as "developmental" tensions. See text accompanying notes 307-12 *infra*.

301. The doctrine that the Constitution gives the federal government limited powers specified therein, but includes powers fairly implied from those expressly given, has been firm since *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). The significance of the tenth amendment as a reminder of the reserved powers of the states has been heightened by two decisions of the Burger Court, *Edelman v. Jordan*, 415 U.S. 651 (1974) and *National League of Cities v. Usery*, 426 U.S. 833 (1976).

302. The tension between courts and legislature is most obviously presented by the doctrine of judicial review. See note 293 *supra*. But it is also presented on the federal scene by the control given Congress over the jurisdiction of the federal courts. See text accompanying notes 431-43 *infra*.

303. These tensions deriving from the separation of powers doctrine have been examined by the Supreme Court in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (legislative vs. executive) and *United States v. Nixon*, 418 U.S. 683 (1974) (court vs. executive).

304. Significant, but limited, protection of the individual against federal government action (art. I, § 9), and against state government action (art. I, § 10) was afforded by the original Constitution.

305. In *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833), the Supreme Court had held that the first ten amendments did not apply to state action. In pre-Civil War days the Consti-

a result of these amendments, a tension which was always present in American society<sup>306</sup>—the tension of race, black vs. white—took on new constitutional significance.

In contemporary society the above tensions remain and new ones compete for constitutional recognition: individuals vs. private groups, arising chiefly in the labor<sup>307</sup> and free exercise of religion<sup>308</sup> fields; male vs. female,<sup>309</sup> majority vs. new identified racial minorities,<sup>310</sup> and, as yet dimly perceived, present generation vs. future generations,<sup>311</sup> accented in conservationist and environmental law,<sup>312</sup> but more generally relevant.

In a given case there may be something to be said for and against each of the competing interests in tension.<sup>313</sup> Clusters of similar results tilting to one of the interests in tension constitute a trend. A trend may overreach itself and be arrested, then a counter-trend may set in. This is the history of Congress' power under the commerce clause, involving the nation vs. state tension: broad national power under Chief Justice Marshall's Court,<sup>314</sup> then restricted national power from mid-19th century until 1937,<sup>315</sup> then broad national power in vogue to this day.<sup>316</sup>

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tution's chief protection to individuals against state governments was via the "obligation of contracts" clause of article I, § 10.

306. The original Constitution had express (art. I, § 2, cl. 3) and implicit (art. I, § 9, cl. 1) provisions affirming slavery. In the infamous *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), the Supreme Court actually declared unconstitutional an act of Congress banning slavery in the territories.

307. *E.g.* *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979); *International Bhd. of Boilermakers v. Hardeman*, 401 U.S. 233 (1971).

308. *E.g.* *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979); *Runyon v. McCrary*, 427 U.S. 160 (1976).

309. Recall that until the enactment of the nineteenth amendment in 1920, women were not even secured the right to vote, and that until *Taylor v. Louisiana*, 419 U.S. 422 (1975), women could be constitutionally excluded from service on juries.

310. See note 68 *supra*; notes 340 & 449 *infra*.

311. Because discussion of this tension in constitutional matters has been almost non-existent to date, I do not stress it in this study as much as I would like to. For a discussion of "how far the present generation is bound [in justice, not law] to respect the claims of its successors," see J. RAWLS, *A THEORY OF JUSTICE* 284-93 (1971).

312. The conservationist idea, whose strength dates from the early part of this century, and the environmental idea, which first drew significant governmental recognition in the 1960's and 1970's, are both rooted, in large part, in a concern for future generations as well as the present generation.

313. Hence, the lively discussion and strongly held positions in majority and minority opinions of the Court where such tensions are the focal point of decision. Compare *Maryland v. Wirtz*, 392 U.S. 183 (1968) with *National League of Cities v. Usery*, 426 U.S. 833 (1976), the case which overruled it only eight years later.

314. In *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824) Chief Justice Marshall's opinion for the Court left open the possibility that Congress' power over interstate commerce was exclusive. The Court never accepted this view.

315. A more narrow view of national power, *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) and *Hammer v. Dagenhart*, 247 U.S. 251 (1918), ended with *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), *United States v. Darby*, 312 U.S. 100 (1941) and *Wickard v. Filburn*, 317 U.S. 111 (1942).

In many respects constitutional law as we know it, and some of the major tensions present today, began with the enactment of the thirteenth, fourteenth, and fifteenth amendments in 1866-1870, after the Civil War. Slavery was abolished,<sup>317</sup> citizenship was conferred on all persons born in the United States, and all persons were guaranteed against state action due process of law and the equal protection of the laws.<sup>318</sup> Although the vote was guaranteed to none, the vote could not be denied on the basis of race.<sup>319</sup> The fourteenth amendment heightened the constitutional tensions between federal courts and the states<sup>320</sup> and between the states and individuals.<sup>321</sup> The Court purported to vindicate individual rights against state<sup>322</sup> and national<sup>323</sup> social legislation, generally through the due process clauses.<sup>324</sup> Perversely however, almost till Warren days the Supreme Court responded laggardly to continuing state discrimination against the new black citizens.<sup>325</sup> The first truly liberating thrust of the Civil War Amendments came not in the race area, for which they were chiefly designed, but by enforcement of the first amendment against the states through the due process clause of the fourteenth amendment.<sup>326</sup> Major parts of this development were in place by the advent of the Roosevelt Court in 1940.<sup>327</sup>

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316. The broad nationalizing trend was interrupted, if not arrested, by the Burger Court decision in *National League of Cities v. Usery*, 426 U.S. 833 (1976), which for the first time in 40 years found in the tenth amendment limitations on Congress' power over commerce.

317. See note 61 *supra*.

318. See note 54 *supra*.

319. 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."

320. The Court's early wariness was reflected in *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873). See also Corwin, *The Supreme Court and the Fourteenth Amendment*, 7 MICH. L. REV. 643 (1909).

321. Prior to the fourteenth amendment an individual's challenge to state legislation was largely limited to reliance on the state constitution. See note 304 *supra*. As the Court shed its early wariness, commencing about 1890, see *Chicago M. & St. P. Ry. v. Minnesota*, 134 U.S. 418 (1890), individuals could effectively challenge state legislation by way of the fourteenth amendment due process clause. The Court's new receptivity to a substantive due process challenge peaked in *Lochner v. New York*, 198 U.S. 45 (1905).

322. *E.g.*, *Lochner v. New York*, 198 U.S. 45 (1905).

323. *E.g.*, *Adair v. United States*, 208 U.S. 161 (1908) (the Supreme Court extending its new activism to the fifth amendment's due process component).

324. The same effect was often achieved by the Court's restrictive interpretation of the commerce clause. See text accompanying note 315 *supra*.

325. *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Civil Rights Cases*, 109 U.S. 3 (1883).

326. See *Gitlow v. New York*, 268 U.S. 652 (1925).

327. By 1937 the Court had decided cases involving speech, press, and assembly: *Herndon v. Lowry*, 301 U.S. 242 (1937), *Whitney v. California*, 274 U.S. 357 (1927) (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). The religion cases would follow in 1946, *Everson v. Board of Educ.*, 330 U.S. 1 (1947) (foreshadowed by *Cantwell v. Connecticut*, 310 U.S. 296 (1940)).



The New Deal Court's<sup>328</sup> chief concerns were with the nation vs. state tension (withdrawing judicial objections to congressional legislation),<sup>329</sup> and with the courts vs. legislature tension (lightening the grip of judicial review).<sup>330</sup> But it also gave the first effective judicial relief since Civil War days to victims of the black vs. white tension (largely confined to countering racial discrimination in voting).<sup>331</sup> It remained to the Warren Court, as we have seen, to give to black citizens the first credible implementation of the equal protection promised by the fourteenth amendment in 1868.<sup>332</sup> At the same time the Warren Court dealt with another tension, enforcing against the states on behalf of individuals constitutional guarantees of particular provisions of the first eight amendments.<sup>333</sup> The Warren Court not only brushed with the nation vs. state, and court vs. legislature tensions, but it sided with individuals against their legislatures by interpreting equal protection to democratize the state election process in its "one-person-one-vote" reapportionment decisions. The Constitution did not guarantee a right to vote. But it could, and did, require that a legislature assure that one person's vote should be weighted equally with another's.<sup>334</sup>

The Burger Court has confronted each of these traditional tensions. Nation vs. state—here it has somewhat cut back from the nationalizing response of the Warren Court.<sup>335</sup> Court vs. legislature—here it has generally held to the Warren Court's reluctance to intervene in social and economic matters,<sup>336</sup> while showing greater hesitation than its

328. Immediately following the overwhelming popular endorsement in the 1936 election, President Roosevelt sought to insure favorable Supreme Court rulings on the constitutionality of his New Deal legislation by proposing legislation that would permit him to appoint additional Justices to the Supreme Court. See R. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* 187-91 (1941). After Congress rejected the "court packing plan," the Court showed a more hospitable attitude to the New Deal legislation. See, e.g., *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937). Immediately thereafter, Roosevelt had his first appointment to the Court, and other vacancies soon developed. See note 290 *supra*.

329. For example, *United States v. Darby*, 312 U.S. 100 (1941) and *Wickard v. Filburn*, 317 U.S. 111 (1942), involved a withdrawal by the Court from its previous position of expansive state power under the Constitution by virtue of the tenth amendment. See note 301 *supra*.

330. E.g., 312 U.S. 100 (1941); 317 U.S. 111 (1942). In these commerce clause cases the Court shifted from its previous posture of substituting judicial for congressional judgment to a deferential review.

331. See *Smith v. Allright*, 311 U.S. 649 (1944). *Terry v. Adams*, 345 U.S. 461 (1953) effectively eliminated the so-called "white primary."

332. See text accompanying notes 5-9 & 35 *supra*.

333. The development of what has been called procedural due process involved the Court's expansion of the technique it had already employed with respect to the first amendment. See text accompanying notes 326-27 *supra*.

334. *Reynolds v. Sims*, 377 U.S. 533 (1964); *Baker v. Carr*, 369 U.S. 186 (1962).

335. See cases cited in notes 301 & 316 *supra*. Also relevant here is a line of cases commencing with *Younger v. Harris*, 401 U.S. 37 (1971) limiting federal judicial intervention in state court proceedings.

336. The pivotal case is *Dandridge v. Williams*, 397 U.S. 471 (1970). See text accompanying note 32 *supra*.

predecessor at intervening in voting matters.<sup>337</sup> Individual vs. government—the new individual rights identified by the Warren Court have, in general, been retained but not extended,<sup>338</sup> with the obvious exception of the abortion case.<sup>339</sup> Black vs. white—here the Burger Court has faced its most severe challenge. The problem of racial discrimination is no longer the simple black vs. white of earlier days, but affects other identifiable minorities who are subjected to comparable discrimination.<sup>340</sup> And two new major tensions have presented themselves: male vs. female and present vs. future generations. The Warren Court, like its predecessors,<sup>341</sup> had been content with a most deferential review of alleged discrimination against women.<sup>342</sup> The Burger Court has faced an onslaught of cases seeking constitutional bars to gender stereotypes of the past, with remedial compensation.<sup>343</sup> Barely perceived as yet is this second new tension in the area of constitutional policy: the claim for consideration of the effect of a particular constitutional decision (or trend) on future generations, on the nation of the future as well as on the nation of the present.<sup>344</sup>

## 2. *Fundamental Ideas*

Constitutional morality<sup>345</sup> is deeply concerned with certain leading

337. Even Justice Harlan, who had opposed the equal protection vote decisions, *see* cases cited in note 247 *supra*, thought it odd that the Court declined to extend these cases to disallow multi-member districts. *Whitcomb v. Chavis*, 403 U.S. 124, 165, 167 (1971). And the Burger Court early showed greater tolerance of deviation from one-person-one-vote standard of equality. *Mahan v. Howell*, 410 U.S. 315 (1973); *Abate v. Mundt*, 403 U.S. 182 (1971).

338. The Burger Court made a sharp turn in the first amendment obscenity cases in *Miller v. California*, 413 U.S. 15 (1973). But even Justice Brennan, a dominant figure in the Warren Court approach that *Miller* rejected, conceded that some change was in order. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 73-74 (1973) (Brennan, J., dissenting).

Reports of the impending death of two prominent Warren Court decisions—the exclusionary rule of *Mapp v. Ohio*, 367 U.S. 643 (1961) and the custody warnings of *Miranda v. Arizona*, 384 U.S. 436 (1966)—proved exaggerated. Each was curtailed, but neither overruled. And in a surprising 1981 decision, *Edwards v. Arizona*, 101 S. Ct. 188 (1981), the scope of *Miranda* was even slightly extended.

339. *Roe v. Wade*, 410 U.S. 113 (1973). The case may prove to be the Achilles heel of the Burger Court. *See* text accompanying notes 410-30 *infra*.

Another exception is with respect to habeas corpus, where *Wainwright v. Sykes*, 433 U.S. 72 (1977) cut severely into *Fay v. Noia*, 372 U.S. 391 (1963).

340. *See* text accompanying notes 68 & 310 *supra*.

341. A highly deferential gender case of the Roosevelt Court, *Goesaert v. Cleary*, 335 U.S. 464 (1948), was finally given a decent burial in *Craig v. Boren*, 429 U.S. 190, 210 n.23 (1976).

342. *See* text accompanying note 74 *supra*.

343. *See* text accompanying notes 75-77 *supra*.

344. Although the seed was present in Chief Justice Marshall's "constitution intended to endure for ages to come," *see* text accompanying notes 360-62 *infra*, the Court has yet to give explicit attention to this tension. Professor John Rawls defines this as the question of "how far the present generation is bound to respect the claims of its successors." J. RAWLS, *A THEORY OF JUSTICE* 284 (1971).

345. I am using the term "constitutional morality" to include the major tensions (discussed at pp. 355-60 *supra*), the leading, or fundamental, ideas (developed here), and the factors of an ac-

ideas which have been identified as fundamental to the constitutional society.<sup>346</sup> In the United States of 1981 these certainly include: equality of opportunity rooted in "equal protection of the laws" of the fourteenth amendment and the "pursuit of happiness" of the Declaration of Independence;<sup>347</sup> personal liberty qualified by the requirements of public order;<sup>348</sup> procedural justice, particularly in matters where governmental power faces the individual;<sup>349</sup> free expression and association;<sup>350</sup> separation of organized religion from government;<sup>351</sup> and the right of persons to participate equally and fairly as voters and as candidates for public elective office.<sup>352</sup> Other leading ideas may fairly be suggested,<sup>353</sup> but these will do for now. The specifics of these fundamental ideas have been gradually spelled out in particular judicial decisions, some of which found leading ideas in conflict with each other.<sup>354</sup> These fundamental ideas represent the foundation of justice in American constitutional society.<sup>355</sup>

### 3. *Factors of Constitutional Process*

Since constitutional adjudication is by its nature judicial, it is of the

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cepted process (discussed at pp. 361-69 *infra*), all of which give guidance to constitutional decisionmaking.

346. The Court has had difficulty in agreeing as to the grounds upon which it identifies a right as "fundamental." As to due process, see *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) (whether the right is "fundamental to the American scheme of justice"). As to equal protection, see *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 33-34 (1973) (whether a right is "explicitly or implicitly guaranteed by the Constitution").

347. While the Declaration of Independence is obviously not a part of the Constitution, the suggestion here is that it is legitimate to consider it in searching for the "leading ideas" of American society, particularly where a provision is reinforced by constitutional experience.

348. Justice Cardozo, in a phrase long used as a standard by the Supreme Court, referred to the constitutional system as a "scheme of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

349. See text accompanying note 337 *supra*.

350. See text accompanying note 327 *supra*.

351. *Id.*

352. See text accompanying notes 55-57 & 334 *supra*.

353. Examples are: the idea of universal popular suffrage of national representatives (seventeenth amendment concerning senators), nineteenth amendment, extending suffrage to women; the anti-vote dilution cases commencing with *Baker v. Carr*, 369 U.S. 186 (1962); the idea of full employment; the idea of collective bargaining; and the idea of economic security for senior citizens. In this analysis an idea does not become a "leading" or "fundamental" idea of the society simply by the enactment of particular legislation, but by the continuing acceptance of the idea by a succession of generations. Nor is it required that the idea be the result of a constitutional initiative. Where it results from statute it may be repealed; where it results from court decision it may be overruled by subsequent decision or by amendment. But until then it is relevant to constitutional decisionmaking.

354. *E.g.*, *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976) (freedom of the press vs. right to a fair trial). See text accompanying note 544 *infra*.

355. The notion of leading or fundamental ideas is further developed at text accompanying notes 419, 439, & 565-76 *infra*.

essence of constitutional morality<sup>356</sup> that the Court consider the tensions and the fundamental ideas in light of an accepted constitutional judicial process. Ten factors have special relevance here.

### (1) *Remedy*

American constitutional law early underscored one of the basic common law canons of adjudication—that a judicial remedy be afforded once a right has been established, *ubi jus, ibi remedium*, whether the right be to a benefit or to compensation for an injury.<sup>357</sup> An impressive array of decisions by the Burger Court has given renewed meaning to this traditional judicial concern, in a constitutional context.<sup>358</sup>

A question of acute present concern is the constitutional viability of a legislative, executive, or administrative remedy given to one person or group which impinges on the asserted right of another person or group. In a sense it is the classic problem of equal protection highlighted by the current thrusts for affirmative action.

### (2) *Coherent Articulation*

Like all judicial determinations in the common law tradition, constitutional opinions are expected to be reasoned justifications leading to the conclusion reached in a particular case. Like common law judges, constitutional jurists in the course of deciding a case often elaborate and extend or confine the law itself. What is special about constitutional decision-making is that the text which they elaborate is often so spare—"commerce among the several states," "due process," "equal protection of the laws," "case . . . or controversy"—that the overwhelming proportion of constitutional law is made up of the content of the judicial opinions. One other factor marks constitutional opinions from run-of-the-mill judicial handiwork—they must have not only the internal coherence of a judicial opinion, but also be coherent with the Court's elaboration of other parts of the Constitution.<sup>359</sup> In all this,

356. See note 345 *supra*.

357. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." *Id.* at 163. Then, citing 3 W. BLACKSTONE, COMMENTARIES, Chief Justice Marshall continued: "where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is evaded." 5 U.S. (1 Cranch) at 163.

358. A judicial remedy was supplied for violation of a constitutional right in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) (fourth amendment), *Davis v. Passman*, 442 U.S. 228 (1979) (fifth amendment), and *Carlson v. Green*, 446 U.S. 14 (1980) (eighth amendment).

359. For example, consider the disagreement within the Warren Court concerning different standards for due process when applied to the states under the fourteenth amendment and when applied to the federal government under the fifth amendment. The view ultimately prevailed that it was incoherent to have two distinct standards for due process. *Malloy v. Hogan*, 378 U.S. 1 (1964). But Justice Harlan, and those agreeing with him, did not consider a two-standard due

constitutional decision-making is distinct from piecemeal, unreasoned legislative enactment.

### (3) *Constitutional Development*

In *McCulloch v. Maryland*<sup>360</sup> in 1819 Chief Justice Marshall, in his most quoted phrase, said, "[W]e must never forget that it is a *constitution* we are expounding."<sup>361</sup> He noted that it was "a constitution intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs."<sup>362</sup> Add to these insights his earlier postulate in *Marbury v. Madison*: "It is emphatically the province and duty of the judicial department to say what the law is" and, when appropriate, to declare "that a law repugnant to the constitution is void. . . ."<sup>363</sup> Ever since these landmark utterances the Supreme Court has presided, sometimes wisely and sometimes not, over the development of the Constitution.<sup>364</sup>

### (4) *Stare Decisis*

The doctrine of adherence to precedent has been a general rule of

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process an example of incoherence. Rather, they felt, it was coherent with the basic constitutional notion of federalism. See *Roth v. United States*, 354 U.S. 476, 496, 503 (1957) (Harlan, J., dissenting in *Roth*, concurring in *Alberts*). In one limited area, through Justice Powell, the Harlan view (previously sponsored by Justices Cardozo and Frankfurter) has had a mini-revival. See *Apodaca v. Oregon*, 406 U.S. 404, 414 (1972) (Powell, J., concurring) (non-unanimous jury verdicts permitted in state trials, but rejected in dictum as to federal trials).

360. 17 U.S. (4 Wheat.) 316 (1819).

361. *Id.* at 407.

362. *Id.* at 415.

363. 5 U.S. (1 Cranch) 137, 177, 180 (1803).

364. In the 162 years since *McCulloch v. Maryland* there have been only fourteen infusions by constitutional amendment (and two of these cancelled each other out—the eighteenth and twenty first amendments). From 1791, when the first ten amendments were adopted, to the present day only one truly significant set of amendments can be identified—the thirteenth, fourteenth, and fifteenth amendments adopted in 1865-1870. See notes 317-19 *supra*.

Recall two classic reaffirmations of the notion of constitutional development. Speaking in reference to the treaty-making power in *Missouri v. Holland*, 252 U.S. 416, 433 (1920), Justice Holmes said:

[W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.

This was echoed by Chief Justice Hughes in *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 442-43 (1934):

It is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time. If by the statement that what the Constitution meant at the time of its adoption it means today, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation.

judicial decision-making in the common law system. Both from the standpoint of judicial economy (to avoid repeated reconsiderations of the same point) and from the standpoint of public reliance on what the law is, the courts early proclaimed themselves subject to *stare decisis* (to adhere to matters decided). *Stare decisis* has been a part of the constitutional decision-making process although not as rigidly adhered to there as in ordinary litigation.<sup>365</sup> As Justice Stevens has recently noted, *stare decisis* is more at home in constitutional law with respect to past decisions that were arguably correct when made, and remain arguably so, than with decisions that are overshadowed by subsequent developments that justify a change in the constitutional policy that underlies them.<sup>366</sup>

### (5) *Quasi-Legislative Effect*

Common law judicial decisions often have the effect of stating or elaborating rules of law. When a common law decision pronounces a new legal rule, that new rule has traditionally been applied to that case.<sup>367</sup> Sometimes this was explained in metaphysical terms—that the common law has an independent, almost eternal, existence, and that a judge announcing a “new” rule was simply “finding” the common law that was there all the time. Hence, the explanation went, it was not unfair to hold the losing party to the rule’s liabilities in the case first announcing the new rule. Practically speaking, then, the new common law rule had a retroactive effect.<sup>368</sup> Under the traditional view that a judicial decision merely declared, or found, the law, and did not make it, problems arose in constitutional law when prior decisions were overruled. The claim could be made that the new (overruling) constitutional rule had always been the “law,” and that those convicted without its benefit must be given a new trial. The specter of emptying the prisons was cited to restrain overruling of past constitutional decisions. The effect was to inhibit constitutional development and correction of error.

In *Linkletter v. Walker*<sup>369</sup> the Court stated that under specified conditions the Court, in announcing a new constitutional rule, could give

365. See CARDOZO, *supra* note 286, at 17 & 71.

366. See text accompanying note 173 *supra*. Justice Powell has noted the interplay of *stare decisis* and the minimum coherence requirement of a single majority opinion. See note 166 *supra*.

367. Cardozo used for his example the classic negligence case of *MacPherson v. Buick Co.*, 217 N.Y. 382 (1916). CARDOZO, *supra* note 286, at 146.

368. “[I]n the vast majority of cases the retrospective effect of judge-made law is felt either to involve no hardship or only such hardship as is inevitable where no rule has been declared.” CARDOZO, *supra* note 286, at 146. Such justification, however, would not satisfy the situation in which an earlier rule was overruled in the subsequent case. In that event Cardozo recommends merely prospective overruling and cites some courts which have taken this course. *Id.* at 147.

369. 381 U.S. 618, 629 (1965).

it, like legislation, merely prospective effect. The *Linkletter* development thus made explicit that constitutional rules could have a peculiarly quasi-legislative effect. The new doctrine, while sharply criticized,<sup>370</sup> has become firm<sup>371</sup> and has given the Court greater flexibility in departing from its precedents.<sup>372</sup>

### (6) *Judicial Oversight*

There are two aspects to judicial oversight by the Supreme Court. First, apart from its constitutional concerns, the Supreme Court functions as the highest court of the federal system, much as the highest court of a state presides over a state legal system.<sup>373</sup> For example, in matters of taxation and labor relations the Supreme Court, like a highest state court, gives the final interpretation to federal statutes which govern these areas. Second, the Supreme Court's oversight in constitutional law, which concerns us here, is carried out by formulation of constitutional rules or standards.<sup>374</sup> The lower federal and state<sup>375</sup> courts then apply these rules or standards to new cases, and the Court oversees this application through its selection of cases for its review.<sup>376</sup> Because of the limited exercise of Supreme Court review, these lower court determinations are usually conclusive for litigants. In areas of emerging law the Court is more likely to bring up cases for its full consideration. But even here it often bides its time for exercising corrective oversight.<sup>377</sup>

370. *Jenkins v. Delaware*, 395 U.S. 213, 224 (1969) (Harlan, J., dissenting); *Desist v. United States*, 394 U.S. 244, 258 (1969) (Harlan, J., dissenting).

371. The current formulation of the *Linkletter* doctrine is contained in *Stovall v. Denno*, 388 U.S. 293 (1967), which specifies the criteria used to determine whether a new constitutional rule should be retroactive or merely prospective in effect: "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." *Id.* at 297.

372. The factors outlined in *Stovall* suggest that overruling unsatisfactory constitutional precedent creates difficulties. These may be satisfied by opting for a merely prospective overruling.

373. Federal cases ordinarily reach the Supreme Court by direct review of the courts of appeal, under appellate jurisdiction statute, 28 U.S.C. § 1254 (1976). There is only limited scope to direct review from three-judge district courts under 28 U.S.C. § 2284 since its amendment in 1976.

374. The special problem of standards is dealt with under the next heading.

375. The Supreme Court may review decisions of the highest applicable state court, as to controlling federal questions, pursuant to 28 U.S.C. § 1257 (1976). Like review from the federal courts, this state jurisdictional statute provides both for obligatory review by appeal and for discretionary review by certiorari.

376. With respect to review by certiorari the Supreme Court has total discretion. As to the obligatory appeals the Court has established doctrines by which it dismisses appeals for "want of a substantial federal question," and decides other appeals summarily without briefs or oral argument. See notes 387-88 *infra*.

377. See discussion of *Minnick v. California Dep't of Correction*, 101 S. Ct. 2211 (1981) at text accompanying notes 501-05 *infra*.

(7) *Constitutional Standards*

A familiar (almost necessary) tool of the Supreme Court in applying such indefinite clauses of the Constitution as "due process" and "equal protection" has been to develop certain constitutional standards, or tests, or formulas for dealing with constitutional cases. The Supreme Court leaves to the lower courts the task of applying the formulas to the facts of specific cases, and then selectively reviews occasional lower court cases which seem to violate its standard or to call for a new refinement. There is need to formulate standards that may be readily, intelligibly, and consistently applied by lower courts.<sup>378</sup> There is also need to avoid standards that are subject to possible misuse that would invidiously impinge upon protected constitutional interests.

(8) *Constitutional Realism*

Two different varieties of constitutional realism have characterized constitutional interpretation by the Supreme Court. First is a disinclination to assume as the basis for decision an ideal that perhaps ultimately should be achieved, or accepted, but is not ripe as yet for the society of today. In the first death penalty case, *Furman v. Georgia*,<sup>379</sup> several Justices were persuaded that "evolving standards of decency" in the society had reached the stage where the death penalty should be considered in violation of due process as a "cruel and unusual punishment."<sup>380</sup> A majority of the Court reversed the convictions in *Furman* and its companion cases, but on much more modest grounds.<sup>381</sup> Subsequent events—reinstitution of the death penalty in states which had lately abolished it, and a reswing towards the death penalty in public opinion polls—verified the Court's hunch that, however edifying, constitutional abolition was not in the cards for now.

The second aspect of constitutional realism is the Court's concern that the gap between its decisions and their public acceptability not be so great as to seriously impede their enforcement or to impair public respect for the Court as an institution.<sup>382</sup> Its occasional excessive concern with this gap has been immortalized by Mr. Dooley's quip: "The Supreme Court follows the election returns."<sup>383</sup>

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378. See note 259 *supra*.

379. 408 U.S. 238 (1972).

380. *Id.* at 241-375.

381. *Id.* at 240.

382. See C. HUGHES, THE SUPREME COURT OF THE UNITED STATES 50-54 (1928). Hughes referred to three cases as the Court's "self-inflicted wounds": *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857); *Hepburn v. Griswold*, 76 U.S. (8 Wall.) 603 (1870); and the *Income Tax Cases*, *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 158 U.S. 601 (1895).

383. "[T]here's wan thing I'm sure about . . . That is, . . . th' supreme court follows th' election returns." F. DUNNE, MR. DOOLEY ON THE CHOICE OF LAW 52 (E. Bander, ed. 1963).



(9) *Constitutional Responsibility*

A counterpoise to that aspect of realism that cautions the Court against prematurely embracing ideal aspirations is the Court's responsibility to advance rather than obstruct the contemporary society in its more noble aspirations to constitutional justice.

The second aspect of constitutional realism is tempered by the Court's awareness of its responsibility as the developing and enforcing organ of the Constitution, especially of provisions that safeguard individual rights and interests against majority rule, even when the majority speaks by legislation. Perhaps Mr. Dooley would have been shaken or stirred by the constitutional decisions of the Warren Court in racial and criminal justice matters, far in advance of, if not directly counter to, majority public opinion.<sup>384</sup> The *Brown* era decisions certainly helped mold public opinion, rather than meekly following it.<sup>385</sup>

(10) *Fencing Out*

A much disputed, but commonplace factor of constitutional process is the array of techniques available to the Court to avoid, or to postpone, decisions on constitutional questions. The most obvious one derives from the Court's almost total control over its own docket. The Court has discretion to grant or to refuse a writ of certiorari to review state or lower federal courts.<sup>386</sup> Even where, by statute, appeal is of right, the Court has formulated discretionary doctrines to dispose of an appeal summarily, or to set it down for full consideration and written decision after briefs and oral argument.<sup>387</sup> And after certiorari has been granted, and after an appeal has been briefed and argued, the Court retains authority to dismiss the writ as improvidently granted or dismiss or affirm an appeal without opinion.<sup>388</sup>

The mootness and standing doctrines are also used to fence out con-

384. The unpopularity of *Brown v. Board of Educ.*, 347 U.S. 483 (1954) is recalled by Justice Douglas in his autobiography, *THE COURT YEARS* at 113, 219-30, & 137 (1980).

385. See Broderick, *Preferential Admissions and the Brown Heritage*, 8 N.C. CENT. L.J. 123, 136-44, 152-56 (1977).

386. "[A]ll that a denial of a petition for a writ of certiorari means is that fewer than four members of the Court thought it should be granted. . . . [S]uch a denial carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review." *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 919 (1950) (Frankfurter, J., opinion respecting denial of petition for writ of certiorari).

387. *Rescue Army v. Municipal Court*, 331 U.S. 549 (1947) (dismissal for want of a properly presented federal question); *Zucht v. King*, 260 U.S. 174 (1922) (dismissal for want of a "substantial" federal question). Both types of dismissal constitute a determination of want of appellate jurisdiction.

388. *E.g.*, *Miller v. California*, 418 U.S. 915 (1974) (*Miller II*). Such a dismissal constitutes a decision by the Supreme Court on the merits, and as such is binding upon lower courts. *Hicks v. Miranda*, 422 U.S. 332 (1975).

stitutional questions the Court prefers not to decide at the time presented.

The current formulation, and erratic enforcement, of the doctrine of mootness especially lends itself to fencing out.<sup>389</sup> The basic theory of mootness is sound—not to decide cases that have, in effect, been resolved by the time they reach the Court. But exceptions have been formulated so loosely as to give broad discretion to the Court to fence out constitutional decision.<sup>390</sup>

Standing rests upon the notion that a party should have sufficient “personal stake” in the outcome of a litigated matter to insure full, and not indifferent or feigned, presentation of the issues.<sup>391</sup> The Burger Court has attempted to add to standing an additional requirement that implicates the prudential judgment of the Court.<sup>392</sup> The Court has lately backed off “prudential” standing,<sup>393</sup> but “personal stake,” as defined by the decisions, leaves ample room for fencing out many constitutional cases.<sup>394</sup>

So much for fencing out entire cases. What of fencing out constitutional issues in cases that the Court is prepared to decide? It is a traditional doctrine of constitutional law that the Supreme Court (or any federal court) should not reach a constitutional issue if the case can be fairly decided on nonconstitutional grounds.<sup>395</sup> Occasionally, the reach of the Court for a statutory basis for decision leaves the distinct impression that this doctrine has been used for purposes of fencing out constitutional issues. A recent example is the opinion of the Stevens Four in *Bakke*<sup>396</sup> on the basis of Title VI, when a majority of the Court (and almost all the litigants on each side) thought an equal protection pronouncement necessary to decide the case.

The Supreme Court is thus amply endowed with techniques to decide when a constitutional decision should and should not be made.

389. See *United States Parole Comm'n v. Geraghty*, 445 U.S. 388 (1980).

390. Note particularly the Court's exception to mootness in cases where the claim on the merits is “capable of repetition, yet evading review.” *Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975); *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 514-15 (1911). Compare *DeFunis v. Odegaard*, 416 U.S. 312 (1974) with *Roe v. Wade*, 410 U.S. 113 (1973).

391. “Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions? This is the gist of the question of standing.” *Baker v. Carr*, 369 U.S. 186, 204 (1962).

392. *Warth v. Seldin*, 422 U.S. 490 (1975).

393. *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59 (1978).

394. See *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976); *O'Shea v. Littleton*, 414 U.S. 488 (1974); *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973).

395. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977) is a recent reminder of this well-settled point.

396. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 408 (1978). See text accompanying note 116 *supra*.

The Court often deals with the conflicting pressures of constitutional realism and constitutional responsibility by fencing out the issue entirely for a time. There is respectable opinion for the view that in fencing out the Court is performing its function dextrously, rather than evading responsibility.<sup>397</sup> But others disagree.<sup>398</sup>

### B. *Predictiveness of Constitutionality I: Two Current Proposals*

The preceding analysis of tensions, leading ideas, and constitutional process factors was offered as a description of the way the constitutional process actually functions. One may find the description accurate without being convinced that the analysis is predictive of how the Supreme Court will decide concrete cases. Its predictive utility will be assessed in this and the following subsection.<sup>399</sup>

Here I shall consider two controversial pieces of proposed congressional legislation which, if passed, will certainly be measured for constitutionality by the Supreme Court: the Human Life bill,<sup>400</sup> in which Congress defines when life begins, and the bill withdrawing from the Supreme Court, and other federal courts, jurisdiction to pass on the constitutionality of voluntary prayers in public schools.<sup>401</sup> In different ways these bills draw into question which governmental body has the final word as to constitutionality in the American constitutional system.<sup>402</sup>

Since *Marbury v. Madison* in 1803 the consistent position of the Supreme Court has been that it is the body designated by the Constitution to give the ultimate pronouncement as to the meaning of that doc-

397. The late Professor Alexander Bickel refers to this progression of devices for withholding the ultimate constitutional judgment of the Supreme Court as "passive virtues." A. BICKEL, *THE LEAST DANGEROUS BRANCH* 183 (1962).

398. See P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 240-41, 661-62, 1629 (2d ed. 1973) [hereinafter cited as *HART & WECHSLER*]; Gunther, *The Subtle Vices of the "Passive Virtues"—a Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 18 (1964).

399. Not until I shall inquire whether the analysis has "normative" value (i.e., represents an "ought" that pushes towards how cases "should" be decided) do I confront the judicial positivists. Even positivists find acceptable, even useful, an accurate description of the de facto functioning of a legal system. Professor H.L.A. Hart, the most celebrated contemporary positivist, see note 523 *infra*, goes so far as to make a "rule of recognition specifying the ultimate criteria used in the identification of the law an essential part of a legal system." H.L.A. HART, *THE CONCEPT OF LAW* 113, 120 (1962). He insists that "this rule of recognition, in terms of which [one] assesses the validity of a particular statute, is not only accepted by him but is the rule of recognition actually accepted and employed in the general operation of the system." *Id.* at 105. See note 523 *infra*.

400. S. 158 97th Cong., 1st Sess., 127 CONG. REC. (S. 287, Jan. 19, 1981).

401. S. 438, 96th Cong., 1st Sess., 125 CONG. REC. (S. 1583, Feb. 21, 1979).

402. Justice Rehnquist's opinion for the Court in *Rostker v. Goldberg*, 101 S. Ct. 2646 (1981) implies that the Court will give unusual deference to congressional decisions concerning national defense—the raising of armies—even in the face of due process or equal protection claims. But the Court stops short of withdrawing from any judicial review in these matters.

ument.<sup>403</sup> There are arguably three instances in which the Court, in interpreting the Constitution, has conceded a certain priority to Congress. The first covers those rare circumstances in which the Court has determined a case to be beyond its constitutional jurisdiction under article III on the ground that it raises a "political question" and not a "judicial one."<sup>404</sup> The second is the series of cases following *Katzenbach v. Morgan*<sup>405</sup> in which the Court has recognized a certain primacy in Congress under the enforcement clause of the fourteenth amendment. The last derives from the Court's recognition of the constitutional power of Congress to define the subject matter jurisdiction of the federal courts.<sup>406</sup> In other situations,<sup>407</sup> the finality of the Supreme Court's word as to constitutionality has left those dissatisfied with its decisions to the ultimate relief of constitutional amendment, a remedy that has been successfully availed of only four times.<sup>408</sup>

Of the two current congressional efforts to circumvent constitutional decision, one employs the enforcement clause technique and the other the device of withdrawing specific subject matter from the jurisdiction of the federal courts. Testimony has been given, pro and con, as to the constitutionality of each.<sup>409</sup> Obviously, considerations of constitutional policy will be crucial should the legislation be enacted and tested in the Supreme Court. In light of the Tensions/Fundamental Ideas/

403. "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). "So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case . . . the court must determine which of these conflicting rules governs the case." *Id.* at 178.

404. In *Baker v. Carr*, 369 U.S. 186 (1962) and *Powell v. McCormack*, 395 U.S. 486 (1969) the Court established narrow ground rules for "political questions," identifying that doctrine as limited to separation of powers questions among the branches of the national government, with a heavy emphasis upon the Court's finding "a textually demonstrable constitutional commitment of the issue to a coordinate political department." 369 U.S. at 217.

405. 384 U.S. 641 (1966). See text accompanying notes 79-102 *supra*.

406. U.S. CONST. art. III, § 1: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." See *Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850). As to the appellate power of the Supreme Court see *Ex Parte McCordle*, 74 U.S. (7 Wall.) 506 (1869). See note 438 *infra*. With these cases compare *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872).

407. Even in the above situations the Supreme Court decides whether the bar to its jurisdiction exists, *i.e.*, whether there is, in fact, a political question, whether an act is within the congressional power under section 5, and whether the case is within the subject matter jurisdiction of the federal courts.

408. *Oregon v. Mitchell*, 400 U.S. 112 (1970) (18-year old voting—overruled by twenty-sixth amendment); *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895) (federal income tax—overruled by sixteenth amendment); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857) (slavery in United States territories—overruled by the fourteenth amendment); *Chisholm v. Georgia*, 2 U.S. 419 (2 Dall.) 419 (1793) (suit in federal courts against a state by citizen of another state or foreign country—overruled by the eleventh amendment).

409. Cohodas, *Anti-Abortion Bill Advances in Senate Panel*, 39 CONG. Q. 1253 (1981); Cohodas, *Members Move to Rein in Supreme Court*, 39 CONG. Q. 947 (1981); Cohodas, *Opponents Take Momentum from Legislation Designed to Return Prayer to Schools*, 38 CONG. Q. 1966 (1980).

Constitutional Factors analysis, how would the Court appraise their constitutionality?

### *The Human Life Bill*

In its controversial 1973 decision in *Roe v. Wade*,<sup>410</sup> the Supreme Court identified as "fundamental" the right of a woman to elect to have an abortion. En route to its conclusion, Justice Blackmun's opinion for the Court considered the argument that a fetus was a "person" within the meaning of the fourteenth amendment. He conceded that "[i]f this suggestion of personhood is established, the appellant's [woman plaintiff] case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment."<sup>411</sup> However, he concluded that "the unborn have never been recognized in law as persons in the whole sense"<sup>412</sup> and denied that "by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake."<sup>413</sup>

The pending human life bill, by defining that life begins at conception, purports to confer the status of "person" which would entitle the fetus to the protection of the fourteenth amendment under Justice Blackmun's concession in *Roe*. The bill is, of course, designed to "override the rights of the pregnant woman"<sup>414</sup> as established in the Court's opinion in *Roe v. Wade*.

The constitutional ground relied on by proponents of the bill is the second arm of Justice Brennan's opinion in *Katzenbach v. Morgan*<sup>415</sup> that Congress might redefine the substantive content of the fourteenth amendment—without his admonition in that opinion that section 5 "grants Congress no power to restrict, abrogate, or dilute these guarantees"<sup>416</sup> of due process and equal protection. The Court's subsequent pronouncements on this question have been discussed above.<sup>417</sup> While suggestive, they are not totally dispositive. How is the Supreme Court likely to resolve this constitutional question in light of the threefold analysis recommended above?

#### 1. *Tensions*

While several of the tensions are obviously involved in this legislation, the crucial one, in the context of section 5, is between the courts

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410. 410 U.S. 113 (1973).

411. *Id.* at 156-57.

412. *Id.* at 162.

413. *Id.*

414. *Id.*

415. 384 U.S. 641 (1966). See text accompanying notes 86-92 *supra*.

416. 384 U.S. at 651 n.10.

417. See text accompanying notes 93-102 *supra*.

and the legislature.<sup>418</sup> If this bill should be found constitutional, responsibility for the ultimate determination of the content of significant constitutional rights would obviously pass from the courts to the Congress.

## 2. *Fundamental Ideas*

In view of the recency of the Court's determination in *Roe v. Wade* and the bitter division in the nation that it has provoked, it presses credulity to the extreme to characterize the right of a woman to choose an abortion as a "fundamental idea" of the society. Undoubtedly this consideration gives appeal to the extraordinary resort to congressional "repeal" of the "right."<sup>419</sup> But it also heightens the significance of the factors of "process" integral to constitutional morality.

## 3. *Constitutional Process*

### (1) *Remedy*

Although the bill purports to cancel the remedy, since it is addressed to cancellation of the right itself, this element is not directly involved.<sup>420</sup>

### (2) *Coherence*

Quite obviously, if Congress is free to pick and choose among those rights identified by the Supreme Court as "fundamental," the prospect of a coherent fabric of rights is diminished. When the Court identifies a "fundamental right" it is forced to justify its conclusion with reasons that are coherent with other determinations. However unsatisfactory the Court's handiwork in a particular area,<sup>421</sup> Congress would be controlled by no comparable responsibility of coherent articulation.

### (3) *Constitutional Development*

For the same reasons, the legislature is hardly the organ to assume responsibility for reasoned constitutional development.<sup>422</sup> One might

418. More specifically, the tension is between Congress and the Supreme Court. Indirectly involved, of course, is the tension between the individual affected and his state government.

419. Consider here the floodgate argument of Justice Harlan in his *Katzenbach v. Morgan* dissent:

In effect the Court reads § 5 of the Fourteenth Amendment as giving Congress the power to define the *substantive* scope of the Amendment. If that indeed be the true reach of § 5, then I do not see why Congress should not be able as well to exercise its § 5 "discretion" by enacting statutes so as in effect to dilute equal protection and due process decisions of this Court. 384 U.S. 641, 668 (1966). Recall Justice Brennan's rejection of this point. *Id.* at 651 n.10.

420. If there is no right there is no need for a remedy. *Ubi ius, ibi remedium*, in reverse. See text accompanying note 357 *supra*.

421. See text accompanying notes 36-68 *supra*.

422. While a legislature may occasionally deal coherently with the reform of an entire area of

respond that Congress' sortie here is simply, as in *Katzenbach v. Morgan*,<sup>423</sup> one of occasional repair. Still, once Congress' power to subtract from rights identified by the Supreme Court is conceded, there is no apparent basis to stem a flood-tide of ad hoc congressional revision of constitutional rights that are publicly unpopular.<sup>424</sup> This is the legislature's role in many legal systems, England for example, but it falls short of constitutional government as understood in the United States since *Marbury v. Madison*.

#### (4) *Stare Decisis*

Again, the factor of stability in the law which this judicial factor fosters would be attenuated. Still, in some periods the *stare decisis* doctrine has been used to excess in arresting constitutional change.<sup>425</sup>

#### (5) *Quasi-Legislative Effect*

The contrast here is between an authoritative legislative rule, which is readily subject to revision or repeal, and a constitutional rule pronounced by the Supreme Court with, at most, quasi-legislative effect as I have defined it. Since an ill-considered legislative rule is more easily rectified than a judicial one, the advantage here might be on the side of congressional action.<sup>426</sup>

#### (6) *Constitutional Standards*

Beyond objections cited in the categories considered above there is little to choose here between Congress and the Court. The preliminary establishment of standards by Congress has been found satisfactory in the context of administrative law.

law, with the assistance of professional committees (as with the federal rules of procedure and evidence, the Administrative Procedure Act, and various state codes), its normal functioning is dealing ad hoc with particular problems of immediate public concern.

423. See text accompanying notes 80-82 *supra*.

424. Recall Congress' partial revision of the custodial interrogation safeguards laid down by the Court in *Miranda v. Arizona*, 384 U.S. 436 (1966) in Title II of the Omnibus Crime Control Act of 1968. Burt, *The Miranda and Title II: A Morganatic Marriage*, 1969 SUP. CT. REV. 81.

425. A conviction that the Supreme Court was in such a phase in early New Deal days prompted President Roosevelt to propose his 1937 court packing plan. See note 328 *supra*.

426. A direct overruling of an unsatisfactory constitutional decision is tidy and clean cut. Since *Linkletter v. Walker*, 381 U.S. 618 (1965), the overruling decision need not have retroactive effect. However, outright reversal is rare, and the spectacle of the Court retreating less forthrightly is not edifying. Examples of such retreats by the Burger Court include *Roe v. Wade*, 410 U.S. 113 (1973) to *Harris v. McRae*, 448 U.S. 297 (1980) (abortion rights and their consequences); from *Graham v. Richardson*, 403 U.S. 365 (1971) to *Ambach v. Norwich*, 441 U.S. 68 (1979) (alienage as a "suspect classification" for equal protection); from *Warth v. Seldin*, 422 U.S. 59 (1975) to *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59 (1978) (the addition of "prudential considerations" to article III "personal stake" requirements for standing). For a rare example of outright overruling by the Court of its recent constitutional decisions, see *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (second flag salute case).

(7) *Judicial Oversight*

This concern would be slight. If this legislation were held constitutional the Supreme Court would oversee its enforcement in the federal and state courts. However, the Court's control over interpretation and application of a statute is far less than oversight of its own decisions, which it may revise or overrule.<sup>427</sup>

(8) *Constitutional Realism*

(9) *Constitutional Responsibility*

In the peculiar context of the Court's abortion decision in *Roe v. Wade*,<sup>428</sup> which has sparked an eight-year long war between fairly equally divided and equally determined groups opposing and favoring abortion, an argument that the Court's abortion decision was unrealistic has some appeal. But equally unrealistic would be confidence that, given this precedent, other constitutional liberties would be invulnerable to popular disapproval.<sup>429</sup>

(10) *Fencing Out*

Awareness of a specific case's posture is advisable before risking even most general predictions as to fencing out. This proposed legislation is built upon framework erected by the Court itself, the *Katzenbach v. Morgan* "substantive" ground formula, and it is directed to undermining a recent major decision of the Court that defined personal constitutional rights. While the Court itself has lately dulled the equal protection implications of its abortion decision,<sup>430</sup> it has shown no disposition to overrule it, much less to submit passively to its nullification by Congress. Consequently, it is unlikely that the Court would allow the proposed legislation to survive without reaching the merits.

*The School Prayer Bill*

One of the most controversial decisions of the Supreme Court in the Warren era was *Engel v. Vitale*,<sup>431</sup> in which the Court held that a New York statute prescribing a nondenominational prayer for recitation in state public schools was in violation of the establishment clause of the first amendment. Although disagreement with the decision was not

427. The implications of upholding this bill would be that Congress would have power to revise constitutional decisions dealing with individual rights. This is different in kind from the Court permitting Congress to accord more power to the states than the Court's decisions under the commerce clause had allowed. *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408 (1946).

428. 410 U.S. 113 (1973).

429. See note 416 *supra*.

430. See *Harris v. McCrae*, 448 U.S. 297 (1980).

431. 370 U.S. 421 (1962).



universal among organized religious groups, in 1979 Senator Jesse Helms of North Carolina introduced a bill, since annexed to other proposed legislation, that sought to counter the effect of the school prayer decision.<sup>432</sup> The technique employed by the Helms amendment is to bar Supreme Court jurisdiction to review "any case arising out of any state statute (which) relates to voluntary prayers" in public schools, and to withdraw from federal district court jurisdiction "any case or question" which the amendment denies the Supreme Court jurisdiction to review. The effect is to give finality to the state court's interpretation of the Constitution on the matter.

Using the rationale of the power of Congress over the jurisdiction of federal courts,<sup>433</sup> the Helms amendment seeks to nullify the practical effect of *Engel v. Vitale*. Should the amendment be passed, there is Supreme Court precedent that arguably could justify a decision either way as to the constitutionality of the amendment.<sup>434</sup> The argument in support of Congress' power to withdraw particular subject matter from the jurisdiction of the lower federal courts seems stronger than that which would withdraw from the Supreme Court all power to review an allegedly unconstitutional state court decision.<sup>435</sup> At any event, Congress' power to withdraw from all federal courts the right to pass on constitutional rights denied by the states is untested.<sup>436</sup> Since the Supreme Court's answer will not be found in clear text or precedent, again it will sound in the domain of constitutional policy. How would the analysis we have been considering bear upon its decision?

### 1. *Tensions*

Once again, the predominant tension here is that between Congress and the Supreme Court as the ultimate arbiter of the Constitution.<sup>437</sup> In the context of jurisdiction it seems that Congress' power is at its peak. For article III of the Constitution gave Congress the option whether or not to establish lower federal courts at all. And although the Supreme Court was established by the Constitution itself, article III

432. S. 438, 96th Cong., 1st Sess., 127 CONG. REC. (S. 1583, Feb. 11, 1979).

433. See note 406 *supra*.

434. See notes 406 *supra* & 438 *infra*.

435. From the time of *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816), it has been understood that Supreme Court jurisdiction over constitutional issues originating in state courts is a function of the supremacy clause of article VI and is "supported by the letter and spirit of the constitution." 14 U.S. (1 Wheat.) at 340.

436. No prior legislation sought to deprive both the Supreme Court and the lower federal courts of jurisdiction to pass on alleged infringement of constitutional rights.

437. Also involved here is the nation vs. state tension, practical finality in interpreting provisions of the Constitution being left to state courts. The government vs. individual tension is not directly involved since, in theory, the individual's right remains, although it will be enforced by a state rather than a federal court.

gave Congress the power to make exceptions from its appellate jurisdiction.<sup>438</sup>

## 2. *Fundamental Ideas*

It is hard to generate fervor for the proposition that the right not to have voluntary prayer in public schools is a "fundamental idea" of the American constitutional system. As an original proposition, a non-denominational prayer with voluntary participation might seem to fall short of the "establishment of religion" barred by the first amendment. However, the first amendment bar of establishment is itself a fundamental idea, and it is not seriously challenged that the Supreme Court has asserted, without serious contradiction, the authority to define its scope. The Helms amendment recognizes the constitutional truth of this assertion, and seeks to circumvent it by using the jurisdictional technique.

## 3. *Constitutional Process*

### (1) *Remedy*

Unlike the human life bill, the Helms school prayer amendment does not negate the existence of a constitutional right. What is denied by the amendment is the possibility of vindication of the constitutional interest in the federal courts. It does not absolutely remove all remedy, for it leaves open the possibility that state courts may affirm the constitutional contours marked out by the Supreme Court in *Engel v. Vitale*. If withdrawal of federal court access were sanctioned here, what would bar future piecemeal withdrawal of other rights from federal court review?

### (2) *Coherence*

### (3) *Constitutional Development*

These concerns for a unified concept of the Constitution under one Supreme Court are nullified by the amendment. What this part of the Constitution means in New York under one set of state courts it may not mean in Kansas under another.

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438. In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the Supreme Court shall have original Jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such regulations as the Congress shall make. U.S. CONST. art. III, § 2, cl. 3 (emphasis added). See generally note 406 *supra*, especially *Ex Parte McCordle* cited therein. Professor Henry Hart suggests that *McCordle* should be read so that the exceptions to the Court's appellate jurisdiction "must not be such as will destroy the essential role of the Supreme Court in the constitutional plan." Hart recalls that in *McCordle*, "the circuit courts of the United States were still open in habeas corpus." HART AND WECHSLER, *supra* note 398, at 331.

(4) *Stare Decisis*

To strike down this legislation as to the lower federal courts, the Supreme Court will have to confront its cases which have given broad recognition to congressional control of their jurisdiction.<sup>439</sup> And, while arguably distinguishable, *Ex Parte McCordle* paid impressive heed to Congress' power to make "exceptions" to Supreme Court appellate jurisdiction. However, the Court has considered no legislation which barred both inferior federal court jurisdiction and Supreme Court appellate jurisdiction, and left final word to the state courts, with respect to enforcement of provisions of the Constitution.

(5) *Quasi-Legislative Effect*

This factor is inconclusive here.

(6) *Constitutional Standards*(7) *Judicial Oversight*

Obviously there would remain neither an effective national constitutional standard, nor judicial oversight by the Supreme Court on this matter, if the amendment were held constitutional.<sup>440</sup>

(8) *Constitutional Realism*

The argument that the amendment leaves the Constitution, as interpreted by the Supreme Court, intact and merely leaves its implementation to the state courts, runs afoul of the canon of constitutional realism. Obviously, the legislation can have no other design than the expectation that the state courts would interpret the establishment clause more tolerantly in the matter of school prayer than had the Supreme Court in *Engel v. Vitale*.<sup>441</sup>

(9) *Constitutional Responsibility*

Certain decisions of the 1980-81 Term<sup>442</sup> may be read by some as harbingers of the Court's imminent acceptance of a major reallocation to Congress of the Court's function of determining the substantive con-

439. See cases cited note 443 *infra*.

440. When this shortfall is added to the impairment of the factors of coherence and constitutional development, the result of the proposed legislation might well "destroy the essential role of the Supreme Court in the constitutional plan." HART & WECHSLER, *supra* note 398, at 331. See note 438 *supra*.

441. 370 U.S. 421 (1962). The reasons cited against fencing out the human life bill, see text accompanying note 430 *supra*, also apply here.

442. For example, *Albernaz v. United States*, 101 S. Ct. 1137 (1981); *Rostker v. Goldberg*, 101 S. Ct. 2646 (1981) (see text accompanying note 272 *supra*); *United States Postal Service v. Council of Greenburgh Civic Ass'ns*, 101 S. Ct. 2676 (1981); *Haig v. Agee*, 101 S. Ct. 2766 (1981). See *McCarty v. McCarty*, 101 S. Ct. 2728 (1981).

tent of constitutional rights. It is predictable, however, that the Court will not renounce its traditional ultimate responsibility in this regard short of a constitutional amendment.

### (10) *Fencing Out*

Although the human life bill did not seem a likely candidate for fencing out constitutional decision, different considerations are present here. The Court itself has recognized the strength of Congress' constitutional position on control of the jurisdiction of the federal courts.<sup>443</sup> For this reason the Court may well strain to avoid a direct confrontation with Congress here.

### *Summary*

The suggested analysis would predict the Court's flat rejection of the human life amendment. On grounds of constitutional realism it would probably also reject the school prayer legislation, although it might well fence out constitutional decision here.

### C. *Predictiveness II: Affirmative Action*

Application of the suggested analysis is less predictive when it comes to affirmative action. Consider what, if anything, it would have predicted in the *Bakke*,<sup>444</sup> *Weber*,<sup>445</sup> and *Fullilove*<sup>446</sup> cases, and then consider how it foreshadows decision making in cases involving other affirmative action particulars on which the Court has not yet passed.<sup>447</sup>

### *Bakke*

#### 1. *Tensions*

In *Bakke*<sup>448</sup> the fourteenth amendment equal protection clause was invoked to challenge state action—the establishment of preferential racial admissions to a state medical school on behalf of several minority groups. *Bakke* involved practically all the tensions mentioned: nation vs. state, government vs. individual, court vs. executive, present generation vs. future generation, and—with its maximum complication—the black vs. white tension. The admissions program in *Bakke* was designed to favor other minorities in addition to blacks—Asian-Americans, and Hispanic Americans. I shall hereafter call this the black plus

443. *Ex Parte McCordle*, 74 U.S. (7 Wall.) 506 (1869); *Sheldon v. Sill*, 49 U.S. (8 How.) 440 (1850). *But see* *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872).

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

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

446. *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

447. *See* note 500 *infra*.

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

vs. white tension, in view of the additional concerns which it raises.<sup>449</sup>

## 2. *Fundamental Ideas*

The fundamental idea of the American society involved in this case is equality of opportunity.<sup>450</sup> The unsuccessful white applicant at the medical school claimed that the preferential admissions program denied his equal opportunity to become a physician. The Regents of the University of California, on the other hand, claimed that the preferences were themselves designed to make realistic the opportunity of minority groups to become physicians. In resolving this fundamental difference of view, the Court could appropriately seek guidance in the established factors of constitutional process.

## 3. *Constitutional Process Factors*

### (1) *Remedy*

Plaintiff Bakke's asserted injury, and demanded remedy, was traditional. The preferential racial admissions program would cost him his seat in medical school. A view of the preferential admissions program as remedial would require the Court to accept that the favored minorities had been injured by educational and other relevant disadvantages inflicted on them by the society as a whole.<sup>451</sup> Furthermore, the claim of educational and other social disadvantage was one thing with respect to black applicants; it was more questionable when applied to other minority groups, especially the Asian-Americans who had been generally successful in securing academic admissions, even at Davis.<sup>452</sup>

### (2) *Coherent Articulation*

The factor of coherent articulation would predict at least a majority opinion by the Court, the minimum required for internal coherence of a decision. Beyond that it would predict that such an opinion would be externally coherent with rulings of the Court in comparable constitutional matters. The specific question in *Bakke* was which equal protection standard would test the constitutionality of a preferential racial admissions program which penalized a white applicant.<sup>453</sup> Where divergent decisional results exist in comparable areas the factor of exter-

449. See text accompanying notes 68, 310, & 340 *supra*.

450. More precisely, what standard shall be used to review state action that curtails the equality of opportunity to participate in the medical profession.

451. The record in *Bakke* showed no history of racial discrimination at the recently founded medical school at Davis. 438 U.S. at 305.

452. *Id.* at 297 n.37.

453. The lower courts in *Bakke*, and in the comparable *Defunis v. Odegaard*, 416 U.S. 312 (1974), accepted that the choice was between a deferential rational basis test and a strict scrutiny compelling state interest test.

nal coherence can hardly predict an outcome.<sup>454</sup>

Such divergence was present here. Should the equal protection test be the strict scrutiny (compelling state interest) that is applied when a racial classification penalizes a black citizen? Or, should the applicable test be a deferential (rational basis) test, since the strict test was devised expressly to counter racial prejudice against blacks and other "discrete and insular minorities"?<sup>455</sup> Or, should a special intermediate test be applicable to "benign" discrimination of any kind, for example, that already used to test benign gender discrimination?<sup>456</sup>

The factor of external coherence would predict some effort by the Court to get the field in order, but it would hardly help in predicting which direction the order would take.

### (3) *Constitutional Development*

### (4) *Stare Decisis*

We look to the factor of constitutional development to see if the flow of Supreme Court decisions points in one direction rather than another, with respect to the affirmative action issue under consideration in *Bakke*. Here too there is an indecisiveness in past decisions, and both development and *stare decisis*<sup>457</sup> are uncertain factors for prediction.

Recall that the question is whether a strict, or deferential, or intermediate constitutional test should be applied to a benign racial preference disadvantaging a white person. To what line of decisions do we look for development? At least two call for attention.

The reparational line of decisions in racial matters<sup>458</sup> since *Brown v. Board of Education*<sup>459</sup> would suggest that the "strict scrutiny" standard

454. However, considerations other than coherence may well justify one decision rather than another in a particular case. In subsequent cases, then, coherence may properly come into play.

455. *United States v. Carolene Prod. Co.*, 304 U.S. 144, 153 n.4 (1938). Justice Powell's majority opinion in *San Antonio Independent School Dist. v. Rodriguez* seemed to accept Justice Stone's footnote 4 as the proper standard for "suspect classification":

The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process. We thus conclude that the Texas system does not operate to the peculiar disadvantage of any suspect class.

411 U.S. 1, 28 (1973).

456. *Craig v. Boren*, 429 U.S. 190 (1976). See text accompanying notes 77-78 & 105 *supra*.

457. Strictly, *stare decisis* is not applicable here. *Bakke* raised the very question left unanswered by the Court in *DeFunis v. Odegaard*, 416 U.S. 312 (1974). See text accompanying note 109 *supra*. In a broad sense *stare decisis* may be considered to envelop the precedential value of the lines of decision cited in notes 463-68 *infra*.

458. In addition to the school cases, these decisions include *McLaughlin v. Florida*, 379 U.S. 184 (1964), *Loving v. Virginia*, 388 U.S. 1 (1967), and *Hunter v. Erickson*, 393 U.S. 385 (1969) in the equal protection area.

459. 347 U.S. 483 (1954).

had been devised in the spirit of *Slaughter-House's*<sup>460</sup> recognition that the primary function of the equal protection clause was to protect the new black citizens from racial discrimination and in the spirit of *Brown's* belated recognition that strong steps were appropriate to remedy seventy-five years of governmental unfaithfulness to the constitutional promise to blacks of equal protection. Following this analysis, there would be no reason to apply the strict test to a benign racial preference that incidentally disadvantages a majority person.

On the other hand, the Supreme Court has always recognized that the equal protection clause protects "any person" against prejudicial classifications.<sup>461</sup> And in recent years a body of equal protection law has given "strict" protection to "any person," and not just to blacks.<sup>462</sup> Perhaps, it might be argued, this is the key to a decision suggested by the factor of development.

In fact, neither of these possible alternatives is adequately predictive, although each may be strongly argued as a starting point for judicial reasoning.<sup>463</sup> For the Court had expressly withheld decision on this particular question of constitutional affirmative action in a racial context.<sup>464</sup> The line of benign discrimination cases in the gender area was hardly dispositive.<sup>465</sup> Whereas racial discrimination against blacks had been held to be the primary target of equal protection relief,<sup>466</sup> sexual discrimination was a much later arrival on the equal protection scene and was tested by a less strict constitutional standard.<sup>467</sup>

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460. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873).

461. See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (the equal protection clause sustained relief to Chinese laundrymen who had been discriminated against on racial grounds); *Ex Parte Virginia*, 100 U.S. 339, 347 (1880) (dictum); *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880) (dictum).

462. The equal protection vote dilution cases, starting with *Baker v. Carr*, 369 U.S. 186 (1962), protect "any person." See text accompanying note 334 *supra*. It should be recalled that the precise question here is not the applicability of "equal protection" to "any person", which all concede, but the appropriate standard of review. And in this connection the recent majority opinion in *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973) was given some credibility by the litigants in *Bakke*.

463. I argued for the reparational alternative in an article in this journal while *Bakke* was *sub judice*. Broderick, *Preferential Admissions and the Brown Heritage*, 8 N.C. CENT. L.J. 123, 138-57 (1977). Justice Powell rejected this approach and opted for the "any person" starting point in his crucial solo opinion in *Bakke*. See text accompanying notes 64-68 *supra*.

464. *DeFunis v. Odegaard*, 416 U.S. 312 (1974).

465. *Orr v. Orr*, 440 U.S. 268 (1979); *Craig v. Boren*, 429 U.S. 190 (1976). See text accompanying notes 104-05 *supra*.

466. See text accompanying note 52 *supra*.

467. See text accompanying notes 49-72 *supra*.

- (5) *Quasi-Legislative Effect*
- (6) *Constitutional Standards*
- (7) *Judicial Oversight*

None of these factors are predictive of *Bakke*, for the reasons just discussed.

- (8) *Constitutional Realism*

Each of the two suggested elements of constitutional realism<sup>468</sup> bears inspection with respect to the predictability of the Court's decision.

The Court is reluctant to rest decision upon constitutional ideals that are beyond present reach. Only twenty-three years after *Brown*, with the promises of the Civil War Amendments still unfulfilled, it was unlikely that the Court would rest its decision in *Bakke* on the premise of a colorblind Constitution,<sup>469</sup> though briefs filed in the case urged the Court to do so.

The Court's attentiveness to strong popular sentiment, the Mr. Dooley syndrome, raised serious concerns bearing on predictability as the time for decision approached with consistent public opinion registering in favor of Bakke's position.

- (9) *Constitutional Responsibility*
- (10) *Fencing Out*.

The persuasiveness of these factors in *Bakke* varies depending on the precise time at which one used them as a basis for prediction. The Supreme Court granted certiorari in *Bakke* on the same day on which it decided *United Jewish Organizations v. Carey*.<sup>470</sup> It then seemed that, after avoiding the preferential racial admissions issue three years earlier in *DeFunis*, the Court was prepared to decide this significant constitutional aspect of affirmative action.<sup>471</sup> However, at the time of argument, after the heavy register of public support for Bakke's position,<sup>471a</sup> the Court might well have been expected to grasp at straws to avoid reaching the constitutional issue.

468. See text accompanying notes 379-83 *supra*.

469. The term derives from the dissenting opinion of the first Justice Harlan in *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896).

470. 430 U.S. 144 (1977).

471. As Professor Gunther points out, *UJO* "gave rise to some speculation that the Court was willing to apply deferential review to benign racial classifications." G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 813 n.17 (10th ed. 1980).

471a. New York Times, Nov. 2, 1977, 18:2 (N.Y. Times-CBS poll).



### Summary

Consideration of the elements of the suggested analysis yielded no basis for prediction of the *Bakke* outcome. It did, however, illuminate that the Court was at a crucial constitutional watershed, and suggest that the Court might remain cautious, hesitant to move definitively in one direction—broadly upholding remedial racial affirmative action—rather than the other—wiping out racial preferences in their entirety.

In result, the Court seemed to heed the public pressure aspect of constitutional realism, while stopping short of unrealistic colorblindness. One understands better the relieved sigh of Professor Tribe.<sup>472</sup>

### Weber

Strictly speaking, *United Steelworkers v. Weber*,<sup>473</sup> not being a constitutional decision, does not fit into the analysis I have been suggesting. With that caveat it is of some interest to inquire how predictive the analysis is of the Court's majority opinion.

#### 1. Tensions

Since this is a private action by an employee against his employer and his union, none of the governmental tensions are applicable. The most obvious tension here is the black vs. white tension, uncomplicated, it seems, with the favoring of non-black minority groups.<sup>474</sup> In addition, the present generation vs. future generation tension is relevant. In the Gramercy, Louisiana area where the *Weber* case arose, black participation in advanced craft jobs in the construction trade was almost nil (1.83%), despite the fact that thirty-nine percent of the work force was black.<sup>475</sup> The management and union had agreed that without the preferential craft training program the prospects of significant black participation in future generations were also nil.<sup>476</sup>

#### 2. Fundamental Ideas

As in *Bakke*, the fundamental idea was equal opportunity—here equal opportunity to secure a high grade of employment in a manufacturing plant in a rather confined geographical area.

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472. See note 286 *supra*.

473. 443 U.S. 193 (1979).

474. *Id.* at 197.

475. *Id.* at 198-99.

476. *Id.* at 198.

### 3. *Constitutional Process Factors*

#### (1) *Remedy*

Plaintiff Weber's remedy—to enjoin enforcement of the private racial preference program—would depend entirely upon construction of a specific provision of Title VII of the Civil Rights Act of 1964 that allegedly barred even voluntary use of racial preference.<sup>477</sup> In defending the preference the contracting parties—employer and union—had to bring their program within the protection of affirmative action (the only possibility left open by *McDonald v. Santa Fe Trail*).<sup>478</sup> To do this required that the program be in some sense remedial. But in precisely what sense?<sup>479</sup> That, at least, was unpredictable.

#### (2) *Coherence*

Even considering the minimal expectation of internal coherence, a majority opinion was by no means predictable in *Weber*. Only seven Justices were present at the oral argument before the Court. The reduced number was particularly significant in view of the Court's sharp division on affirmative action in *Bakke*.

Although *Weber*, as a private, statutory case, would not be directly controlled by *Bakke*, the consideration of external coherence made it predictable that *Bakke*'s limitations as to remedy would be relevant.<sup>480</sup>

#### (3) *Development*

In a difficult question of statutory interpretation, where legislative text and history are inconclusive, the Court has been wont to interpret a statute in the setting of constitutional and statutory policy.<sup>481</sup> In the

477. Civil Rights Act of 1964 § 703(j), 42 U.S.C. § 2000e-2(j) (1976):

Nothing in this subchapter shall be interpreted to require any employer . . . 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 percentage of persons of any race, color, religion, sex or national origin . . . 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.

For a fuller discussion of *Weber*, including the pertinence of two other sections of Title VII, § 703(a) and § 703(d), see Broderick, *Bakke, Weber and Mr. Justice Stewart: Constitutional Theory and Affirmative Action*, 11 N.C. CENT. L.J. 3, 57-68 (1979).

478. 427 U.S. 273 (1976). *McDonald* held that Title VII's ban on racial discrimination in employment applied to discrimination against whites, as well as against blacks and other minorities; however, the Court's opinion expressly reserved the question of affirmative action ("benign discrimination"). *Id.* at 281 n.8.

479. Remedial of discrimination in a particular plant? Or, something less, remedial of some form of societal discrimination? The latter view lacked majority support in *Bakke*. See text accompanying notes 115-19 *supra* & note 483 *infra*.

480. See note 479 *supra*.

481. The classic case often cited for the search for the "spirit" of a statute is *Holy Trinity*

context of *Bakke*, we reviewed the diverse inferences that might be drawn from development prior to that case.<sup>482</sup> Did the *Bakke* decision supply better focus to development, so as to help predict the outcome of *Weber*? In one sense it did, in leaving open the possibility of a remedial use of race where there had been societal discrimination.<sup>483</sup> On the other hand, *Bakke* rejected a remedy that would reserve a fixed number of places for minorities and deprive a majority applicant of a place that would otherwise be his.<sup>484</sup>

Especially since four members of the Court<sup>485</sup> in *Bakke* had not unveiled their position on these contrary thrusts, the factor of development after *Bakke* was hardly predictive of *Weber*'s outcome.

#### (4) *Stare Decisis*

Since the question to be decided in *Weber* has been expressly left open in *McDonald*,<sup>486</sup> *stare decisis* is not helpful here.

#### (5) *Quasi-Legislative Effect*

Since *Weber* involved simply a construction of a congressional statute, which Congress could change by simple amendment, the factor of quasi-legislative effect has no bearing on the predictability of *Weber*.

#### (6) *Standards*

*McDonald* left open the question of what affirmative action remedy was available under Title VII. The answer was not predictable from previous standards, constitutional or otherwise. And, of course, constitutional standards (such as they were)<sup>487</sup> did not apply to this statutory case.

#### (7) *Judicial Oversight*

This factor has no bearing here.

#### (8) *Constitutional Realism*

The public reaction against affirmative action and the appeal of col-

Church v. United States, 143 U.S. 457, 459 (1892). See also *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967).

482. See text accompanying notes 458-67 *supra*.

483. In *Bakke* the Brennan Four had accepted societal discrimination. Justice Powell, though obviously inhospitable, had not ruled it out, where there were proper findings. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978). See text accompanying notes 115-19 *supra*.

484. Strictly speaking, only the solo opinion of Justice Powell did so as a matter of equal protection. 438 U.S. at 287, 320, 421. But see text accompanying notes 171-72 *supra*.

485. The Stevens Four spoke only on Title VI. 438 U.S. at 408.

486. *McDonald v. Santa Fe Trail Trans. Co.*, 427 U.S. 273 (1976). See note 478 *supra*.

487. See text accompanying notes 277-81 *supra*.

orblind equality were present in *Weber*, as in *Bakke*, and would press against upholding the affirmative action program. However, two special notes bearing on realism are of significance to the predictability of the decision in *Weber*:

(1) If a permissible affirmative action remedy must be confined to plants where past racial discrimination actually occurred, the possibility would disappear of any significant change in the disproportionate lack of participation of blacks. To require as justification for a private preference the proof or admission by an employer of past racial discrimination would diminish the likelihood of voluntary programs. For an employer would thereby open himself to damage suits for past discriminations by aggrieved minorities. Furthermore, removal of the likelihood of voluntary programs would put the full burden of affirmative action remedial relief on the courts. This aspect of realism would suggest the advantage of upholding a voluntary program, even if it is not actually predictive of *Weber*'s result.

(2) On the other hand, Weber alleged with considerable realism that the affirmative action program in his case, if voluntary at all, was so only in a technical sense. He contended that the employer, in instituting the program, had responded to strong federal pressure from the Office of Contract Compliance.<sup>488</sup> If the Supreme Court had accepted this position the plan would not only arguably come within the specific ban of the statutory language in Title VII,<sup>489</sup> but also be subject to a controlling constitutional ingredient, the equal protection component of the fifth amendment.

The Court's likely handling of these issues was hardly predictable, and it could well have gone either way.

### (9) *Responsibility*

Since, as noted above, only seven members of the Supreme Court sat for the *Weber* argument, it was not even predictable that the Court

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488. The Office of Federal Contract Compliance (OFCC), subsequently named the Office of Federal Contract Compliance Programs (OFCCP), is an arm of the Department of Labor responsible for ensuring compliance by Government contractors with the equal employment opportunity requirements established by Exec. Order No. 11246, 3 CFR 339 (1964-1965 Comp.), as amended by Exec. Order No. 11375, 3 CFR 684 (1966-1970 Comp.), and by Exec. Order No. 12086, 43 Fed. Reg. 4650 (1978).

United Steelworkers v. Weber, 443 U.S. 193, 223 n.2 (1979).

489. Title VII concededly had no statutory requirement of racial balance. The open question was whether it banned a voluntary use of such racial balance objectives. See note 477 *supra*.

would have a majority of its members writing one opinion, much less which direction the opinion would take.

But one clue to the Court's recognition of the importance of a clear answer in *Weber* was the announcement that Justice Powell, who was ill, had received the tapes of the oral argument, and might participate in the Court's decision.<sup>490</sup>

However, the factor of responsibility was hardly predictable as to the direction which a majority opinion would take, given the uncertainties of *Bakke*.

### (10) *Fencing out*

Since there was a clear basis in *Weber* for not reaching a constitutional issue (despite the concern raised above under 8(2)), it was predictable that the case would be anchored on statutory grounds.

### *Summary*

From the suggested analysis it was predictable that *Weber* would be decided on statutory grounds, but without knowing which way. The ambiguous wink of development from *Bakke* inspired no confidence that the Court would construe the statute as it did—favorable to the voluntary plan, with a strong reiteration by a majority of the Court of the *Brown* era policy of reparation for denial of equal opportunity in appropriate cases: "the integration of blacks into the mainstream of American society."<sup>491</sup> The question still remained, of course: What are appropriate cases?

### *Fullilove*

#### 1. *Tensions*

The 10% set-aside for minority contracts in the 1977 congressional public works appropriations, under equal protection challenge in *Fullilove v. Klutznick*,<sup>492</sup> rubs against three sets of tensions: Court vs. Congress; black plus vs. white,<sup>493</sup> and present vs. future generations.

#### 2. *Fundamental Ideas*

The fundamental idea in question is again equal opportunity—here the equal opportunity of blacks and other specified minorities to func-

490. Justice Powell ultimately did not participate. Justice Stevens disqualified himself, presumably because one of the parties had been a client.

491. 443 U.S. at 202.

492. 448 U.S. 448 (1980).

493. See text accompanying notes 310, 340, & 449 *supra*.

tion effectively in the contracting business, at least with respect to sharing in the allocation of public appropriations.

### 3. *Constitutional Process Factors*

#### (1) *Remedy*

In *Fullilove*, plaintiffs, majority contractors, did not claim that the 10% set-aside deprived them of an identified share of the public contract funds. They claimed that the affirmative action provision on its face denied them equal protection.<sup>494</sup> Defendants supported the set-aside on the ground that it constitutes a valid legislative remedy for disadvantaged minorities in the construction business. The predictability of result was obviously chancey, given the uncertainties of *Bakke*.

#### (2) *Coherent Articulation*

Recall that only five Justices in *Bakke* dealt with the constitutional criteria for affirmative action, and that the more restrictive opinion of Justice Powell supplied the crucial fifth vote for the Court's secondary holding that under some circumstances race might be a permissible factor in governmental classification. Barring future clarification, the Powell opinion constitutes our best guess as to the prevailing equal protection standard of the Court. However, as a one-Justice opinion it is a weak predicate for affirmative action analysis. It was fairly predictable that *Fullilove* would be the occasion for a majority opinion by the Court furnishing constitutional guidance for at least some aspects of affirmative action. What this guidance would be was less predictable, even taking account of the Court's hospitality to certain private affirmative action in *Weber's* statutory context.

#### (3) *Development*

The same uncertain considerations prevail which were noted in discussing the bearing of development on *Bakke* and *Weber*.

#### (4) *Stare decisis*

In *Bakke* the Court agreed only that there could be some use of race as a factor in governmental classifications. But until a majority of the Court accepts the specifics of the Powell opinion, it has no *stare decisis* effect beyond this single vague point. At most it can be consulted to predict what would be minimally required to make an affirmative ac-

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494. 448 U.S. at 487. The failure of plaintiffs to particularize their alleged injury opened the possibility of a standing infirmity. *Id.* at 480 n.1.

tion plan acceptable to a majority of the Court.<sup>495</sup>

(5) *Quasi-Legislative Effect*

The congressional legislation under review in *Fullilove* was limited as to time and subject matter. It could be repealed by Congress. And Congress, rather than the Court, assumed the primary responsibility for the remedial character of the legislation.<sup>496</sup> For these reasons this factor tilts slightly towards the constitutional acceptability of the minority set-aside.

(6) *Constitutional Standards*

(7) *Judicial Oversight*

In the absence of a preexisting majority constitutional formulation these factors were not predictive of the outcome of *Fullilove*.

(8) *Constitutional Realism*

(9) *Constitutional Responsibility*

(10) *Fencing Out*

These factors were no more helpful in predicting the outcome of *Fullilove* than they had been in *Bakke* and *Weber*. The Court's disinclination in *Bakke* to face directly the issue of the constitutionality of affirmative action raised the possibility that it would fence out a constitutional decision entirely in *Fullilove* on standing grounds.<sup>497</sup> Or, at least, it suggested that the Court would restrict its opinion to the special concerns of a congressionally formulated remedy for past racial discrimination.<sup>498</sup>

### Summary

With no previous majority constitutional opinion to draw on, there was little basis in the analysis to predict the *Fullilove* result. At most, one might have dared to predict that the case would produce a majority opinion as to the constitutionality of affirmative action. This prediction would have proven wrong. Alternatively, one might have ventured that the Court would fence out the constitutional issue entirely. This, too, would have proven wrong. Finally, one could have predicted that

495. As to other courts using *Bakke* in this way, see text accompanying notes 277-81 *supra*. As to the Supreme Court so using it in *Fullilove*, see text accompanying note 156 *supra*.

496. As to Justice Powell's modification in *Fullilove* of his previous requirement in *Bakke* of legislative findings of societal discrimination, see text accompanying note 159 *supra*.

497. Chief Justice Burger's opinion did not dismiss this possibility lightly, nor did it pursue it. 448 U.S. at 480 n.1.

498. As the Court, in fact, did in *Fullilove*. See text accompanying notes 155 & 157 *supra*.

the Court would confine itself to pronouncements on the constitutionality of a congressional remedial affirmative action plan. This is largely what eventuated from the divided opinions of the Court in *Fullilove*. Perhaps there was more: cautions by the Court that its tolerance of affirmative action had reached outer limits.<sup>499</sup> But still no authoritative majority opinion expressed this view.

What light does the suggested analysis give as to the likely resolution of aspects of affirmative action that remain?<sup>500</sup> Consider the following "hypothetical" cases.

### *Case A*

Assume that a municipal police or fire department adopts a hiring and promotion program whose stated purpose is to increase the percentage of woman employees to equal their percentage in the municipal labor force, and to increase minority employees (blacks and Hispanic-Americans) to a level equalling at least 70% of the two minority groups' representation in the city's labor force. The municipality denies that there has been past sex or racial discrimination in the departments, and identifies the object of the plan as improving communications and rapport between the public and the police and fire officials by making the representation of the two public services more in line with their percentage representation in the local population. Plaintiffs, white male applicants who would have won positions except for the preference program, sue to enjoin administration of the program on grounds of denial of their constitutional right to equal protection.

This may be recognized as *Bakke* in the employment field, posed again to the Court after the Court's decisions in *Bakke* and *Weber* and *Fullilove*. Like *Bakke* there was no claim that the program was a remedy for past discrimination in the department. Absent such proof would the affirmative action program pass muster? True, after *Bakke* the Court upheld a program dealing with the black plus vs. white tension in *Fullilove*. But here there was still another tension—male vs. female. Such a case came before the Court in the 1980 Term. Rather than deal with these tensions, the Court "fenced out" the case, returning it to the California courts.<sup>501</sup>

499. "That the program may press the outer limits of congressional authority affords no basis for striking it down." 448 U.S. at 490 (Burger, C.J.). See text accompanying notes 155 & 157 *supra*.

500. For example, the constitutionality of state-derived affirmative action for past societal discrimination, or of judicial relief apart from a showing of past discrimination in the immediate situation before the Court, or the extent to which reservation of places (using race as a factor) can be justified even by past discrimination in the immediate unit under discussion.

501. *Minnick v. California Dep't of Corrections*, 101 S. Ct. 2211 (1981). The Court was hardly clear as to why it fenced out this case, settling for a combination of (a) the judgment appealed from was not "final" within the meaning of 28 U.S.C. § 1257, and (b) want of a properly presented



If the Court had dealt with the merits, would it have stood by the Powell opinion in *Bakke*, requiring that the state establish a compelling state interest in the racial minority aspect?<sup>502</sup> And would it have stood by the intermediate *Craig v. Boren* test to justify the program insofar as it related to sex? Would these two conclusions not treat more favorably affirmative action for women, than affirmative action for blacks, the very group which *Slaughter-House*<sup>503</sup> had recognized were the ones specially favored by the equal protection clause of the fourteenth amendment? With such doctrinal disarray, small wonder the Court ran for cover. But when it does face this incongruity, as it must eventually, how will the black minority fare? The Court, as Court, must reaffirm, or reject, the promise of *Slaughter-House*. In *Minnick*,<sup>504</sup> as in *DeFunis*<sup>505</sup> in 1974, those Justices most favorable to the promises of *Slaughter-House* and the spirit of reparation of the *Brown* era pressed to "fence out" a decision on the merits. As Professor Tribe wrote about *Bakke*,<sup>506</sup> perhaps this was the best result proponents on the Court of the spirit of *Brown* could hope for in the Spring of 1981.

### Case B

Assume that a local municipal police or fire department has had a notable resistance to hiring of racial minorities, both blacks and others, and of women. An action brought by the aggrieved minorities and women leads a federal district court to prescribe a hiring plan that would require the municipal department to fill vacancies for a 10-year period on a basis of 50% open to all, and 50% divided between women and the respective minorities in accordance with a formula like that set out in *Case A*—the preference to last until the percentage of women and minorities in the department corresponds to the percentages of women and minorities in the state job pool.

The tensions of *Case A* are present here. However, the remedy sought is judicial. The Burger Three in *Fullilove*<sup>507</sup> suggested that judicial power was less potent to remedy past discrimination with affirmative action plans than was Congress'. This suggestion implies that the affirmative action plan must be a remedy for past racial discrimination in the specific police or fire department. If such past racial discrimina-

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constitutional question, *Rescue Army v. Municipal Court*, 331 U.S. 549 (1947). See text accompanying note 387 *supra*.

502. See text accompanying notes 118-19 *supra*.

503. See text accompanying note 52 *supra*. But see *Rostker v. Goldberg*, 101 S. Ct. 2646 (1981).

504. *Minnick v. California Dep't of Correction*, 101 S. Ct. 2211 (1981).

505. *DeFunis v. Odegaard*, 416 U.S. 312 (1974).

506. See note 285 *supra*.

507. *Fullilove v. Klutznick*, 448 U.S. 448, 480 (1980).

tion is proved in the department, a remedy of proper modesty, as this might well be, would seem to survive. On the other hand, if the reliance is purely on past societal discrimination within the state at large, the *Fullilove* warning may well be invoked to strike down the plan as beyond judicial power. In this context the same disposition would likely be made of the sex discrimination claim.<sup>508</sup>

### Summary

In neither *Case A* nor *Case B* does the suggested analysis furnish a firm basis for prediction of the Court's disposition. It does, however, illuminate the factors on which the Court may act, or defer, or obscure. And it accents unexplained inconsistencies and inconsideration in the Court's dealing with the constitutional tensions: male vs. female compared with black vs. white; and Court vs. Congress compared with court vs. state. Perhaps most striking is the Court's almost total disregard of the tension of present vs. future generations. Without constitutional flexibility future generations will almost certainly be saddled with precisely the inequalities of today. Without true constitutional realism the mirage of "colorblindness" threatens to mock the promise of equality under the law, that is, under a formulation of the law by which equality is realistically possible.

### D. Normativeness

In section A of this part, I suggested a form of analysis as descriptive of how the constitutional process is actually conducted. One may agree or disagree with the cogency of one or more elements so described. The description is accurate or inaccurate. It is not right or wrong. In sections B and C, I inquired whether, assuming the description was accurate, it served to predict the outcome of constitutional litigation.

The analysis did seem to foreshadow decisional outcomes in the institutional conflicts embodied in section B largely, I believe, because it made clear that contrary conclusions would substantially change the long accepted presuppositions as to the basic functioning of the constitutional system. Such basic changes are not impossible to effect. But they require resort to the amending process.

On the other hand, the analysis had little, if any, predictive force in the affirmative action situations examined in section C. Why should this be? Is it not because that problem—with its complex of tensions, some old, some new—does not challenge the historic mode of functioning of the constitutional system, but encompasses resolution of tensions within that system? The analysis, without more, does not inevitably

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508. See note 503 *supra*.

furnish the basis for predicting one resolution rather than another in such a situation with complex competing tensions.

When we go beyond assessing the descriptive and predictive potential of the analysis and ask whether it is normative, we enter an area of greater controversy. For in calling something—let us say X—normative we understand that X compels a given result in order for the Court's decision to be "right" law. An explicit, precise provision of the Constitution is clearly normative.<sup>509</sup> A congressional decision that each state should have three senators, or a court decision approving it, would obviously be "wrong," contrary to a specific normative provision of the Constitution.<sup>510</sup> In the series of cases from *Marbury*<sup>511</sup> through *Cooper v. Aaron*,<sup>512</sup> to *United States v. Nixon*,<sup>513</sup> the Supreme Court has, without successful constitutional challenge, asserted that its decisions as to the meaning of constitutional provisions are normative, are the "law of the land." The present inquiry goes beyond this and asks: Can there be any X that may be considered normative of what the Supreme Court should decide in a particular case beyond the demonstrably clear and pertinent constitutional language situation discussed above? To answer this affirmatively does not mean that if the Supreme Court should decide something contrary to X its pronouncement would not be "law."<sup>514</sup> It does, however, suggest that its decision would not be "right" law, and demonstrably so because of X. It would be law, but "wrong."

If we say that the suggested analysis in addition to being predictive with respect to the human life bill and prayer amendments was also normative, it must be because there is an "X" in the American constitutional system which stipulates that any change in the basic functioning of that system must be accomplished by constitutional amendment. That assumption may be made within the framework of the suggested analysis of the constitutional process.<sup>515</sup>

509. *E.g.*, U.S. CONST. amend. XVII: "The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote."

510. This is a crucial point. Cardozo grappled with it in terms of "right" and "power," in a passage dealing with a common law judge that is applicable here: "Judges have, of course, the power, though not the right, to ignore the mandate of a statute, and render judgment in despite [*sic*] of it. . . . None the less, by that abuse of power, they violate the law." CARDOZO, *supra* note 286, at 129.

511. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

512. 358 U.S. 1, 18 (1958): "[T]he interpretation of the Fourteenth Amendment enunciated by this Court . . . is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States 'any Thing in the Constitution or Laws of any State to the contrary notwithstanding.'"

513. 418 U.S. 683 (1974): "We . . . reaffirm that it is the province and duty of this Court 'to say what the law is' . . . ." *Id.* at 705.

514. See text accompanying notes 131-32 *supra*.

515. The key words here are "basic functioning." An obvious illustration is suggested by judi-

Can we go a step further and suggest that there is also room for other "X's" that would be normative to constitutional decision in less overpowering situations, in the sense that they would furnish direction to constitutional decisions that aspire to be "right" law? However difficult this task, it can only be renounced if we are content to postulate that the Supreme Court and its Justices are at large in their work in its most significant area, and that there is no possibility of objectively "right" constitutional decision. To open ourselves to this task leads, of course, to an inquiry I have sidestepped to this point—the problem of justice in American society.

## V. THE PROBLEM OF JUSTICE IN AMERICAN SOCIETY

The discussion to date has outlined (1) what the Burger Court has done in the constitutional area of equal protection,<sup>516</sup> (2) what its individual Justices have said in support of their differing conclusions in equal protection,<sup>517</sup> (3) whether an acceptable account can be given from the Supreme Court's practice of the nature of the constitutional process,<sup>518</sup> and (4) whether such an account is to any extent predictive<sup>519</sup> or normative<sup>520</sup> as well as descriptive. As to more obvious cases, I have suggested that constitutional process may seem predictive,<sup>521</sup> but that in complex situations something more is needed to explain why a decision goes this way rather than that.<sup>522</sup> For want of a more precise term we may call this missing piece a view of justice. What follows is an inquiry as to this missing ingredient. What is this "justice"? Or better, what is this justice in the specific context of the American constitutional system? How does it relate to complex constitutional determinations, particularly the aspects of equal protection which this article has stressed? Is it either predictive or normative?

There are various techniques for avoiding completely any "legal" discussion of the problem of justice. Judicial positivism has largely assigned it to politics or ethics, and thereby withdrawn it from law.<sup>523</sup>

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cial review. Not specifically provided for in the original Constitution, nor in any subsequent amendment, it was identified by Chief Justice Marshall in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and since continually maintained. It thus constitutes a "leading idea" that can hardly be erased by simple legislation.

516. See text accompanying notes 1-165 *supra*.

517. See text accompanying notes 170-254 *supra*.

518. See text accompanying notes 286-398 *supra*.

519. See text accompanying notes 399-499 *supra*.

520. See text accompanying notes 509-514 *supra*.

521. See text accompanying notes 399-443 *supra*.

522. See text accompanying notes 444-508 *supra*.

523. In his formulation of a contemporary positivism, Professor H.L.A. Hart stands by what he calls "the great battle cries of legal positivism: 'The existence of law is one thing; its merit or demerit another.'" [citing J. AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED*, Lecture V, 184-85 (1832)]: "The law of a State is not an ideal but something which actually exists . . . it is not

The influential jurisprudential thinkers known as American Realists<sup>524</sup> have recognized that the notion of justice, apart from positive law, is a factor in judicial decision, and a dominant one in the field of constitutional law.<sup>525</sup> But they despair of defining it in any objective manner, and affirm that different judges, like different people, have different individual views of the content of justice. They urge the "relatively subordinate importance of rules." They insist that judges do "legislate" in the process of deciding certain cases, and so they stress that one should "learn the law by observing the conduct of judges."<sup>526</sup> In his celebrated book, Cardozo rejected the abdication of the positivists as contrary to judicial experience; he also rejected the give-it-up individualism of the realists as contrary to his model of a proper (even constitutional) judge.<sup>527</sup> He agreed with the realists that the judge may properly be said to be "legislating";<sup>528</sup> but, he said, the judge strives to apply an objective standard of justice.<sup>529</sup> Unfortunately, the criteria that Cardozo offered for this objectivity were not sufficiently precise to give guidance to those judges who were inclined to strive for objectivity.<sup>530</sup>

In 1958, Professor Henry M. Hart, Jr., and Professor (later Dean) Albert Sacks prepared an original and perceptive set of teaching mater-

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that which ought to be but that which is.' [citing J. GRAY, *THE NATURE AND SOURCES OF LAW* 213 (1909)]; 'Legal norms may have any kind of content.' [citing H. KELSEN, *GENERAL THEORY OF LAW AND STATE* 113 (1946)]." H.L.A. HART, *THE CONCEPT OF LAW* 203 (1961). Hart sees the proposition "that there is no necessary connexion between law and morals, or law as it is and law as it ought to be" as a central thesis of judicial positivism with which he agrees.

He identifies "justice"—at least in the sense of treating like cases alike and different cases differently—as the aspect of morality most relevant to criticism of law. *Id.* at 154-59. Hart adds that "the criteria of relevant resemblances and differences may often vary with the fundamental moral outlook of a given person or society." *Id.* at 158. However, he makes two almost offhand comments which identify the special problem we face in discussing justice and morality within the context of the American constitutional system: (1) "In some systems, as in the United States, the ultimate criteria of legal validity explicitly incorporate principles of justice or substantive moral values . . . ." *Id.* at 199. (2) "Judicial decision, especially on matters of high constitutional import, often involves a choice between moral values, and not merely the application of some single outstanding moral principle. . . ." *Id.* at 200. Our inquiry here fits comfortably within Hart's attenuated positivism. How is this choice to be made, given the principles of justice already incorporated among the constitutional ideas, tensions, and process?

524. For a critical study of these jurists (Gray, Holmes, Frank, Llewellyn, and others), see Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429 (1934). See also J. FRANK, *LAW AND THE MODERN MIND* 264-84 (1930); K. LLEWELLYN, *THE COMMON LAW TRADITION—DECIDING APPEALS* 508-12 (1960); LLEWELLYN, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930); Llewellyn, *Some Realism About realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931).

525. J. FRANK, *COURTS ON TRIAL* 367, 371 (1959).

526. J. FRANK, *LAW AND THE MODERN MIND* 132, 284 (1930).

527. CARDOZO, *supra* note 286, at 136, 171.

528. *Id.* at 115.

529. *Id.* at 106, 121.

530. *Id.* at 112-13, 141, 170.

ials for a course at Harvard Law School in "The Legal Process."<sup>531</sup> They stressed principles and policies of the Constitution, major legislation, and long-standing significant judicial decisions, as starting points for judicial reasoning.<sup>532</sup> So viewed, these afforded objective data for elaborations of the idea of justice in American society. A decade later, sociological studies on the nature of social institutions led Professor Charles Black to suggest that objective decisional content could be derived from constitutional structures, such as the nation-state relationship and the tripartite division of powers provided by the federal Constitution.<sup>533</sup> In the 1970's Professor John Rawls, a moral philosopher, published a full scale analysis of the idea of justice,<sup>534</sup> with attention to American constitutional concerns, and an American lawyer in Blackstone's chair at Oxford, Professor Ronald Dworkin, focused new attention upon the normative content of "rights."<sup>535</sup> Despite these efforts to foster a basis for objective decision according to justice, two generations of American judges since Cardozo have accepted, for the most part, the invitation of the realists to decide in the "gaps" according to their individual lights. Is this the best that can be done? I think not.

To focus the quest for an objective basis of justice or "right" law in constitutional decisionmaking, consider the more extreme positivists'

531. H.M. Hart, Jr. & Albert Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (tentative ed. 1958).

532. *Id.* at 158-60. *See also id.* at 101-02 (discussing Cardozo with respect to conflicting principles in private law).

A linguistic problem lurks in discussion of "principles" and "policies." Hart and Sacks identify a "policy" as "simply a statement of objective. E.g. full employment, the promotion of the practice and procedure of collective bargaining, . . . etc., etc., etc." A "principle," to Hart and Sacks, differs from a "policy" in that beyond stating a result it "asserts that the result *ought* to be achieved and includes, either expressly or by reference to well understood bodies of thought, a statement of *the reasons why* it should be achieved. E.g. *pacta sunt servanda*—agreements should be observed; no person should be unjustly enriched; etc., etc." But both "[p]rinciples and policies, like rules and standards, are general directive propositions" of the particular legal system. They are the basic "guides to the exercise of a trained and responsible discretion . . . the basic devices for controlling as well as may be the most important and the more intractable of the decisions which the circumstances of man in society require to be postponed to the future." *Id.* at 159-60.

But Professor Ronald Dworkin defines principles and policies significantly otherwise. In his latest formulation he writes:

Arguments of principle attempt to justify a political decision that benefits some person or group by showing that the person or group has a right to the benefit. Arguments of policy attempt to justify a decision by showing that, in spite of the fact that those who are benefited do not have a right to the benefit, providing the benefit will advance a collective goal of the political community.

R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 294 (1978). This distinction is at the core of Dworkin's "rights thesis." *See note 592 infra.*

533. C. BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 15 (1969).

534. J. RAWLS, *A THEORY OF JUSTICE* (1971).

535. R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1978). An entire issue of the *Georgia Law Review* was given over to critiques of Dworkin's "rights thesis" by several scholars, including H.L.A. Hart, and Dworkin's rebuttal. *Jurisprudence Symposium*, 11 GA. L. REV. 969 (1977).

solution again. Their view is that "justice" is known only as it is contained in positive law.<sup>536</sup> The realists assume that judges often are making, not merely declaring, law,<sup>537</sup> and that they are generally influenced by a personal concept of policy, or justice.<sup>538</sup> Many realists assume that this personal concept of policy is, like a legislator's, rooted in the utilitarian creed of the greatest good for the greatest number.<sup>539</sup> It is difficult to apply an unalloyed brand of utilitarianism in constitutional law, because of the specific identification in the Constitution of a variety of individual rights entitled to protection against the states and the national government.<sup>540</sup>

I make certain easily conceded assumptions. The starting point of our inquiry is at what Holmes<sup>541</sup> and Cardozo<sup>542</sup> called "gaps" in constitutional law. Where the constitutional language is clear, where the legislative history is compelling, or where there is clear and satisfactory precedent, one finds the *system's* answer of "justice" in the law itself. On this all seem to agree. But where there is less than clarity in these elements the judge, like a legislator, must make a choice. We have examined an array of factors a constitutional judge considers. But these factors are often not, without more, sufficient to compel a judicial choice. For example, should a particular period of constitutional development be arrested, and another direction taken? In such a case, or when the judge seeks, without compelling history or precedent, to define "equality" in a specific situation, what factors of justice can he call on to help him make the "right" or "just" decision?

536. This view would rule out the present inquiry as beyond the proper scope of law in contrast to more moderate positivism of H.L.A. Hart. *But see* note 523 *supra*.

537. Others, not themselves realists, also take this position—Cardozo, for example. *See* note 287 *supra*.

538. Ronald Dworkin suggests a principal concern of American jurisprudence: "How do courts decide difficult or controversial lawsuits?" The question was largely ignored by English legal theory, at least before H.L.A. Hart. R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 3 (1978). Dworkin then suggests that the American realists' mission was to unveil that "judges actually decide cases according to their own political or moral tastes, and then choose an appropriate legal rule as a rationalization," as contrasted with "the orthodox doctrine that judges merely apply existing rules." *Id.*

539. For an interesting discussion of various forms of utilitarianism in a constitutional context of equal protection, see R. DWORKIN, *supra* note 538, at 231-39.

540. This is a main point of Dworkin's and explains his pleasure at Rawls' *A THEORY OF JUSTICE*. Using a form of social contract theory, Rawls rejected utilitarianism in its most prominent forms as an inadequate basis for a theory of justice. J. RAWLS, *supra* note 534, at 183-92.

541. "I recognize without hesitation that judges must and do legislate, but they do so only interstitially; they are confined from molar to molecular motions." *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 211 (1917).

542. CARDOZO, *supra* note 286, at 69, 113, 125.

## A. *Rights*

Take the question of rights, so stressed by Professor Dworkin.<sup>543</sup> If a plaintiff asserts a right that is safeguarded by a specific provision of the Constitution, that may end the inquiry. But perhaps not. There may be a conflict with a different constitutional right asserted by the defendant. Consider the recent conflict between a newspaper's first amendment right to report on a trial and a defendant's right to a fair trial.<sup>544</sup> Or, the question before the Court may involve the arguable outer rim of a right that is itself clearly established. The Supreme Court has recognized the right to appointed counsel by an indigent defendant in a criminal case.<sup>545</sup> This past Term the Court rejected the claim that this right is broad enough to require appointed counsel in a civil case when a court cuts off the parental rights of an indigent parent.<sup>546</sup> On what does the Court draw in making its determination that the right did not extend this extra inch? Even when there is no conflict with another right, a specific, conceded, right may not be granted when other important elements are present which significantly affect the whole society—for example, national security,<sup>547</sup> or public order,<sup>548</sup> or morality,<sup>549</sup> or the proper functioning of the criminal justice system.<sup>550</sup> In considering these other elements the Court is drawing on the concept of justice to curtail specific rights.

## B. *Equality*

Now consider the notion of equality, which in most formulations is placed at the core of an idea of justice.<sup>551</sup> Equality made its explicit entrance into the American constitutional system only in 1868, with the guaranty by the fourteenth amendment of equal protection of the

543. See note 535 *supra*.

544. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976).

545. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

546. *Lassiter v. Department of Social Serv.*, 101 S. Ct. 2153 (1981).

547. This was the underlying premise of the Court's decision in *Dennis v. United States*, 341 U.S. 494 (1951).

548. This concern was stressed in *Heffron v. International Society for Krishna Consciousness*, 101 S. Ct. 2559, 2566 (1981), as a basis for limiting first amendment rights.

549. This was the underlying premise of *Miller v. California*, 413 U.S. 15 (1973).

550. *Linkletter v. Walker*, 381 U.S. 618 (1965). See text accompanying note 371 *supra*.

551. Professor Carl Friedrich finds that "Aristotle's doctrine concerning the relation of justice to equality" is "basic to all thought concerning the problem of justice and law." C. FRIEDRICH, *THE PHILOSOPHY OF LAW IN HISTORICAL PERSPECTIVE* 192 (1958).

Central for his point of view is the proposition that the just must be understood in the sense of the equal. But Aristotle draws the decisive distinction between numerical and proportional equality. Numerical equality equates each man as a unit with each other man. It is what we now ordinarily understand by equality and what we mean when we say that all citizens are equal before the law.

*Id.* at 21.



laws.<sup>552</sup> As the Supreme Court noted in the *Slaughter-House Cases*,<sup>553</sup> this provision was directly pointed to racial discrimination against the new black citizens. The constitutional question of equality usually comes before the Court by a plaintiff's challenge to legislative or executive action that gives social benefits or burdens to some that are not accorded to others. The Court's basic test of the abridgment of constitutional equality (aside from the set of extraordinary cases)<sup>554</sup> has been simply whether the legislature had a rational basis for its legislated inequality. Neither equality, nor equal protection, is assured by the Constitution, said the Court, when a legislature could reasonably make the challenged classification.<sup>555</sup> What considerations of justice led the Court to this attenuation of equality? Then came the Warren Court exceptions to this restrictive view of equality: a state must show a much stronger reason—a compelling state interest—to justify a denial of equality on the basis of race.<sup>556</sup> What basis in justice led the Court to make this differentiation? The reason ultimately given for this expanded equality for black citizens was not a mere notion of justice, but the historical facts that had been cited in *Slaughter-House*,<sup>557</sup> and the outrageous denial of constitutional equality to blacks that the Supreme Court itself had sponsored from *Plessy v. Ferguson*<sup>558</sup> in 1896 to *Brown v. Board of Education*<sup>559</sup> in 1954. Although there is not one line about injustice or constitutional morality in *Brown* itself,<sup>560</sup> the Court soon acknowledged that in using extraordinary remedies, often disadvantageous to non-black citizens in the school cases, it was engaged in a traditional judicial exercise of remedial justice, repairing the equality damaged by past injustice.<sup>561</sup>

552. See notes 319 *supra* & 585 *infra*.

553. 83 U.S. (16 Wall.) 36 (1873). See text accompanying note 52 *supra*.

554. Discussed at text accompanying notes 35, 42-45 *supra*.

555. Hence, the rational basis test, so deferential to legislative judgment. See text accompanying note 32 *supra*.

556. See cases cited in note 35 *supra*.

557. See text accompanying note 52 *supra*.

558. 163 U.S. 537 (1896).

559. 347 U.S. 483 (1954).

560. In discussing the "separate but equal" doctrine in *Brown* the Supreme Court declined to face squarely its change of direction as being impelled by convictions of justice and injustice. It squirmed to find "psychological facts" which established that "separate" public education of black children was in fact "unequal." *Id.* at 494 n.4.

561. From the outset, the extraordinary judicial remedies employed in the school cases following *Brown*, constituted use of the traditional powers of an equity court to remedy past injustices, or, as the Court put it in *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 25 (1971), "to correct past constitutional violations."

A friendly critic made the following comment on this section on equality: "Equality? Is this clear? Is there not room to argue that both Alan Bakke and the blacks admitted [under the preferential admissions program in *Regents of the Univ. of Cal. v. Bakke*, see text accompanying notes 448-72 *supra*] were asserting an interest in equality—Bakke to be treated like all applicants, and the black students to be admitted on a basis that did not carry forward prior discrimination

### C. Remedial Justice

Remedial justice is not entirely the work of the courts. But when state and federal legislative and administrative bodies sponsored their own forms of remedial justice in affirmative action plans, and these forms were challenged, the Court asked itself: What constitutional guideposts can furnish our solution here? Legislative preference? Popular preference? Individualized judicial notions of justice? Why not an objective idea of justice that can be drawn from the American constitutional experience?

On what objective notion of justice did the Court draw in fashioning its determination in *Washington v. Davis*,<sup>562</sup> and its successor cases,<sup>563</sup> that the constitutional denial of equal protection by a state or national government must be proved to be intentional? Neither these decisions, nor *Bakke*,<sup>564</sup> were impelled by text, or established policy, or clear precedent. At most these were classic instances of the Court at the cross-roads, legislating within "gaps." Was the Court at large? Or was there at hand an objective notion of justice to guide its decision in either *Davis* or *Bakke*?

### D. Leading Ideas

With these three traditional elements in hand—rights, equality, and remedial justice—each adapted to the unique requirements of the American constitutional system—a stab at an objective formulation of justice can be made. But something is still missing. It concerns what I called earlier the leading or fundamental ideas of the American constitutional system, something akin to what Hart and Sacks referred to as principles and policies.<sup>565</sup> Some of these appear in the constitutional language,<sup>566</sup> others have evolved by major judicial decision.<sup>567</sup> Can some order, or priority, emerge among these leading ideas? One does not require a rigid hierarchy among them to say that some fundamental ideas are more important than others. Since the constitutional language does not establish such a pecking order, it must derive from other sources. Ultimately, it must be pronounced explicitly, or acted on

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against the class of which they were members? Am I really asking 'equality' in reference to what?" The point is well taken, and my suggestion is that the critical point of reference is found in the society's "leading ideas." See section D. *infra*.

562. 426 U.S. 229 (1976).

563. *City of Mobile v. Bolden*, 446 U.S. 55 (1980); *Arlington Heights v. Metropolitan Hous. Corp.*, 429 U.S. 252 (1977).

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

565. See notes 531-32 *supra*.

566. The equal protection clause is an example. See notes 318 & 523 *supra*.

567. The classic example is the pronouncement of the doctrine of judicial review in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and its continued reiteration and acceptance.

implicitly, by the Supreme Court as the ultimate interpreter of the Constitution.<sup>568</sup> An example is the recent recognition by the Court of a peculiar prominence of the first amendment. Some Justices had frankly called for a "preferred position."<sup>569</sup> Although this particular explicit formulation did not survive, one need only recall the *Pentagon Papers Case*<sup>570</sup> to be reassured that the first amendment does rank unusually high among the leading fundamental ideas.<sup>571</sup>

Similarly, one could fairly expect that the idea of equality—adopted in the Constitution<sup>572</sup> after generations of racial oppression,<sup>573</sup> after a bitter internal war to erase this racial oppression, and after constitutional amendments<sup>574</sup> to prevent carry-over of its vestiges to the "new" nation—would rank high among the leading ideas.<sup>575</sup> The failure of the Supreme Court to recognize this in the last quarter of the 19th century and the first half of the present century, gave new urgency to this

568. This is not the only way a written constitution can operate. France and Switzerland have no comparable judicial review. But it is the basic theory of American constitutional law, accepted since *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). See text accompanying notes 293, 363 & 515 *supra*.

569. The source of this short-lived view was Justice Stone's influential footnote in *United States v. Carolene Prod. Co.*, 304 U.S. 144, 152 n. 4 (1938), discussed in notes 34 & 107 *supra*. See also *Kovacs v. Cooper*, 336 U.S. 77, 88, 90 (1949); *Jones v. Opelika*, 316 U.S. 584, 600 (1942); *Schneider v. Irvington*, 308 U.S. 147, 161 (1939). However, as Justice Frankfurter pointed out in his concurring opinion in *Kovacs*, the doctrine never commanded a majority position on the Court. 336 U.S. at 94-95.

570. *New York Times Co. v. United States*, 403 U.S. 713 (1971).

571. See text accompanying notes 345-55 *supra*.

572. In the fourteenth amendment in 1868. See note 54 *supra*.

The same friendly critic cited in note 561 *supra* responded to this note and the accompanying text: "I guess I'm not sure equality was, or is, adopted in the Constitution." The distinction must be made between the adoption of the idea or goal of equality—which the fourteenth amendment certainly did—and the fulfillment of that idea of equality—which clearly remains unrealized. The suggestion here is that equality, as an adopted idea is a valid and necessary guide to constitutional decisionmaking, a core element of constitutional morality in our legal system. In his interesting study, *Racism, Sexism and Preferential Treatment: An Approach to the Topics*, 24 U.C.L.A. L. REV. 581 (1977), Professor Richard Wasserstrom distinguishes "the way the culture is" from the perspective of "the way things ought to be." And he suggests a third perspective focusing on the question: "What is the best or most appropriate way to move from the existing social realities [racism, sexism, etc.] . . . to a closer approximation of the ideal society." I am proposing that the idea of equality-in-face-of-racism is not simply a valid moral or ethical ideal, but that it has actually been adopted (as an "idea" to be sure), and is a present part of our constitutional materials, crying out to be realized.

573. See text accompanying notes 52, 69 & 71 *supra*.

574. See notes 54, 61 & 319 *supra*.

575. Consider the implications of *Bolling v. Sharpe*, 347 U.S. 497 (1954). In this companion case to *Brown*, the Supreme Court ruled that equal protection of the laws was an ingredient of the fifth amendment's due process clause, and as such was applicable to the federal government and its instrumentalities (public schools in the District of Columbia). The implication of this ruling, to which the Court has consistently adhered, is that the guaranty of equal protection has been in the Constitution from 1791, and that the fourteenth amendment merely applied it to the states. Its specification in the fourteenth amendment, rather than again being subsumed in a "due process" clause, accents the special racial significance given equal protection in *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873). See text accompanying notes 52 & 54 *supra*.

idea of practical racial equality. Undertaking the too long-deferred task to build an America in which divisions—personal, social, political, and economic—would eventually foreswear race as a principle of classification was the great contribution of the Warren Court. One might call it a heritage which its successors hold in trust.<sup>576</sup>

### E. *Constitutional Justice and the Burger Court*

Why has the Burger Court been troubled with this heritage? We have seen some of the reasons: complications presented by the more visible presence of minorities other than blacks;<sup>577</sup> popular resistance to the economic effects of affirmative action;<sup>578</sup> a lingering, if somewhat muted racism;<sup>579</sup> the Court's reluctance to seriously disadvantage majority whites in the course of fulfilling remedial justice to blacks;<sup>580</sup> and the emergence of the newly perceived thrust of equality for women.<sup>581</sup> These are real considerations, although some of them are obviously unworthy. If the objections be faced squarely, do they fairly displace equality-in-face-of-racism as a leading constitutional idea? It is this issue that needs to be addressed frankly by the Court—as an aspect constitutional morality, or constitutional justice. The question of what kind of society we are to become requires a different quality of attention than the Court has given it. First, it must respect as authoritative, the leading ideas to which the society has committed itself but not yet realized. Second, it must address the realities that stand in the way of realizing such an elusive idea as equality-in-face-of-racism now and in the future. For, the Court's mission is to interpret a Constitution in face of future as well as present generations. The Court must directly answer the question and not circumvent it with cant such as present "colorblindness,"<sup>582</sup> and the requirement of proof-beyond-reach of intentional discrimination to make out a constitutional violation.<sup>583</sup>

Constitutional morality requires a conception of justice. This should be not the sum total of conceptions of individual Justices, but one that

576. See Broderick, *Preferential Admissions and the Brown Heritage*, 8 N.C. CENT. L.J. 124, 172 (1977).

577. See text accompanying notes 310, 340 & 449 *supra*.

578. See text accompanying note 476 *supra*.

579. This consideration has been acknowledged in recent Supreme Court opinions. See text accompanying notes 69, 71, & 180-81 *supra*.

580. See *Teamsters v. United States*, 431 U.S. 324 (1977); *United Steelworkers v. Weber*, 443 U.S. 193 (1979); *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

581. By adding women to blacks (and other racial minorities) as classes which are candidates for remedial affirmative action for past discrimination, the degree of disadvantage to white males is increased.

582. The Court has been urged, and obviously was tempted, to a premature invocation of "colorblindness." See text accompanying notes 182 & 469 *supra*. But so far it has wisely abstained from doing so.

583. See note 54 *supra*.

has been fairly proclaimed by the constitutional society. It is central to such a concept of constitutional justice that its leading ideas are ultimately pronounced in operative form not by poll or vote, not by legislature or executive (although these have a contribution to make), but by the constitutional judge—subject only to correction by constitutional amendment.<sup>584</sup>

President Calvin Coolidge is credited with observing, "The business of the country is business." The business of constitutional law is constitutional justice. In our system, to date, pronouncement of these conclusions of justice has been the business of the Supreme Court. The responsibility of that Court, sometimes fulfilled, sometimes not, is to execute its task with a searching eye for an objective constitutional morality.

### EPILOG

Beyond its initial rapportage on the work of the Burger Court in equal protection, this article is work in progress. I raise an old question:<sup>585</sup> Are there arguably objective criteria by which the Court can measure its responsibility and its work where constitutional language gives no clear answer? To answer, "Do justice" or "Enforce rights," obviously only restates the need for specifications and clarity as to the hallmarks of "justice" or "rights" in the American constitutional system.<sup>586</sup> There may be limits to the degree of specification that is available. But lack of clarity is inexcusable.

How much specification may be expected in the search for constitutional morality<sup>587</sup> in the American system? Here is the proper area for further research and debate. The tentative answer of this paper—rooted in its suggestions of tensions and leading ideas—is: far more than is presently given, and probably less than some would prefer.

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584. There is obviously misunderstanding and insensitivity, even at the highest levels of government, of the range of responsibility of a constitutional Justice. On the occasion of Justice Stewart's announced plan to retire, the White House spokesman reiterated a frequently stated position of the President. As reported in the *New York Times*, June 19, 1981, at 6, col. 1, "Today, Larry Speakes, the deputy White House press secretary, said that Mr. Reagan would nominate someone who shared with the President 'one key view: the role of the courts is to interpret the law, not to enact new law by judicial fiat.'"

The same news report recalled: "Mr. Reagan has been highly critical of recent Supreme Court decisions. At a news conference early last year he said that the public 'had seen the Supreme Court override public opinion' on such issues as school prayer, school desegregation and the treatment of criminals. Each time, he said, 'Our great respect for the Court shielded those Justices who put themselves above the law.'" *Id.*

585. The question was pressed a generation ago in a frequently cited, if largely unproductive, article, Wechsler, *Toward Neutral Principles of Constitutional Law*, 75 HARV. L. REV. 1 (1959).

586. See A. ROSS, *ON LAW AND JUSTICE* (1959). "[T]o invoke justice is the same thing as banging on the table." *Id.* at 274.

587. See text accompanying notes 296 *supra* & 590 *infra*.

As to clarity, the first step is to recognize that the responsibility of the Supreme Court in the American constitutional system does not depend upon a general theory of law such as H.L.A. Hart and Dworkin have been disputing with great profit to all.<sup>588</sup> Even positivists recognize that constitutional clauses such as "due process" and "equal protection" have moral content.<sup>589</sup> The crucial task is to identify the criteria *our constitutional system* recognizes and accepts for fixing the content of constitutional law.<sup>590</sup> I have argued that these criteria (or "rules of recognition") may take account of explicit leading ideas and tensions, or those which have evolved in our 200 years of constitutional history. These suggestions are skeletal. Further work is necessary on the operative effect of tensions and the method of identifying the leading ideas, but the task is not as impossible as Dworkin suggests.<sup>591</sup> Dworkin makes an important contribution in arguing (against a utilitarian tilt) for a primacy of individual rights.<sup>592</sup> But he offers little clarity in respect of criteria for permissible limitation of these rights, or for dealing with a conflict of rights. It may be that no sharp criteria are often available. But Dworkin insists nonetheless that each case has "one right answer" which a proper judge should identify.<sup>593</sup> The problem, I believe, is that he wants to solve constitutional problems with a theory of general law. Once we recognize that the American constitutional system assigns a limited political choice (theory of tensions)<sup>594</sup> to the Supreme Court, the need for one right answer dissolves. Even at the same moment in history different views, say as to federalism or separation of powers, would be within constitutional "rightness" markers.

The second point as to clarity is that there is no excuse for obfusca-

588. See text accompanying notes 523 & 535-40 *supra*.

589. H.L.A. HART, *THE CONCEPT OF LAW* 199 (1961). See note 523 *supra*.

590. This statement accepts, provisionally, Hart's "rule of recognition" analysis. See text accompanying note 399 *supra*. I have referred to this total task as realization of constitutional morality. See text accompanying note 296 *supra*. Interestingly, Dworkin at one point identifies "constitutional morality" as "the justification that must be given for its constitution as interpreted by its judges." R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 126 (1978). But he still denies Hart's "rule of recognition" thesis. *Id.* at 59-60.

591. R. DWORKIN, *supra* note 590, at 28-31, 64-68. I am assuming that Dworkin would raise the same objections against "leading ideas" that he makes as to principles.

592. In a choice chapter, Dworkin uses his "rights thesis" against utilitarian arguments to justify affirmative action against a "reverse discrimination" challenge. *Id.* at 223-39. Briefly, Dworkin's "rights thesis" proposes that "judicial decisions in civil cases . . . characteristically are and should be generated by principle not policy." *Id.* at 84. For Dworkin's special definitions of "principles" and "policy," see note 532 *supra*.

593. R. DWORKIN, *supra* note 590, at 279-90, 331-38.

594. See text accompanying notes 299-344 *supra*. As restrained a jurist as Justice Jackson supports this view. R. JACKSON, *THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT* 53-83 (1955). The theory of tensions proposed here does not foreclose the possibility that the government vs. individual (or group) tension should be, as Dworkin suggests, heavily tilted to individual and group rights.

tion, arcaneness, or dissimulation in constitutional law.<sup>595</sup> The Supreme Court makes choices in its decisions that affect the basic concerns of the people of the United States. The minimum requirement is that the Justices understand and express clearly and openly the criteria used in their decisions. Cardozo wrote in language the public can understand.<sup>596</sup> So did Jerome Frank.<sup>597</sup> To a remarkable degree so does H.L.A. Hart.<sup>598</sup> But all these purported to be writing on general law. There is a present demand for authoritative writing in general constitutional law that is comprehensible to non-professionals. There is no want of think pieces by constitutional lawyers in the law reviews, triggered by concern with particular decisions of the Court.<sup>599</sup> Such special pleading articles have drawn out some thoughtful responses.<sup>600</sup> But this literature, such as it is, deals only with fragments of constitutional law. Furthermore, these fragments are pointed to professionals, even to specialists among professionals.<sup>601</sup> The crucial constitutional overviews are left to theorists of general law.<sup>602</sup> The public is left

595. A proper emphasis on clarity for public consumption would undoubtedly purge, for example, such nuances as Dworkin's suggestion that a judge should either lie, or resign, when the answer he finds in authoritative legal materials is contrary to "strong" reasons supplied by "background moral rights." In such case, says Dworkin, the judge may have "a moral duty to do what he can to support these rights." But Dworkin insists, somewhat mysteriously, that he would not "make this lie a matter of jurisprudential theory." R. DWORKIN, *supra* note 590 at 327.

596. See B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921). See also text accompanying notes 286-89, 294-96 & 365-68 *supra*.

597. See J. FRANK, *LAW AND THE MODERN MIND* (1930), *passim*; J. FRANK, *COURTS ON TRIAL* (1959), *passim*. See also notes 524-26 *supra*.

598. See H.L.A. HART, *THE CONCEPT OF LAW* (1961), *passim*. See also note 523 *supra*.

599. The following recent "jurisprudential" articles on constitutional law are illustrations of this point, being in whole or large part responses to the Supreme Court's perceived excess in its 1973 abortion decision: Ely, *"The Wages of Crying Wolf": A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973) (but compare his later articles cited in the next note); Monaghan, *The Supreme Court 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975) (to which compare Schrock and Welsh, *Reconsidering the Constitutional Common Law*, 91 HARV. L. REV. 1117 (1978)); and Monaghan, *Of "Liberty and Property"*, 62 CORNELL L.J. 405 (1977). A comparable volley of legal literature followed upon the controversial race, criminal justice, and reapportionment decisions of the Warren Court, and the affirmative action issues presented to the Burger Court.

600. See, e.g., J. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980); Ely, *Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5 (1978); Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399 (1978); Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843 (1978); Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975).

601. The debate recounted in notes 599-600 has produced new and unhelpful jargon for which there is neither need nor previous authority: (1) the suggestion of a "constitutional common law" in which Congress may override all but core policies underlying constitutional decisions of the Court, see Monaghan, and Schrock and Welsh *supra* note 597, and (2) suggestions of "interpretative" review, somewhat allied to the concept of "constitutional common law," which would limit the authority of the Supreme Court to enforcing express or clearly implicit (whatever that means in the context of "due process" and "equal protection") language of the Constitution. The authors cited do not agree on what "noninterpretative" means, except that the Supreme Court has more authority than the "interpretative" theory would allow it.

602. While Hart mentions it only in passing, see note 523 *supra*, Dworkin is obviously at home

outside, with little to "look in" at.

An original American legal realist,<sup>603</sup> Justice Douglas, after thirty-six years on the Court, wrote these words defensively rather than critically: "The truck drivers and field hands of the nation cannot be expected to understand subtle constitutional nuances."<sup>604</sup> It is high time that constitutional law, which governs their lives, be written so they can.

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with American constitutional law. But he does not undertake a special constitutional theory, opting for a general theory of law.

603. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1257 (1931).

604. W. DOUGLAS, *THE COURT YEARS* 278 n.18 (1980).