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CONSTITUTIONAL POLITICS: AFFIRMATIVE ACTION AND SUPREME PROCESS

ALBERT BRODERICK*

INTRODUCTION

In its narrowest focus this article asks questions as to the likely outcome of two cases currently before the Supreme Court, which may well be decided before this is read. The subject of these two cases—affirmative action—has been highly controversial and has found the Court often hesitant and indecisive. En route to considering the predictability of results in these cases—quite a different question from my perception of desirability—I shall directly confront that past indecisiveness, and ask why. Many others have done this. In its brief history affirmative action had drawn unusual attention from academic lawyers, philosophers, and moralists. My interest is in the Supreme Court, and how it goes about deciding such cases where the body politic is divided. The answer suggested here I designate—following distinguished commentators who served on the Court—as “constitutional politics.”¹

Deeply instilled in the legal profession is the cherished notion that everything surrounding the Constitution, including its interpretation, is—or should be—ordered by “law.” Of course, the widest differences exist among academic lawyers writing in the constitutional field as to what this “law” of interpretation should be. Nevertheless, I have been warned by eminent members of this fraternity/sorority that description of the interpretative function of the Supreme Court as “constitutional politics” will be widely (and perhaps deliberately) misunderstood. As a minimum, they suggest, I should warn up front just what I intend by “constitutional politics.” Fair enough.

What I do not mean, of course, is partisan politics. What I do try to develop in the course of this article is that beyond this exclusion, the politics of constitutional interpretation has included such a wide range as nation-states politics, separation-of-national-powers politics, race politics, sex politics, fair-trial politics, extension-of-the-franchise politics, economic-theory politics, consensus politics, and fairness politics—yes, and affirmative action politics (which combines many of these).

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1. See *infra* text accompanying notes 15-18.

No one of these accounts for the variety of conflicting interpretations by the Supreme Court across its history. Consensus politics might explain the Court's sex decisions down to the 1970's, and its race decisions down to 1954. But in no way can it account for the unpopular criminal justice decisions of the 1960's, or the often minority-friendly decisions in the *Brown* era, following 1954.² Nor has it been established to general satisfaction that any of these sets of decisions is clearly rooted either in constitutional text or in demonstrable framers' intent. It is already evident that it is no part of the constitutional politics thesis developed here that the "politics" used by a particular Supreme Court in pronouncing "constitutional law" is either good or bad. Nor does the thesis consider the question whether there is, or is not, a better way to run our constitutional system. The constitutional politics thesis is purely descriptive. Evaluation of the performance of the Court—the Court of today, or across its 200-year history—is the next step, saved for another day.

Last Term the Supreme Court heard and decided three affirmative action cases.³ The central question in these cases was—let's face it—whether affirmative action had a future. The United States Department of Justice had mounted a relentless attack on any racial preference in an employment program that did not benefit a specific victim of identified racial discrimination. This campaign was fueled by some language in the majority opinion in *Firefighters Local Union No. 1784 v. Stotts*⁴ in 1984, and the Solicitor General entered the three 1986 affirmative action cases on behalf of the United States to persuade the Supreme Court to administer the final lethal blow.

In the first of these 1985 Term decisions, *Wygant v. Jackson Board of Education*,⁵ the Supreme Court reversed the Sixth Circuit Court of Appeals which had approved a provision of an affirmative action plan a union had negotiated with a public school board. Since the provision in question resulted in failure to recall from layoff a more senior white teacher, and there had been no findings of past discrimination that met previous standards set by the Court, the *Wygant* reversal was neither unexpected, nor especially damaging, in fact quite the opposite. In the opinions reversing the Sixth Circuit, a majority of the Court used language that seemed to reaffirm the availability of an affirmative action

2. The Court was well aware that it was moving in advance of majority opinion—certainly in the south—when it issued its unanimous opinion in *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). See W. DOUGLAS, *THE COURT YEARS (1939-1975)*, *THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS* 113-15 (1980). A similar point can be made for the criminal justice decisions of the Warren era. See *infra* text accompanying notes 88-93.

3. *Wygant v. Jackson Bd. of Educ.*, 106 S. Ct. 1842 (1986); *Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC*, 106 S. Ct. 3019 (1986); *Local Number 93, Int'l Ass'n of Firefighters, v. City of Cleveland*, 106 S. Ct. 3063 (1986).

4. *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984).

5. *Wygant v. Jackson Bd. of Educ.*, 106 S. Ct. 1842 (1986).

plan under title VII as a remedy for past racial discrimination, even as to persons who were not themselves "specific victims" of the identified racial discrimination.

In *Local 28 of Sheet Metal Workers' International Association v. EEOC*⁶ and *Local Number 93, International Association of Firefighters v. City of Cleveland*,⁷ the Supreme Court made clear, even if by narrow margins, that it rejected the current Department of Justice position on affirmative action. In *Sheet Metal Workers*, as eight years earlier in *Regents of the University of California v. Bakke*,⁸ Justice Powell's opinion was controlling. The Court divided 5-4 in upholding under title VII the court-ordered affirmative action plan in face of egregious past discrimination. According to Justice Powell, neither the *Stotts* decision, nor any bar from title VII or the equal protection clause, prevented the district court from establishing an affirmative action plan that benefited non-victims in the circumstances shown there.⁹

In *Local Number 93*¹⁰ the Court, this time by a 6-3 vote, rejected a second contention that the Department of Justice claimed was implicit in *Stotts*: that a consent decree could not embody relief beyond that which a district court could order after full trial of a case. The Court, in an opinion by Justice Brennan, found that the underlying policy of title VII in favor of voluntary settlement negated this contention.¹¹ However, the

6. *Sheet Metal Workers*, 106 S. Ct. at 3054 (opinion of Brennan, J., joined by Marshall J., Blackmun, J., and Stevens, J.), 3054-57 (Powell, J., concurring in part and concurring in the judgment).

7. *Local Number 93*, 106 S. Ct. at 3077. (Justice Brennan's opinion of the Court was joined by Justices Marshall, Blackmun, Powell, Stevens and O'Connor.)

8. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). In this case a majority of the Justices spoke for the first time on the question whether an affirmative racial preference could be constitutional under the equal protection clause. Justice Powell maintained that a strict "compelling state interest" test must be met to justify use of such a "benign" discrimination, and illustrated situations which could satisfy the test. Justice Brennan (joined by Justices White, Marshall and Blackmun) would have subjected a racial preference to a less demanding constitutional test. Most courts of appeal accepted the Powell opinion, the highest common denominator of a majority of the Court, as controlling, pending further word from the Supreme Court. The Court's cautious approach in *Bakke* to the question of the constitutionality of affirmative action was underscored by the fact that four Justices did not deal with the constitutional issue. Of the Court majority which directed Bakke's admission to Davis Medical School, affirming the judgment of the California Supreme Court, only Justice Powell reached the equal protection issue. The other four Justices relied solely on title VI of the Civil Rights Act of 1964. 42 U.S.C. § 2000d (1982).

9. *Sheet Metal Workers*, 106 S. Ct. at 3055:

The finding by the District Court. . . that petitioners have engaged in egregious violations of Title VII [of the Civil Rights Act of 1964] establishes, without doubt, a compelling governmental interest sufficient to justify the imposition of a racially classified remedy. . . . My inquiry, therefore, focuses on whether the District Court's remedy is 'narrowly tailored'. . . to the goal of eradicating the discrimination engaged in by petitioners. I believe it is.

Id.

10. *Local Number 93*, 106 S. Ct. 3063 (1986).

11. The Court acknowledged that a consent decree was at the same time a judicial order and a voluntary agreement as to the relief embodied therein. However, the predominant note of a consent decree was its voluntary element. *Id.* at 3072. Hence, it was not to be tested by the same standards

Court did not pass on the appropriateness of the affirmative relief made available in *Local Number 93*, either as to hiring or promotions, and remanded the case for the district court's reconsideration.

Within ten days of the decisions in *Sheet Metal Workers* and *Local Number 93* the Supreme Court granted certiorari in two affirmative action cases which had been on its docket for over six months: *United States v. Paradise*,¹² and *Johnson v. Transportation Agency, Santa Clara County, California*.¹³ These two cases raise questions about affirmative action which the Court did not address in its carefully qualified opinions in the 1985 Term cases. This article will consider these two cases now before the Court in light of *Wygant-Sheet Metal Workers-Local Number 93*, the earlier affirmative action cases in the Court,¹⁴ and contemporary Supreme Court process. The design will be to accentuate the elements of this process that shed light on the likely resolution by the Court of the 1986 Term cases (*Johnson* and *Paradise*), and consequently on the immediate future of affirmative action.

I. THE THESIS OF CONSTITUTIONAL POLITICS

In the memorable posthumous study, *The Supreme Court in the American System of Government*,¹⁵ Supreme Court Justice Robert H. Jackson referred to the Supreme Court "as a political institution arbitrating the allocation of powers between different branches of the Federal Government, between state and nation, between state and state, and between majority government and minority rights."¹⁶ Justice Benjamin Cardozo anticipated Jackson's point after serving eighteen years on New York's

under title VII (§ 706(g)) as a non-voluntary judicial order. The Court did not pass on the appropriateness of the affirmative relief made available in *Local Number 93*. It simply held that "whether or not 706(g) precludes a court from imposing certain forms of race-conscious relief after trial, that provision does not apply to relief awarded in a consent decree." *Id.* Justice O'Connor underscored in her concurring opinion that "The Court leaves open the question whether the race-conscious measures provided for in the consent decree at issue here were permissible," whether under title VII or equal protection. *Id.* at 3080 (O'Connor, J., concurring).

12. *Paradise v. Prescott*, 767 F.2d 1514 (11th Cir. 1985), cert. granted sub nom. *United States v. Paradise*, 106 S. Ct. 3331 (1986).

13. *Johnson v. Transportation Agency, Santa Clara County, Cal.*, 748 F.2d 1308 (9th Cir. 1984), cert. granted, 106 S. Ct. 3331 (1986).

14. Notably, *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Steelworkers v. Weber*, 443 U.S. 193 (1979); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984).

Broderick, *Affirmative Action After Stotts: The United States Supreme Court's 1985 Term*, 15 N.C. CENT. L.J. 145, 186-89 (1985), reports a sampling of the affirmative action literature up to 1985. Three subsequent articles of interest are Abram, *Affirmative Action: Fair Shakers and Social Engineers*, 99 HARV. L. REV. 1312 (1986) (against affirmative action); Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327 (1986) (for affirmative action); and Sullivan, *Sins of Discrimination; Last Term's Affirmative Action Cases*, 99 HARV. L. REV. 78 (1986) (a brief evaluative report on *Wygant-Sheet Metal Workers-Local Number 93*).

15. R. JACKSON, *THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT* (1955).

16. *Id.* at 9.

highest court and ascending to the United States Supreme Court: "it [the New York Court of Appeals] is a great common law court; its problems are lawyers' problems. But the Supreme Court is occupied chiefly with statutory construction. . . and with politics."¹⁷ Justice Jackson, in recalling Cardozo's comment, stressed that "he used politics in no sense of partisanship but in the sense of policy-making. His remarks point to some features of the federal judicial power which distinguish it from the functions of the usual law court."¹⁸

In twenty years of teaching constitutional law to second year law students, I have stressed that there are significant differences between the private law courses they studied in their first year and the study of constitutional law. On rereading Jackson and Cardozo I propose that the Supreme Court's approach to interpretation of the Constitution is not merely "significantly" different than the judicial process of common law judges, but in major areas "totally" different.¹⁹ This modest overstatement is more defensible than encouraging the unbelievable dogma that "law" is "law," and that "constitutional law" is merely a slightly "tuned up" variety. In this section I hope to make the case (with Justices Jackson and Cardozo) that when we consider how the Supreme Court interprets the Constitution the subject at hand is "Constitutional Politics."

In presenting this thesis of "Constitutional Politics" my aim is modest

17. *Id.* at 59.

18. *Id.*

19. From time to time in the course of this article I shall make reference to "the Academy." In general, the term "Academy" refers to scholars writing in various fields of scholarship. Ordinarily in Anglo-American law "the Academy" connotes those academic lawyers who occupy themselves with general legal theory. A constitutional scholar understands the doctrine of judicial review to refer to a court's (notably the Supreme Court's) power to nullify a statute or other governmental act that it sees as in conflict with a provision of the Constitution—a doctrine that has been in place since *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), see *infra* text accompanying notes 23-30. There is a kinship between general legal theory, especially that part dealing with judicial decision-making, and the doctrine of judicial review in constitutional law. But there is an obvious difference. Whereas judge-made case law in areas of general law can be overridden by the legislature, the consequences of judicial review in constitutional law are ordinarily not subject to such easy reversal by democratic process. Furthermore, the still dominant general legal theory in American law, is legal positivism—particularly the moderated positivism of the English academic lawyer, H.L.A. Hart. Hart insists that the central thesis of legal positivism is "that there is no necessary connexion between law and morals, or law as it is and law as it ought to be." H.L.A. HART, *THE CONCEPT OF LAW* 203 (1961). Yet Hart expresses significant reservations as to the application of his general theory to the American constitutional system: "In some systems, as in the United States, the ultimate criteria of legal validity explicitly incorporate principles of justice or substantive moral values. . . . 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 199-200. Those academic lawyers who have been content to approach non-constitutional case law, and constitutional decision-making, with the same general theory of law, have understandably sown confusion. These include such eminent legal theorists as Karl Llewellyn, the paradigm of Legal Realists, see *infra* note 406, and Ronald Dworkin, who has almost single-handedly injected new life into contemporary American jurisprudence, see *infra* note 424. For these reasons, when I speak of "the Academy" in this article I shall generally concentrate on scholars who treat constitutional law-making as a special case. See *infra* notes 404 and 414.

and descriptive, not judgmental. I neither defend nor attack here particular results the Court has reached. I insist merely that the most important work of the Supreme Court throughout its history has been to decide "political questions in legal form."²⁰ The "Constitutional Politics" thesis serves to explain, rather than to justify, to lay citizens and law students as well as lawyers, the mixed track record of the Court. It also provides a necessary first step for lawyers and clients, and lower court judges as well, to predict how the Supreme Court is apt to rule in cases it undertakes to decide. In our present context, this has particular application to the affirmative action cases the Court has docketed for the current 1986 Term. In short, without understanding the reality and the legitimacy of "politics"²¹ in Supreme Court process there is small hope of rescue from scepticism and disillusionment, and no answer to much of the nonsense currently promulgated as constructive criticism of the Supreme Court's supposed "departure" from traditional judicial norms by a flurry of "activist" decision-making.²²

In support of the "Politics" thesis I shall recall four major and familiar lines of decisions that are inexplicable on any principle other than the changing politics of the Supreme Court. The first deals with the Supreme Court's early assertion of its primacy and finality in interpreting the Constitution in relation to the Congress and the Executive, the other two federal centers of power established by the Constitution. The second concerns the Court's marking of the constitutional boundaries between federal and state power. One can hardly conceive of questions more political than these. The third and fourth areas of my present inquiry deal with collisions between individual rights and governmental power (federal or state) in interpretation of the due process and the equal protection ele-

20. JACKSON, *supra* note 15, at 55.

21. The term "constitutional politics" has been used in recent legal scholarship, but generally with a different signification than Jackson's, Cardozo's, and mine in this article. For example, Bruce Ackerman speaks of "constitutional politics" as direct action by "the people" when they rise up (as it were) and speak out decisively on a matter of supreme national importance. His chief example is the New Deal's overthrow of the Court's laissez-faire constitutionalism. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1053 (1984).

In responding to Laurence Tribe's criticism of his theory of the Supreme Court's role in the constitutional amendment process, Walter Dellinger speaks somewhat derisively of "constitutional politics". He constrasts it with "constitutional law," which is the proper business of the courts. Dellinger, *Constitutional Politics: A Rejoinder*, 97 HARV. L. REV. 446, 448-49 (1983). Frank Michelman comes closer to what Jackson and Cardozo intended by "constitutional politics" when he concludes his most recent article by referring to the Supreme Court as a collegial arena of "dialogue" for "the politics of law." Michelman, *Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 65 (1986). In note 225 *infra* I consider the use of the term "jurisprudential politics" by the French academic lawyer, Maurice Hauriou, in a sense close to "constitutional politics" as discussed in this article.

22. See, e.g., *infra* notes 404 and 409, which summarize recent attacks on the Supreme Court and the American law schools by Attorney General Edwin Meese, and Assistant Attorney General William Bradford Reynolds.

ments of the fifth and fourteenth amendments. Whereas the first two deal directly with competing claims of governmental bodies, these last two confrontations find the Court struggling with questions no less political, the majoritarian claims of governmental power and the counter-majoritarian assertions of express or implied limitations upon the exercise of governmental power.

1. The Supreme Court's Assertion of Its Primacy As Interpreter of the Constitution—*Marbury v. Madison* (1803)²³

So persuasive was Chief Justice Marshall's defense of the inevitability of the doctrine of judicial review in *Marbury v. Madison* in 1803²⁴ that much constitutional literature accepts it as an undeniable and inevitable aspect of the "judicial power of the United States" which was vested in the Supreme Court by article III of the Constitution.²⁵ According to Marshall the doctrine of judicial review requires a federal court in deciding a particular case to measure a challenged governmental act or statute against the Constitution and refuse to enforce it if, in the court's view, the act or statute is contrary to the Constitution.²⁶ No matter that the Congress which passed the federal statute in dispute in *Marbury* was composed of many members who had framed the Constitution, and that this Congress had concluded that the statute was valid. Marshall stated "It is emphatically the province and duty of the judicial department to say what the law is,"²⁷ and by "law" Marshall "emphatically" included the meaning of the constitutional language and whether a governmental act trespassed upon the Supreme Court's construction of a relevant passage of the Constitution.

Neither the express constitutional language ("judicial power of the United States") nor the proceedings of the Constitutional Convention (which did not become available until 1840)²⁸ required this broad assertion of judicial supremacy. Truly, this bold assertion in *Marbury*, the Supreme Court's earliest major adventure in political decision-making, however plausible, was a blow struck in its own behalf. Despite the establishment by the Constitution of three separate governmental powers

23. 5 U.S. (1 Cranch) 137 (1803).

24. *Id.* at 178.

25. "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." U.S. CONST. art. III, § 1.

26. *Marbury v. Madison*, 5 U.S. (1 Cranch) at 177-78.

27. *Id.* at 177.

28. "The framers' agreement not to publicize the proceedings of the Constitutional Convention for 50 years—a silence broken only in 1840 with the appearance of James Madison's journals—guaranteed that the crucial earliest discussions of their handiwork would be handicapped by the inaccessibility of the context and intention of the Philadelphia debates." Kennedy, Book Review, *The N. Y. Times Book Rev.*, Sept. 14, 1986, at 11, col. 1.

without any statement of preeminence among them, the Court in *Marbury* set in motion a precedent of enduring political significance, which it has since reinforced.²⁹ Not until the infamous *Dred Scott v. Sandford*³⁰ decision in 1856 did the Supreme Court declare another act of Congress unconstitutional. However, the foundation stone was laid in *Marbury* for the extensive use by the Supreme Court in its second century of its doctrine of judicial review to declare acts of federal and state governments unconstitutional.

2. National Legislative Powers vs State "Police Power": The Eventual Predominance of Another Major Political Decision of Chief Justice Marshall

In article I, section 8 the Constitution enumerates the legislative powers allocated to Congress. These did not include the power to establish corporations, or a national bank. However, in *McCulloch v. Maryland*³¹ another landmark opinion, Chief Justice Marshall upheld Congress' creation of the second Bank of the United States. Marshall stated that in addition to its specifically enumerated powers Congress constitutionally "might employ those [means] which, in its judgment, would most advantageously effect the object to be accomplished"³² (i.e. as set out in a power enumerated in article I, section 8).³³

The post-Marshall Supreme Courts swung constitutional policy towards favoring states exercise of their legislative power (called the "police power")³⁴ in face of the broad allocation to Congress of power to regulate commerce among the several states. Congress did not enact significant national economic statutes until the Interstate Commerce Act³⁵ in 1887 and the Sherman Anti-Trust Act³⁶ in 1890. From 1895 to 1937, with certain exceptions, the Supreme Court trimmed down congressional exercise of the "commerce power." For example, the Court excluded national regulation of enterprises engaged in manufacturing and mining.³⁷

29. *United States v. Nixon*, 418 U.S. 683 (1974); *Cooper v. Aaron*, 358 U.S. 1 (1958); see *infra* note 377.

30. 56 U.S. (19 How.) 393 (1856).

31. 17 U.S. (4 Wheat.) 316 (1819).

32. *Id.* at 419.

33. "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *Id.* at 421.

34. The term "police power" embraced state legislation to regulate in areas of health, safety, welfare and morals. In the mid-19th century years the "police power" of the states was used as a counterfoil to the powers granted by the Constitution to Congress under article I, section 8. See *infra* text accompanying notes 374-75 for Justice Jackson's comment on this development.

35. Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887) (codified at 49 U.S.C. § 1 (1982)).

36. Sherman Anti-Trust Act, ch. 647, 26 Stat. 209 (1890) (codified at 15 U.S.C. § 1 (1982)).

37. *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *Hammer v. Dagenhart*, 247 U.S. 251 (1918); and *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895), exemplify this development.

The weight of the Supreme Court of this period was thrown against national regulation in favor of permitting such enterprises to be regulated, if at all, by the states. Far distant from the broad national theme of Chief Justice Marshall in *McCulloch v. Maryland*³⁸ was this substitution of judicial for congressional judgment as to the "appropriate" scope of the commerce clause, and the Court's citation of the tenth amendment³⁹ as an express constitutional limitation upon the exercise by Congress of its specified legislative powers. This political turn of the Supreme Court ultimately led to its face-to-face confrontation with the unprecedented national program of regulation enacted by the Roosevelt-dominated Congresses of 1933-1936.

The so-called Roosevelt "court-packing" plan of 1937⁴⁰ was directed at the "political" shift of the Supreme Court away from the Marshall view of broad congressional legislative power. Although the Roosevelt proposal to add members to the Supreme Court failed, beginning in 1937 the Supreme Court made still another "political" change of direction. The early Marshall measure of national legislative power was reinstated. In a series of cases culminating in two decisions upholding the Fair Labor Standards Act of 1938⁴¹ and the second Agricultural Adjustment Act of 1936,⁴² reinforced by two decisions upholding (on commerce clause grounds) the Civil Rights Act of 1964,⁴³ the Supreme Court accepted the minimal "rational basis" standard of review in passing on the constitutionality of congressional enactments under the commerce clause.⁴⁴

Oddly enough, even the pre-Roosevelt Court with all its hostility to

38. 17 U.S. (4 Wheat.) 316, 421 (1819).

39. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. AMEND. X.

40. On February 5, 1937, at the beginning of the second month of his second term (which he had won with the loss of but two states) President Roosevelt sent a proposed bill to Congress which, if passed, would have permitted him to name up to six additional members of the Supreme Court. S. Rep. No. 711, 75th Cong., 1st Sess. (1937) (Reorganization of the Federal Judiciary—Adverse Report of the Committee on the Judiciary). See *infra* note 394.

41. *United States v. Darby*, 312 U.S. 100 (1941).

42. *Wickard v. Filburn*, 317 U.S. 111 (1942).

43. 42 U.S.C. § 2000e (1982); *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964).

44. Since the advent of the Roosevelt Court (see *infra* note 76), the Supreme Court has sought to repel any suggestion that it merely substitutes its judgment for that of a legislature by using an carefully orchestrated system of graduated interest analysis.

A unanimous opinion of Justice Marshall in *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981), attests the continued viability of this standard:

The court must defer to a congressional finding that a regulated activity affects interstate commerce, if there is any rational basis for such a finding. *Katzenbach v. McClung*, 379 U.S. 294, 303-04 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964). This established, the only remaining question for judicial inquiry is whether 'the means chosen by [Congress] must be reasonably adapted to the end permitted by the Constitution.' The judicial task is at an end once the court determines that Congress acted rationally in adopting a particular regulatory scheme.

congressional regulatory legislation, upheld in the broadest possible terms Congress' power under article I, section 8 to pass taxing and spending legislation "for the general welfare," with minimal judicial review as to Congress' determination of what constituted the "general welfare."⁴⁵ The "political" decision of the Court to forego judicial oversight of Congress' power under the "taxing and spending" clause has been almost total in the half century since the *United States v. Butler*⁴⁶ case.

Two separate "political" turnarounds by the Burger Court with respect to Congress' legislative power to regulate states in their functions as states have cancelled each other out, leaving congressional power seemingly as broad in regulating state activities as in regulating private activities under the commerce power.⁴⁷

The current Supreme Court, with the sole exception of the "states as

Id. at 276.

In *City of Cleburne v. Cleburne Living Center*, 105 S. Ct. 3249 (1985), Justice White summarized the current state of the catalog of equal protection formulas in delivering the opinion of the Court:

The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. . . . The general rule gives way, however, when a statute classifies by race, alienage or national origin. These factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others. For these reasons and because such discrimination is unlikely to be soon rectified by legislative means, these laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest.

Id. at 3254-55. The opinion goes on to point out that the Court has developed intermediate tests for gender, *see infra* notes 165-68, and illegitimacy, *but see infra* note 149, and declined to do so for discrimination based on age, or on mental retardation (a conclusion of *Cleburne* itself). *Id.* at 3255-58. The Court's determination of which test is appropriate for a particular form of discrimination is, of course, crucial for purposes of judicial review.

45. *United States v. Butler*, 297 U.S. 1 (1936).

46. In *Butler* the Court stated that "the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution." *Id.* at 66. In a controlling opinion in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), Chief Justice Burger upheld a racial preference set-aside under the spending power. *See infra* text accompanying notes 260-66. However, he declined to "explore the outermost limitations on the objectives attainable [by] the Spending Power," observing that its reach was "at least as broad as the regulatory powers of Congress," and that these furnished ample basis to sustain the program. *Fullilove*, 448 U.S. at 475.

47. *Garcia v. San Antonio Metro. Transit Auth.*, 105 S. Ct. 1005 (1985); *National League of Cities v. Usery*, 426 U.S. 833 (1976); *Maryland v. Wirtz*, 392 U.S. 183 (1968). In the earliest of these cases the Court upheld application of the requirements of the Fair Labor Standards Act to state functions. In the second the Court overruled *Maryland v. Wirtz*, limiting the effect of Congressional legislation which bore upon the "states as states" so as to burden the exercise of their governmental functions. Then, only nine years later, the Court overruled *National League of Cities v. Garcia*. The current deep political differences on the Court with respect to the federal-state power allocation are made unmistakably clear in the vituperative *Garcia* opinions, which underscore the traditionally fragile adherence of the Court to *stare decisis* in constitutional decisions. Justice Powell's dissent merely complains that "The stability of judicial decision, and with it respect for the authority of this Court, are not served by the precipitous overruling of multiple precedents that we witness in this case." *Garcia* 105 S. Ct. at 1022. However Justice Rehnquist's dissent seems to forecast and justify further departure from *stare decisis*: "I do not think it incumbent on those of us in dissent to spell out

states" question,⁴⁸ has been in agreement on the practical acceptance of the John Marshall test of expansive congressional power. The Court has implemented this political decision by embodying it in a minimal "rational basis" test⁴⁹ for measuring the constitutionality of congressional legislation. The result, following the Court's post-1937 work habits, is embodied in a Court-created formula of "law." But the legal formula merely conveys the Court's political decision that the Constitution "requires" the recognition that close judicial oversight is not feasible with respect to measures passed by the deliberative bodies of the United States Congress in which all fifty states are represented. However, the equal protection clause may open up other possibilities for judicial review⁵⁰ even in economic matters. And when individual personal rights are in contest even congressional legislation will be more carefully scrutinized by the Court, as the next two sections will attest. Here too, the Court's political choices, much contested by some, dictate and underlie the Supreme Court's constitutional decisions.

3. Constitutional Limitations of Governmental Power #1: The Due Process Clauses of the Fifth and Fourteenth Amendments

The constitutional injunction that "No person shall. . .be deprived of life, liberty, or property, without due process of law"⁵¹ entered the American Constitution as an element of the multi-faceted fifth amendment, one of the ten amendments adopted as a package in 1791 and known collectively as the Bill of Rights. In 1833 a unanimous Supreme Court held that the last phrase of the fifth amendment "nor shall private prop-

further the fine points of a [federalism] principle that will, I am confident, in time again command the support of a majority of the Court." *Id.* at 1033.

Dean Wellington has written that "The doctrine of *stare decisis* is not strong in the constitutional realm." Wellington, *History and Morals in Constitutional Adjudication*, 97 HARV. L. REV. 326, 335 (1983). Subsequent action, and comment, by the Court (including *Garcia*, and *Pennhurst State School & Hosp. v. Haldeman*, 105 S. Ct 900 (1984)) suggests that Wellington has understated the case. Justice Brandeis' account of the role of *stare decisis* in constitutional decision in *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406-07 (1932) (Brandeis, J., dissenting), has become classic:

Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. . . . This is commonly true even when the error is a matter of serious concern, provided correction can be made by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions.

See also Justice Douglas' confirming update: Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735 (1949)(listing over thirty cases that had been overruled from 1937-49.)

From all of this we may conclude that while the Court values stability of decisions and decisional coherence, the Justices show little patience with the "conserving" (stand pat) dimension of the *stare decisis* doctrine when they consider that significant "political" issues are at stake.

48. See *supra* text accompanying note 47.

49. See *supra* note 44.

50. See *Metropolitan Life Ins. Co. v. Ward*, 469 U.S. 810 (1984).

51. U.S. CONST. amend. V.

erty be taken for public use, without just compensation" was "intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the states."⁵² This *Barron v. Mayor of Baltimore*, decision entailed that the entire Bill of Rights, including the due process clause, did not limit state action. The conclusion was not obvious; other courts had held the Bill of Rights generally applicable to the states. The usually nationalistic Chief Justice Marshall, again decided an important political question. But this time in the Nullification atmosphere of the 1830's his opinion for the Court left the states free from restraints written to favor individuals against undue exercise of governmental power.

The Supreme Court did not suggest what process was "due" from the national government until 1855. Its first definition of the content of "due process of law" in *Murray's Lessee v. Hoboken Land & Improvement Co.*,⁵³ was both rigid and modest. "Due process" was to be measured by (1) the express terms of the Constitution itself, notably those listed elsewhere in the Bill of Rights, and (2) "old process"—"those settled usages and modes of proceeding existing in the common and statute law of England before the immigration of our ancestors," provided they are not "unsuited" to the needs of the new constitutional democracy.⁵⁴

In 1868, shortly after the Civil War, the fourteenth amendment was added to the Constitution, expressly providing that "No State shall . . . deprive any person of life, liberty or property, without due process of law." The Supreme Court was slow to identify the content of fourteenth amendment "due process," which was couched in the exact same language of the fifth amendment. In the *Slaughter-House Cases*⁵⁵ in 1873, the due process clause was pressed as making unconstitutional a Louisiana law which established a monopoly of butchering in New Orleans. The defendant urged that this law infringed on his "property" right or "liberty" to pursue a trade. The Supreme Court abruptly rejected this contention:

[I]t is sufficient to say that under no construction of that provision ["due process"] that we have ever seen, or any that we deem admissible, can [this] restraint . . . be held to be a deprivation of property within the meaning of that provision.⁵⁶

Four years later the Court suggested a hardly more helpful formulation of due process: "the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require."⁵⁷ By the turn of the

52. *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

53. 59 U.S. (18 How.) 272 (1856).

54. *Id.* at 277.

55. 83 U.S. (16 Wall.) 36 (1873).

56. *Id.* at 80-81.

57. *Davidson v. New Orleans*, 96 U.S. 97, 104 (1877).

century the Supreme Court had made a significant retreat, or political adjustment, from its earlier reluctance (in *Slaughter-House* and succeeding cases)⁵⁸ to view property and contract rights as protected by the fifth and fourteenth amendment due process clauses against federal and state action. The words "due process" were unchanged. Yet the Court took a 180 degree turn as to the substantial protection they afforded individuals against governmental action affecting property and contract interests. Such cases as *Allgeyer v. Louisiana*⁵⁹ and *Lochner v. New York*,⁶⁰ and a procession of cases down to 1937,⁶¹ could only be explained as a political change of direction by the Supreme Court.

Over this same period between the end of the Civil War and the early decades of this century the Supreme Court showed little interest in protecting individual rights by use of the due process clause beyond the economic context (property and contract). In 1884, in *Hurtado v. California*,⁶² the Supreme Court did throw off the rigid historical formulation of due process which it had specified in *Murray*.⁶³ The basic constitutional guarantees of due process, said Justice Mathews for the Court, do not merely consecrate "particular forms of procedure" (as *Murray* had suggested); "they constitute the very substance of individual rights to life, liberty and property."⁶⁴ *Hurtado* recognized a new scope for the Supreme Court in identifying new constitutional rights as elements of due process. The scope was wide, but the criteria for identifying such rights were loose: history, comparative law, natural law (in the sense of "justice—*suum cuique tribuere*"),⁶⁵ and the learning of experience.⁶⁶ The Court's search for the content of due process was to be for "fundamental principles of liberty and justice."⁶⁷ In *Hurtado* the Court, applying this test, held that California had stayed within constitutional limits in failing to furnish *Hurtado* with indictment by grand jury, because this right, although it was specified in the fifth amendment, was not "fundamental."⁶⁸

58. See *Barbier v. Connolly*, 113 U.S. 27 (1885); *Butchers' Union Co. v. Crescent City Co.*, 111 U.S. 746 (1884); *Ex parte Wall*, 107 U.S. 265 (1882).

59. 165 U.S. 578 (1897).

60. 198 U.S. 45 (1905).

61. Among the most frequently cited cases in this procession are *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932); *Ribnik v. McBride*, 277 U.S. 350 (1928); *Tyson & Bro. v. Banton*, 273 U.S. 418 (1927); *Weaver v. Palmer Bros. Co.*, 270 U.S. 402 (1926); *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504 (1924); *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923); *Adams v. Tanner*, 244 U.S. 590 (1917); *Coppage v. Kansas*, 236 U.S. 1 (1915); *Adair v. United States*, 208 U.S. 1 (1908).

62. 110 U.S. 516 (1884).

63. See *supra* text accompanying notes 53-54.

64. *Hurtado*, 110 U.S. at 532.

65. "To give to each his own." *Id.* at 531.

66. *Id.*

67. *Id.* at 535.

68. *Id.* at 538.

In *Twining v. New Jersey* in 1908,⁶⁹ a state prosecutor's comment on a defendant's exercise of his privilege not to testify was held not to violate the defendant's privilege against self-incrimination because it was not a "fundamental right," hence not a violation of "due process."⁷⁰ In *Palko v. Connecticut* in 1937,⁷¹ the defendant was indicted for first degree murder, but was convicted of second degree murder.⁷² Therefore, instead of the death penalty, the defendant received a life sentence. The state appealed the sentence and won a new trial which resulted in a first degree murder conviction and the death penalty. Palko appealed, claiming double jeopardy. Double jeopardy was explicitly proscribed by the fifth amendment with respect to the federal government.⁷³ Palko claimed that it was a "fundamental right" entitled to protection against state action by the due process clause of the fourteenth amendment. When the case reached the Supreme Court, Justice Cardozo wrote the Court's opinion denying Palko's claim. The due process clause of the fourteenth amendment, he said, protects only rights that are "of the very essence of a scheme of ordered liberty."⁷⁴ He saw no such right in Palko's claim. "There is here no seismic innovation. The edifice of justice still stands, in its symmetry, to many greater than before."⁷⁵ This exacting test prevailed through the Roosevelt Court's extensive turnover of Justices.⁷⁶

In the 1947 decision of *Adamson v. California*⁷⁷ the Court reconsidered the question earlier disposed of in *Twining*,⁷⁸ the prosecutor's comment as an alleged violation of a defendant's due process rights. Once again the Court turned it aside, citing *Twining* and Cardozo's "scheme of ordered liberty" test.⁷⁹ This time four Justices dissented, led by Justice Black. They would flatly overrule *Twining* and accept as their rationale the contention made by the first Justice Harlan in his dissent in that

69. 211 U.S. 78 (1908).

70. *Id.* at 110. The Court flatly said that the privilege against self-incrimination was not a "fundamental" right. The opinion assumed, at first, that the facts (prosecutor's comment on defendant's declining to take the stand) constituted a violation of the privilege against self-incrimination (if it had been applicable to the states). Later in the opinion the Court squarely stated that such a prosecutor's comment was not "an infringement of the privilege [against] self-incrimination." *Id.* at 114.

71. 302 U.S. 319 (1937).

72. *Id.* at 322.

73. "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb; . . ." U.S. CONST. amend. V.

74. *Palko*, 302 U.S. at 325.

75. *Id.* at 328.

76. From 1937 to 1943 President Roosevelt appointed eight new Supreme Court Justices, and promoted Justice Stone to Chief Justice: Justices Black, Reed, Frankfurter, Douglas, Murphy, Byrnes, Jackson, and Rutledge.

77. 332 U.S. 46 (1947).

78. *Twining*, 211 U.S. at 114.

79. *Palko*, 302 U.S. at 325.

case:⁸⁰ that the fourteenth amendment due process clause was designed by the Framers of that amendment to incorporate the first eight amendments, and apply them against the states. Justice Black's dissent excoriated both the *Twining* standard of "fundamental rights,"⁸¹ and the *Palko* embroidery of a "scheme of ordered liberty."⁸²

For the next two decades the Court engaged in a bitter "classic debate."⁸³ When the smoke cleared Justice Black's total incorporation theory had not prevailed, nor had Justice Cardozo's "scheme of ordered liberty" test been discarded. But on a case by case basis every particular element of the first eight amendments, except two,⁸⁴ has been applied to the States by the Court as ingredients of fourteenth amendment due process. The "classic debate" was vituperative. One side claimed to rest on an objective resort to history (Black's claim),⁸⁵ in contrast with subjective judicial decision (Black's charge against his adversaries).⁸⁶ According to Justice Black, rights were so because the Framers of the fourteenth amendment had made them so, and they were, therefore, not subject to being chipped away by *ad hoc* political instincts of the Justices. Justice Frankfurter, leading the opposition, challenged Justice Black's history,⁸⁷

80. *Twining*, 211 U.S. at 114. Justice Harlan made the same point in his dissent in *Maxwell v. Dow*, 176 U.S. 581, 605 (1900).

81. *Adamson*, 332 U.S. at 84.

82. *Id.* at 85-86.

83. This was Justice Brennan's phrase. *Ohio ex rel. Eaton v. Price*, 364 U.S. 263, 274 (1960).

84. The two exceptions are: the civil jury requirement of the seventh amendment, and the grand jury requirement of the fifth amendment. *Hurtado v. California*, 110 U.S. 516 (1884).

85. Justice Black added an elaborate thirty-two page historical appendix to his *Adamson* dissent. *Adamson*, 332 U.S. at 92-123.

86. To Justices Black and Douglas the objectivity and detachment claimed by their adversaries was an illusion: "[E]motion rather than reason dictates the answers." *Hannah v. Larche*, 363 U.S. 420, 506 (1960) (Douglas, J., dissenting). "There is a strong emotional appeal in the words 'fair play,' 'justice' and 'reasonableness'. But they were not chosen by those who wrote the original Constitution or the Fourteenth Amendment as a measuring rod for this Court to use in invalidating State or Federal laws passed by elected representatives." *International Shoe Co. v. Washington*, 326 U.S. 310, 325 (1945) (Black, J., concurring). "Due process under the prevailing doctrine is what the judges say it is; and it differs from judge to judge." *Hannah*, 363 U.S. at 505 (Douglas, J., dissenting). In *Adamson*, Justice Black denounced "the natural law" theory of the Constitution upon which [the majority opinion] relies." *Adamson*, 332 U.S. at 70. In *Hannah*, writing for Justice Black and himself, Justice Douglas denounced the prevailing majority view as a "chameleon-like", "free-wheeling concept of due process," which "turns on the personal predilections of the judge." *Hannah*, 363 U.S. at 506. Due process had become "a tool of the activists who respond to their own visceral reactions in deciding what is fair, decent or reasonable." *Id.* at 505 (Douglas, J., dissenting).

87. Justice Frankfurter, often in company with Justices Burton, Clark, Harlan and Reed, continued to insist on various guides to objectivity in the Court's due process decisions: History (Due process "is itself an historical product" in *Rochin v. California*, 342 U.S. 165, 168 (1952) (Frankfurter, J.); *Bartkus v. Illinois*, 359 U.S. 121, 124 (1959)); a community "sense of justice," ("Due process is not measured by the yardstick of personal reaction. . . but by that whole community sense of 'decency and fairness,'" in *Breithaupt v. Abram*, 352 U.S. 432, 436 (1957) (Clark, J.)); and "a disinterested inquiry pursued in the spirit of science, . . ." *Rochin*, 342 U.S. at 172 (1952). This objectivity was insured by the very nature of the Supreme Court, "a tribunal disciplined for the task and envired by the best safeguards for disinterestedness and detachment." *Bartkus*, 359 U.S. at 128 (1959) (Frankfurter, J.). Curiously Justice Frankfurter coupled these claims of objectivity with

and defended the objectivity of decision according to the *Twining-Palko* tests.

In his 1954 study,⁸⁸ written almost midway in this debate, Justice Jackson (who was invariably aligned with Frankfurter against the Black-led "total incorporationists"), frankly avowed that high-level politics was at stake:

[W]e must bear in mind that in the protection of individual or minority rights, we are often impinging on the principle of majority rule. . . .⁸⁹ In case after case in which so-called civil rights are involved, the question simmers down to one of the extent to which majority rule will be set aside.⁹⁰

Earlier in his book Justice Jackson made even clearer his impatience with the "rights explosion":

Today [the fourteenth amendment] is being used not to restrain state legislatures but to set aside the acts of state courts, particularly in criminal matters. . . . I believe we are unjustifiably invading the rights of the states by expanding the constitutional concept of due process to include the idea that the error of a trial court deprives it of 'jurisdiction,' by including in the concept by interpretation all other constitutional provisions not literally incorporated in the Fourteenth Amendment, and, in the alternative, by incorporating into it all our ideas of decency, even to the point of making a constitutional issue of rulings upon evidence.⁹¹

While affirming that the Supreme Court's decisions were political, Justice Jackson was denying that, in this instance, they were "good" politics. At least they were not his politics.

The almost total course of "selective incorporation" of the Bill of Rights into fourteenth amendment due process was completed by 1969. The final case, *Benton v. Maryland*,⁹² in the last year of the Warren Court, held that the fifth amendment's guarantee against double jeopardy applied to the states by virtue of the fourteenth amendment, and that "insofar as it is inconsistent with this holding, *Palko v. Connecticut* is overruled."⁹³

Just as two terms of President Eisenhower served to preserve and institutionalize the Roosevelt New Deal, sixteen years of the Burger Court

insistence upon the evolving aspect of due process ("due process does not preclude new ends of government or new means for achieving them." *Hannah*, 363 U.S. at 493). He claimed also that "the manifold variety and perplexity of the tasks" of other branches of government and of the states weighed against "a doctrinaire conception" of due process *Id.* at 487. Further, this "disinterested" Court had need to strike "the balance of individual hurt and justifying public good," *id.*, and to recognize that "what is unfair in one situation may be fair in another. . . ." *Id.*

88. R. JACKSON, *supra* note 15.

89. *Id.* at 76.

90. *Id.* at 77.

91. *Id.* at 69-70.

92. 395 U.S. 784 (1969).

93. *Id.* at 794.

seemed to enshrine the basic judicial politics of the Warren years. However, in nibbling around the edges of particular rights,⁹⁴ there was (and is) ample room for stilling, if not actually reversing, the development of these rights through restrictive interpretation. This is politics at retail rather than wholesale, but politics nonetheless.

94. One of the most controversial decisions of the Warren Court was *Miranda v. Arizona*, 384 U.S. 436 (1966), which held that the self-incrimination clause of the fifth amendment forbids the prosecution to make use of the confession or admissions of a person in custody as an ingredient of his conviction of a crime unless he had been advised of certain constitutional rights prior to being questioned: "Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently." *Id.* at 444.

As early as 1971 the Court, under Chief Justice Burger, commenced making inroads. In *Harris v. New York*, 401 U.S. 222 (1971), the Court held that the prosecution could use statements taken in violation of *Miranda* for impeachment purposes on cross-examination of a defendant who elected to take the stand. A procession of lesser intrusions (e.g., *Michigan v. Mosley*, 423 U.S. 96 (1975); *Michigan v. Tucker*, 417 U.S. 433 (1974)), culminated in a major setback to *Miranda* in *New York v. Quarles*, 467 U.S. 649 (1984). In *Quarles* the Court made an express exception to *Miranda* for "a situation in which police officers ask questions reasonably prompted by a concern for the public safety." *Id.* at 656. Then, in *Oregon v. Elstad*, 470 U.S. 298 (1985), the Court dropped another shoe, still insisting that "The Court today in no way retreats from the bright line rule of *Miranda*." *Id.* at 317. In *Elstad* the police first received a confession from a suspect in custody, without giving the *Miranda* warnings, then received the same confession later "after a suspect has been fully advised of and has waived his *Miranda* rights." *Id.* The Oregon Supreme Court had held that the prior confession violating *Miranda* had the effect of preventing defendant's subsequent waiver of rights (after receiving the *Miranda* warnings) from being voluntary; the police should have told him that his first confession was worthless. The Supreme Court reversed, finding no violation of *Miranda* in a conviction based on the second confession. The considerable *Miranda* jurisprudence was carefully combed, enmeshed in a spirited exchange between Justice O'Connor (for a 6-3 majority) and Justices Brennan and Stevens in their dissents (joined by Justice Marshall). One need not agree with Justice O'Connor that "The Court has carefully adhered to this [*Miranda*] principle, permitting a narrow exception only when pressing public safety concerns demanded [citing *Quarles*]." *Id.* at 317. Nor does the decisional evidence compel full agreement with Justice Brennan:

Even while purporting to reaffirm these constitutional guarantees, the Court has engaged of late in a studied campaign to strip the *Miranda* decision piecemeal and to undermine the rights *Miranda* sought to secure. Today's decision not only extends this effort a further step, but delivers a potentially crippling blow to *Miranda* and the ability of courts to safeguard the rights of persons accused of crime.

Id. at 1299. However, it is clear that en route to *Elstad* something had happened to *Miranda*. This "nibbling" process, short of overruling, has also been effectively at work in fourth amendment decisions of the Burger Court (see, e.g., *United States v. Leon*, 104 S. Ct. 3405 (1984)). In a key statutory area, the availability of federal habeas corpus (28 U.S.C. §§ 2241-2256 (1982)) the Burger Court's transformation of previous doctrine by "nibbling" rather than overruling has been still more drastic. (Compare *Fay v. Noia*, 372 U.S. 391 (1963) (opinion by Justice Brennan) with *Wainwright v. Sykes*, 433 U.S. 72 (1977) (opinion by Justice Rehnquist) and *Murray v. Carrier*, 106 S.Ct. 2639 (1986) (opinion by Justice O'Connor, summarizing developments since *Sykes*)). In this criminal justice area, as in the Court's commerce clause-tenth amendment imbroglio of *Wirtz-National League of Cities-Garcia*; see *supra* text accompanying note 47, high level political judgments are in contest among the Justices. In the commerce clause cases the paramount concern is federalism; in the criminal justice cases the high level contest pits individual rights against social order. In Cardozo's much-repeated phrase, "the scheme of ordered liberty," see *supra* text accompanying note 74, continually calls for current decisional choices that are, at root, political.

4. Constitutional Limitations of Governmental Power #2: The Equal Protection Elements of the Fourteenth and Fifth Amendments⁹⁵

What has the Supreme Court done with the equal protection clause of the fourteenth amendment? A brief survey can mark out the claim that the Court's use, non-use, and formulations of "equal protection" have been in furtherance of distinctly political objectives. Its decisions concerning race and sex and general participation in the electoral process will serve as our examples that the politics of the Court in its equal protection decisions has indelibly marked the nation.

Race

Unlike due process, which for almost our first century limited only federal power, equal protection entered the constitutional scene as a limitation solely on the states.⁹⁶ The *Slaughter-House Cases*⁹⁷ in 1873, the first decision to "give meaning to this clause," went right to the point:

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.⁹⁸

In 1880 in *Strauder v. West Virginia*,⁹⁹ after repeating these assertions of *Slaughter-House*, the Supreme Court reiterated:

It was in view of these considerations the Fourteenth Amendment was framed and adopted. It was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general govern-

95. "[N]or shall any State. . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

"[N]or shall any person. . . be deprived of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. V.

Although the fourteenth amendment by its terms applies only to state action, and there is no specific mention of "equal protection" in the fifth amendment, the Court has construed the due process clause of the fifth amendment to have an "equal protection component" that is applicable to the federal government. *Bolling v. Sharpe*, 347 U.S. 497 (1954), a companion case to *Brown v. Board of Educ.*, 347 U.S. 483 (1954), involving segregated schools in the District of Columbia, initiated this development, which is now firm.

96. *Bolling*, 347 U.S. at 499.

97. 83 U.S. (16 Wall.) 36 (1873).

98. *Id.* at 81. The Court looked at the three Civil War Amendments (13th, 14th and 15th) as a whole, and concluded:

[N]o one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.

Id. at 71-72.

99. 100 U.S. 303 (1880).

ment, in that enjoyment, whenever it should be denied by the states.¹⁰⁰ Since the equal protection clause reads: "nor shall any State. . . deny to *any person* within its jurisdiction the equal protection of the laws,"¹⁰¹ these cases, of necessity, recognized that the reach of the amendment was broader than discrimination against black persons. In *Yick Wo v. Hopkins*¹⁰² in 1886 the Court found the administrative discrimination of a San Francisco ordinance against Chinese laundry operators to be a denial of equal protection.

The hospitality to blacks in equality adjudication was given a rude jolt in 1883 in the *Civil Rights Cases*.¹⁰³ In these cases the Supreme Court held unconstitutional provisions of the Civil Rights Act of 1875 which required equal accommodations for blacks in certain public and quasi-public facilities. The most crushing judicial blow, however, came in 1896 in *Plessy v. Ferguson*.¹⁰⁴ In that case the Court sustained the constitutionality of a Louisiana law that required "equal but separate accommodations" for "white" and "colored" railroad passengers.¹⁰⁵ The decision was promptly extended to legalize for seventy-five years racially segregated schools. The political thrust of these decisions in the era of Black Codes¹⁰⁶ and Jim Crow did not escape the first Justice Harlan, who vigorously dissented in both the *Civil Rights Cases* and in *Plessy*. His words in *Plessy* were prophetic:

[W]e boast of the freedom enjoyed by our people above all peoples. But it is difficult to reconcile that boast with a state of the law which, practically, puts the brand of servitude and degradation upon a large class of our fellow citizens, —our equals before the law. The thin disguise of 'equal' accommodations [will] not mislead any one, nor atone for the wrong this day done. . . . In my opinion, the judgment this day rendered will, in time prove quite as pernicious as the decision made [in] the *Dred*

100. *Id.* at 306.

101. U.S. CONST. amend. XIV, § 1 (emphasis added).

102. 118 U.S. 356 (1886).

103. 109 U.S. 3 (1883).

104. 163 U.S. 537 (1896).

105. The statute required railroads to "provide equal but separate accommodations for the white, and colored races. . . ." *Id.* at 540.

106. The landmark reference to Black Codes and Jim Crow is C. WOODWARD, *THE STRANGE CAREER OF JIM CROW* (3d rev. ed. 1974). "[T]he provisional legislatures established by President Johnson in 1865 adopted the notorious Black Codes. Some of them were intended to establish systems of peonage or apprenticeship resembling slavery." *Id.* at 23. "[T]he segregation statutes, or 'Jim Crow' laws. . . [i]n bulk and detail as well as in effectiveness of enforcement. . . were comparable with the black codes of the old regime, though the laxity that mitigated the harshness of the black codes was replaced by a rigidity that was more typical of the segregation code. That code lent the sanction of law to a racial ostracism that extended to churches and schools, to housing and jobs, to eating and drinking. . . to virtually all forms of public transportation, to sports and recreations, to hospitals, orphanages, prisons, and asylums, and ultimately to funeral homes, morgues, and cemeteries." *Id.* at 7. See Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323 (1952): "The 39th Congress, convening in December 1865, witnessed a variety of proposals, all designed to strike down the offensive Black Codes." *Id.* at 1325.

Scott¹⁰⁷ case.¹⁰⁸

The road back from *Plessy* was slow and tortuous. A relentless campaign of case-by-case litigation by the National Association for the Advancement of Colored People (NAACP) finally bore fruit in 1954 in *Brown v. Board of Education*,¹⁰⁹ which held the *Plessy*-segregated schools an unconstitutional violation of equal protection. *Brown* marked the beginning of an era¹¹⁰ in which the Supreme Court removed constitutional protection from other aspects of Jim Crow embodied in racially inspired state and federal legislation. The Court "formulaized" this political development by establishing an exacting standard by which it would measure classifications by race of governmental laws and action—the "strict scrutiny" test that required a showing by the government of a "compelling governmental interest," and in addition that the racial classification was "necesssary" to further this "compelling interest," there being "no less drastic means" by which the governmental objective could be achieved.¹¹¹

The length of the strides taken by the Court under this formula can be seen by recalling the previous almost total impotence of the equal protection clause as a limitation on governmental action. As recently as 1927 Justice Holmes had dismissed an equal protection argument against a state sterilization law as "the usual last resort of constitutional arguments."¹¹²

The *Brown* program of court-supervised school desegregation at first proceeded at a snail's pace.¹¹³ Eventually the Court's frustration pro-

107. *Dred Scott v. Sandford*, 56 U.S. (19 How.) 393 (1856).

108. *Plessy*, 163 U.S. at 559.

109. 347 U.S. 483 (1954).

110. The theme of the "*Brown* era" is developed in Broderick, *Preferential Admissions and the Brown Heritage*, 8 N.C. CENT. L.J. 123, 136-76 (1977), an article written on the eve of the *Bakke* decision: "[I]n the spirit of *Brown* [the Supreme Court] has struck down previously tolerated legislation that impinged on [the] dignity and full citizenship of blacks, often waving the standard of race as a 'suspect class'. In this same spirit came effective national legislation, for the first time in three-quarters of a century, which made voting a reality and gave realistic hope of removing discrimination in employment and housing. Overwhelmingly, the Court interpreted and enforced this legislation in the spirit of *Brown*. . . . In this same spirit, professional and educational groups in public and private sectors recognized the need to help qualify the long-neglected black citizens for leadership and professional service. . . . To their credit, these professional persons and educators saw their programs as filling a national need—in the spirit of *Brown*." *Id.* at 172. In retrospect, one suspects that the *Brown* era began to wind down (if it did not end) with the Supreme Court's decision in *Bakke*. Supreme politics was still in vogue, but it was different, again.

111. The "means" part of this "strict" end-means test is frequently phrased in terms that the means used must be "narrowly tailored" to achieve the "compelling" governmental objective. See *infra* text accompanying notes 286-90.

112. *Buck v. Bell*, 274 U.S. 200, 208 (1927).

113. The Court itself conceded as much in *Green v. County School Bd.*, 391 U.S. 430 (1968), a landmark case which stated that "state-compelled dual systems [were] nevertheless 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." *Id.* at 437-38.

voked it to approve more severe judicial enforcement measures, finally giving its sanction to court-ordered busing.¹¹⁴

Just as the NAACP litigation program had forced the Court's hand in *Brown*, the vigorous civil rights movement of the late 1950's and the 1960's prompted Congress to enact the two most sweeping civil rights statutes since the Civil War—the Civil Rights Act of 1964¹¹⁵ and the Voting Rights Act of 1965.¹¹⁶ The Supreme Court found no difficulty in upholding their constitutionality.¹¹⁷ The politics of race on the Supreme Court had indeed turned around.

One unanswered constitutional question lingered unsolved into the years of the Burger Court: To what extent could racial classifications be used not to stigmatize and burden blacks, and other racial minorities, but to advantage them—to make up, in part, for the damage wrought upon blacks both before and after the Civil War by state-enforced slavery, Black Codes, and Jim Crow. Here we finally reach the problem of affirmative action, whose constitutional dimensions will be construed within the rubric, and politics, of equal protection.¹¹⁸

Sex

The Supreme Court's involvement in the politics of sex, oddly enough, commenced on the same day that *Slaughter-House*¹¹⁹ marked out the Court's initial (later repudiated)¹²⁰ view that the fourteenth amendment equal protection clause was predominantly directed to considerations of race, the remedial concerns of the new black citizens. *Bradwell v. Illinois*¹²¹ is the favorite museum piece of the Supreme Court's early politics of sex. The majority opinion in *Bradwell* (as in *Slaughter-House*) was written by Justice Miller, who observed at the outset: "The opinion just delivered in the *Slaughter-House Cases* renders elaborate argument in the present case unnecessary."¹²² An Illinois statute had denied Myra Bradwell admission to the state bar for the sole reason that she was a woman. In affirming the decision below against Mrs. Bradwell, Justice

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

115. 42 U.S.C. § 2000e-2000e(17) (1982).

116. *Id.* § 1973-1973bb-1.

117. *South Carolina v. Katzenbach*, 383 U.S. 301 (Voting Rights Act of 1965); *Katzenbach v. McClung* 379 U.S. 294 (1964) and *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964) (Title II [public accommodations section] of Civil Rights Act of 1964).

118. The affirmative action developments are discussed in Part III, *infra* text accompanying notes 235-366.

119. 83 U.S. (16 Wall.) 36 (1873).

120. In rejecting the continuing relevance of the "one pervading purpose" (*see supra* note 98) doctrine of *Slaughter-House*, Justice Powell acknowledged that it was the Court's "initial view." *Bakke*, 438 U.S. at 291. But, he maintained, it was outdated by subsequent decisional developments. *See infra* note 349.

121. 83 U.S. (16 Wall.) 130 (1873).

122. *Id.* at 139.

Miller considered only the "privileges and immunities" clause of the fourteenth amendment.¹²³ He held that membership in a state bar was not among the "privileges and immunities of national citizenship" to which the Court had confined that clause in *Slaughter-House*.¹²⁴ Considered in these terms Justice Miller was concerned with the politics of state autonomy in face of the fourteenth amendment, and not directly with the politics of sex. However, Justice Bradley, concurring, could not leave well enough alone and plunged headlong:

[T]he civil law, as well as nature itself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. . . . The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother.¹²⁵

He briefly reflected that "It is true that many women are unmarried and not affected by any of the duties, complications, and incapacities arising out of the married state. . . ." ¹²⁶ This consideration did not give him pause for "This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things and cannot be based upon exceptional cases."¹²⁷ Justices Swayne and Field joined Bradley in this concurrence. Only Chief Justice Chase dissented; he had joined Bradley, Swayne and Field in dissent in *Slaughter-House*; but apparently Bradley's concurrence here was too much for him.¹²⁸

One year after *Bradwell*, in *Minor v. Happersett*,¹²⁹ the Court conceded that women are "persons," and may be "citizens" for purposes of section 1 of the fourteenth amendment.¹³⁰ The Court then considered Virginia Minor's claim that state law had unconstitutionally deprived her of the right to vote. Again, as in *Slaughter-House* and *Bradwell*, the Court gave

123. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; . . ." U.S. CONST. amend. XIV, § 1.

124. *Slaughter-House*, 83 U.S. at 74.

125. *Bradwell*, 83 U.S. at 141.

126. *Id.*

127. *Id.* at 141-42.

128. The *Bradwell* holding and political message was reaffirmed in *In re Lockwood*, 154 U.S. 116 (1894). A Virginia statute dealt with bar admission for a "person" from another state. Virginia interpreted "person" as "male person." The Supreme Court found no constitutional flaw. *Id.* at 118.

129. 88 U.S. (21 Wall.) 162 (1874).

130. Section 1 of the fourteenth amendment makes no gender distinction as to "persons":

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

U.S. CONST. amend. XIV, § 1.

However, section 2, which is concerned with voting, speaks three times of "male" inhabitants or citizens.

no space to equal protection. It considered the "privileges and immunities of national citizenship," and concluded that "the Constitution did not forbid a state committing that important trust [of voting] to men alone."¹³¹ This *Minor* interpretation remained the state of things for women so far as voting was concerned until the adoption of the nineteenth amendment in 1920.¹³²

A study entitled "Sex Discrimination by Law"¹³³ by two male law professors fairly characterized the judicial record up to 1971: "[B]y and large the performance of American judges in the area of sex discrimination can be succinctly described as ranging from poor to abominable."¹³⁴ In compiling this record the United States Supreme Court was in the vanguard.

Everybody's favorite case exemplifying the Supreme Court's gender performance in this period is *Goesaert v. Cleary*.¹³⁵ A Michigan statute permitted women to serve as waitresses in bars, but not as bartenders. The statute made an exception for wives or daughters of owners.¹³⁶ Justice Frankfurter, for a 6-3 Supreme Court, commenced his opinion with the flat statement: "Michigan could, beyond question, forbid all women from working behind a bar."¹³⁷ He then considered the validity under the equal protection clause of the statute's exception in favor of wives and daughters, and found that it was "not without a basis in reason."¹³⁸ The statute survived equal protection intact, under the most minimal rational basis test.

Another indication that in the first seventy-one years of this century the Court continued to treat women as lesser "persons" comes in the jury service cases. The Supreme Court approved disparate treatment for men and women with respect to jury service as late as 1961, in *Hoyt v. Florida*.¹³⁹ A woman charged with second degree murder had challenged her conviction on equal protection grounds because a Florida statute relieved women from jury service who had not "registered with the clerk of the circuit court her desire to be placed on the jury list."¹⁴⁰ The Supreme

131. *Minor*, 88 U.S. at 178.

132. "The right of citizens to vote shall not be denied or abridged by the United States or by any State on account of sex."

"Congress shall have power to enforce this article by appropriate legislation." U.S. CONST. AMEND. XIX.

133. Johnston & Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective*, 46 N.Y.U. L. REV. 675 (1971).

134. *Id.* at 676.

135. 335 U.S. 464 (1948).

136. The statutory exception was "the wife or daughter of the male owner" of a licensed liquor establishment. *Goesaert*, 335 U.S. at 465 (quoting MICH. PUBLIC ACTS, § 19(a) (1945)).

137. *Id.*

138. *Id.* at 467.

139. 368 U.S. 57 (1961).

140. *Id.* at 58.

Court found no constitutional defect. In 1975 the Court found a basis for changing the result reached in *Hoyt*. A defendant sought reversal of a conviction on the ground that if women could, by law, opt out of a venire panel (and men could not), a conviction by a jury derived from that panel would not be a "fair cross section of the community," which the Court proceeded to find a requisite of defendant's sixth amendment right to jury trial.¹⁴¹ But in *Taylor and Duren v. Missouri*,¹⁴² which reaffirmed it, the Court still declined to find an equal protection violation against women.

The turnaround by the Supreme Court, in according women perceptible recognition as "persons" under the equal protection clause, came in 1971 in *Reed v. Reed*.¹⁴³ An Idaho statute permitted men and women to act as administrators of an intestate estate, but provided that among persons entitled so to act "males must be preferred to females."¹⁴⁴ The Idaho Supreme Court approved this mandatory provision of the statute, concluding that the aim of the provision was to eliminate one class of court contests in estate litigation—where two persons, a man and a woman, were otherwise equally entitled to letters of administration. The provision thus reduced the work of probate courts by avoiding "a hearing as to the relative merits. . . of the two or more petitioning relatives."¹⁴⁵ The Supreme Court unanimously reversed on equal protection grounds based on sex discrimination.

The formula used in deciding this case signaled no departure from the words used in *Goesaert*:¹⁴⁶ "The question presented by this case, then, is whether a difference in sex of competing applicants for letters of administration bears a rational relationship to a state objective that is sought to be advanced" by the statute.¹⁴⁷ But the music was different. Chief Justice Burger's opinion acknowledged that "Clearly the objective of reducing the workload on probate courts by eliminating one class of contests is not without some legitimacy."¹⁴⁸ However, giving closer attention than usual to the means used, the Court concluded that "[b]y providing dissimilar treatment for men and women who are thus similarly situated, the challenged section violates the Equal Protection Clause."¹⁴⁹

141. *Taylor v. Louisiana*, 419 U.S. 422 (1975).

142. 439 U.S. 357 (1979).

143. 404 U.S. 71 (1971).

144. *Id.* at 73.

145. *Id.* at 76.

146. *Goesaert v. Cleary*, 335 U.S. 464 (1948); see *supra* text accompanying notes 135-38.

147. *Reed*, 404 U.S. at 76.

148. *Id.*

149. *Id.* at 77. Three years prior to *Reed* the Supreme Court had engaged in very rigorous application of the supposedly minimal rational basis test in two cases challenging state statutes penalizing illegitimacy. *Glonn v. American Guar. & Liab. Ins. Co.*, 391 U.S. 73 (1968); *Levy v. Louisiana*, 391 U.S. 68 (1968).

What had changed? Not the language of the equal protection clause, nor the two-tier basis for the Supreme Court's interpretation of the clause: either the "strict scrutiny" "compelling state interest" test or the minimal scrutiny rational basis test.¹⁵⁰ The inclusion by Congress of "sex" discrimination with respect to employment within the prohibitions of the Civil Rights Act of 1964¹⁵¹ had not been anticipated and had been brought about almost by chance.¹⁵² However, in 1971 the House of Representatives¹⁵³ had passed the proposed Equal Rights Amendment and the measure was under consideration in the Senate.¹⁵⁴

After *Reed*¹⁵⁵ the Supreme Court took under consideration an almost continuous stream of cases concerning alleged sex discrimination.¹⁵⁶ After the Senate passed the Equal Rights Amendment, on March 22, 1972,¹⁵⁷ the Supreme Court decided *Frontiero v. Richardson*.¹⁵⁸

In *Frontiero* a female member of the armed forces claimed that, contrary to the existing statute, she was constitutionally entitled to claim her spouse as a dependent with respect to quarters allowances and medical and dental benefits on an equal basis with male members of the armed forces. The Supreme Court held the offending statutory provision unconstitutional under the equal protection component of the due process clause of the fifth amendment. Only Justice Rehnquist dissented.¹⁵⁹

Writing for a four-Justice plurality, Justice Brennan cited the develop-

150. The Court would expressly reaffirm this two-tier equal protection test two Terms after *Reed*. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973).

151. 42 U.S.C. § 2000e (1982).

152. In 1963 Congress had passed The Equal Pay Act, Pub. L. No. 88-38, § 3, 77 Stat. 56, 56-57 (1963)(codified at 29 U.S.C. § 206(d) (1982)), which purported to secure for women a measure of equal pay for equal work. Title VII, the equal employment provisions of the Civil Rights Act of 1964, was not in the original civil rights bill. It was added to the bill by Congressman Peter Rodino of New Jersey in subcommittee on September 25, 1963. C. WHALEN & B. WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT* 35 (1985). As introduced, title VII did not bar sex discrimination. The motion to include "sex" was made from the floor of the House by a vigorous opponent of the civil rights legislation, Judge Howard W. Smith of South Carolina, who had hoped (in vain) to secure thereby a few votes to block passage of the bill. *Id.* at 117.

153. H.R.J. Res. 208, 92d Cong., 1st Sess. (1971).

154. The Equal Rights Amendment was passed by Congress on March 22, 1972. H.J. Res. No. 208, 92d Cong., 2d Sess. (1972). Section 1 of the proposed (but ultimately unratified) amendment stated that "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex."

155. 404 U.S. 71 (1971).

156. Between 1973 and 1980 the Supreme Court decided the following sex discrimination cases (invidious and benign) in the equal protection context: *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Kahn v. Shevin*, 416 U.S. 351 (1974); *Schlesinger v. Ballard*, 419 U.S. 498 (1975); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Stanton v. Stanton*, 421 U.S. 717 (1975); *Craig v. Boren*, 429 U.S. 190 (1976); *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Califano v. Webster*, 430 U.S. 313 (1977); *Orr v. Orr*, 440 U.S. 268 (1979); *Califano v. Westcott*, 443 U.S. 76 (1979); *Wengler v. Drug-Gists Mut. Ins. Co.*, 446 U.S. 142 (1980).

157. S.J. Res. 8, S.J. Res. 9, 92d Cong., 1st Sess. (1972).

158. 411 U.S. 677 (1973).

159. *Frontiero*, 411 U.S. at 691 (Rehnquist, J., dissenting).

ments reviewed above,¹⁶⁰ and concluded that sex discrimination, like discrimination based on race, should receive the strictest judicial scrutiny, and trigger the compelling state interest test.¹⁶¹ Justice Stewart concurred in the judgment, but did not join the Brennan opinion, simply resting his conclusion on *Reed*.¹⁶² Three other Justices who found the statutory provision unconstitutional also cited *Reed*. However these Justices (Powell, Burger and Blackmun) cited an additional reason for "deferring a general categorizing of sex classifications as invoking the strictest test of judicial scrutiny":¹⁶³ the Equal Rights Amendment pending before the states for ratification. Writing the concurrence for these Justices, Justice Powell commented on the Brennan opinion: "It seems to me that this reaching out to preempt by judicial action a major political decision which is currently in process of resolution does not reflect appropriate respect for duly prescribed legislative processes."¹⁶⁴

Three years later, in *Craig v. Boren*,¹⁶⁵ Justice Brennan again wrote on this subject. In this case, an Oklahoma law differentiated as to age with respect to the sale and purchase of beer: the permissible age for males was twenty-one, for females, eighteen. Although the sex discrimination in this situation favored females, rather than disadvantaging them, the litigants and the Court did not stress this distinction. While purporting to rely on *Reed*¹⁶⁶ for a controlling precedent in holding that the statute violated equal protection in using the sex classification, Justice Brennan reformulated the test. No longer was it simply a rational basis test, beefed up, as in *Reed*: "[C]lassifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."¹⁶⁷ The Court soon recognized that it had departed from its rigid two-tier classification in equal protection matters. The *Craig v. Boren* test was accepted by the Court in later cases¹⁶⁸ as a square breakthrough. Henceforth sex (or gender) discrimination would be con-

160. *Id.*

161. *Frontiero*, 411 U.S. at 688. The argument that "strict scrutiny" should be limited to race (in view of the *Slaughter-House* "one pervading purpose" theme (*see supra* note 120)) had been weakened by the Court's decision two years earlier in *Graham v. Richardson*, 403 U.S. 365 (1971), extending the "suspect classification" category to aliens.

162. 404 U.S. 71 (1971). See the controversial Woodward-Armstrong "account of the inner workings of the Supreme Court from 1969 to 1976." R. WOODWARD & S. ARMSTRONG, *THE BROTHERS: INSIDE THE SUPREME COURT 2* (1979). They propose an anecdotal account of Justice Brennan's bid to secure a fifth vote for his *Frontiero* plurality opinion that makes interesting reading. *Id.* at 254-55.

163. *Frontiero*, 411 U.S. at 692 (citing *Reed v. Reed*, 404 U.S. 71 (1971)).

164. *Id.*

165. 429 U.S. 190 (1976).

166. 404 U.S. 71 (1971); *see supra* text accompanying notes 143-49.

167. *Craig*, 429 U.S. at 197.

168. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982); *Kirchberg v. Feenstra*, 450 U.S. 455 (1981); *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142 (1980); *Orr v. Orr*, 440 U.S. 268 (1979); *Califano v. Webster*, 430 U.S. 313 (1977); *Califano v. Goldfarb*, 430 U.S. 199 (1977).

stitutionally tested neither by the "strict scrutiny" "compelling state interest" test, nor by an unsteady, if tougher, version of the minimal "rational basis" test.¹⁶⁹

Voting Rights

The most thundering "Yes" to our question—does the Supreme Court engage in politics in its constitutional decision-making—is in the area of voting rights. A case can be made that the Court's pre-1962 voting decisions could be defended as faithful interpretations of express provisions of the Constitution.¹⁷⁰ The reapportionment and "fundamental" voting interest decisions of the 1960's hardly leave room for doubt that they were politically inspired.¹⁷¹

The Constitution, as originally adopted, had unusually specific provisions with respect to qualifications of members of the House of Representatives and the Senate.¹⁷² The Constitution, however, left it to the states to prescribe "The Times, Places and Manner of holding Elections for Senators and Representatives," reserving power in Congress to "make or alter such Regulations, except as to the Places of chusing Senators."¹⁷³ However, no specific qualifications were fixed for "Electors" (voters) for members of the House: "the Electors in each State shall have the qualifications requisite for Electors of the most numerous Branch of the State Legislature." The members of the Senate were to be "chosen by the [state] legislature," a provision which continued until 1913 when the seventeenth amendment provided that the two Senators allotted to each state should be "elected by the people," that is, by electors whose qualifi-

169. This story would be incomplete without calling attention to two cases in which the Court revived its taste for gender politics by ignoring the intermediate *Craig v. Boren* test. See *supra* text accompanying note 167. In *Michael M. v. Superior Court*, 450 U.S. 464 (1981), the Court upheld a statutory rape law which permitted conviction of male, but not female, participants in intercourse when the woman was under eighteen. The Court's ground for not testing the statute by the *Craig v. Boren* test was that "the sexes are not similarly situated," *id.* at 469, in this setting. Similarly, in *Rostker v. Goldberg*, 453 U.S. 57 (1981), Congress' failure to require women as well as men to register for the military draft was upheld, on the ground that, as to the draft, men and women were "not similarly situated" because, the Court pointed out, women were by statute "excluded from combat." *Id.* at 77.

170. As will be noted later in this section, Justices Frankfurter and Harlan so regarded them. But this view is premised on a stunted view of the equal protection clause that had shielded voting discrimination since *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1874). See *supra* text accompanying notes 129-32.

171. A third development on voting rights in the 1960's—the removal of practical barriers to the exercise of voting rights by black, and other minority citizens—found substantial Supreme Court support. But the laboring oar here was carried by Congress in response to the determined public protests of the Civil Rights Movement under the leadership of Dr. Martin Luther King, Jr. (Cf. Voting Rights Act of 1965). For this reason, I shall limit my discussion here to the general voting rights decisions, which were distinctively Supreme Court products.

172. U.S. CONST. art. 1, §§ 1, 3.

173. *Id.* § 4.

cations were identical to those for the House.¹⁷⁴ Article I, section 2 also enjoined Congress to apportion Representatives "among the several states. . . according to their respective numbers. . . ."¹⁷⁵

A. Reapportionment.

1. The Pre-1962 Cases.

In 1875, in *Minor v. Happersett*, which I have already mentioned in connection with the gender cases,¹⁷⁶ the Court considered various constitutional possibilities (but not equal protection), and concluded that "[The] Constitution of the United States does not confer the right of suffrage upon any one."¹⁷⁷

In the period of dormancy of equal protection in the voting area, the only constitutional protection with respect to voting discrimination seemed to be that afforded by the fifteenth amendment against racial discrimination in voting.¹⁷⁸ To this, in 1920, was added the nineteenth amendment's similar prohibition against voting discrimination "on account of sex."¹⁷⁹ In 1927, the Supreme Court finally attended to the rampant discrimination against black citizens by exclusion from Democratic primaries in Texas. The Court surprisingly invalidated two state laws on fourteenth amendment equal protection grounds, and not in reliance on the fifteenth amendment.¹⁸⁰

174. "The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof. . . . The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures." U.S. CONST. amend. XVII.

175. "Until 1842 there was the greatest diversity among the States in the manner of choosing Representatives because Congress had made no requirement for districting. . . . Congress then provided for the election of Representatives by districts. . . . In 1850 Congress dropped the requirement. . . . The Reapportionment Act of 1862 required that districts be of contiguous territory. . . . In 1872 Congress added the requirement of substantial equality of inhabitants. . . . This was reinforced in 1911. . . . But the 1929 Act. . . dropped these requirements." *Colegrove v. Green*, 328 U.S. 549, 555 (1946) (Frankfurter, J.).

176. See *supra* text accompanying notes 129-32.

177. 88 U.S. (21 Wall.) 162, 178 (1875).

178. "Sec. 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.

"Sec. 2. The Congress shall have power to enforce this article by appropriate legislation." U.S. CONST. amend. XV.

179. U.S. CONST. amend. XIX.

180. *Nixon v. Herndon*, 273 U.S. 536 (1927). A subsequent Texas statute which continued the racial exclusion was also held unconstitutional on equal protection grounds. *Nixon v. Condon*, 286 U.S. 73 (1932). The use in these cases of the equal protection clause (which had previously been ignored in vote cases) seems to have been prompted by the Court's hesitation at that time to consider the primary an essential part of the state's electoral process so as to trigger the fifteenth amendment. See *supra* note 178. In *Grovey v. Townsend*, 295 U.S. 45 (1935), the third round of the Texas racial voting cases, the Court refused to find violations of either equal protection or the fifteenth amendment, expressly holding that a party primary was not "state action," but mere private action beyond the reach of either amendment. *Grovey* was subsequently overruled in *Smith v. Allwright*, 321 U.S. 649 (1944), which held that the Texas white primary violated the fifteenth amendment. Finally, in

Still another case in which the Court would flatly reject an equal protection basis for countering voting discrimination came before the Court in 1946. In *Colegrove v. Green*¹⁸¹ it appeared that Illinois had not reapportioned its congressional election districts since the census of 1900. Twenty Illinois districts had populations from 112,116 to 385,207.¹⁸² Plaintiffs, qualified voters living in districts with populations ranging from 612,000 to 914,000, sued state officials "to restrain them, in effect, from taking proceedings for an election in November 1946" under the existing congressional districts.¹⁸³ Plaintiffs (petitioners in the Supreme Court) claimed a right to relief under article I,¹⁸⁴ and under the equal protection clause of the fourteenth amendment. The Court rejected petitioners' claim by a 4-3 vote. Three Justices agreed with the plurality opinion of Justice Frankfurter, which declined to consider petitioners' claim on the ground that "this issue [is] of a peculiarly political nature and therefore not meet for judicial determination. . . . To sustain this action would cut very deep into the very being of Congress. Courts ought not to enter this political thicket."¹⁸⁵ The controlling vote was furnished by Justice Rutledge, who was willing to assume that the controversy was "justiciable," but so delicate that jurisdiction over it "should be exercised only in the most compelling circumstances."¹⁸⁶

Three Justices dissented. Justice Black's dissent in *Colegrove*, joined by Justices Douglas and Murphy, completely foreshadows *Baker v. Carr*,¹⁸⁷ the 1962 case which would overrule *Colegrove* 16 years later:

Appellants claim that since they live in the heavily populated districts their vote is much less effective than the vote of those living in a district which under the 1901 Act is also allowed to choose one Congressman, though its population is sometimes only one-ninth that of the heavily populated districts. Appellants contend that this reduction of the effectiveness of their vote is the result of a wilful legislative discrimination against them and thus amounts to a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment.¹⁸⁸

Having stated the contentions, Justice Black found jurisdiction, justiciability, standing, and the kind of injury for which "equity can and should grant relief." He concluded that "Such discriminatory legislation seems to me exactly the kind that the equal protection clause was in-

Terry v. Adams, 345 U.S. 461 (1953) Texas' attempt to circumvent *Smith v. Allwright* by staging an all-white pre-primary primary was likewise held to violate the fifteenth amendment.

181. 328 U.S. 549 (1946).

182. *Id.* at 566 (Black, J., dissenting).

183. *Id.* at 550 (Frankfurter, J.).

184. See *supra* text accompanying notes 172-75.

185. *Colegrove*, 328 U.S. at 552, 556.

186. *Id.* at 565.

187. 369 U.S. 186 (1962).

188. *Colegrove*, 328 U.S. at 567-68.

tended to prohibit. . . ."¹⁸⁹ But he was in dissent.

In *Gomillion v. Lightfoot*¹⁹⁰ in 1960 the Court considered the claim of black voters, grounded both in equal protection and in the fifteenth amendment, that they had been unconstitutionally redistricted out of the municipality of Tuskegee, and thus denied the right to vote in its municipal elections. The Court unanimously upheld plaintiffs' claim. Justice Frankfurter wrote the opinion of the Court, and distinguished *Colegrove*:

The appellants in *Colegrove* complained only of a dilution of the strength of their votes as a result of legislative inaction over a course of many years. The petitioners here complain that affirmative legislative action deprives them of their votes and the consequent advantages that the ballot affords.¹⁹¹

The decision was expressly rooted in the fifteenth amendment. Only Justice Whittaker, concurring, would have rested it on the equal protection clause of the fourteenth amendment.¹⁹²

2. The Reapportionment Decisions.

In the next Term *Baker v. Carr*¹⁹³ came before the Court. It was argued, and then set down for reargument and decision in the following Term. With a single exception¹⁹⁴ it was *Colegrove* revisited. The petitioners claimed that ancient state districting (even the year—1901—was the same as in *Colegrove*) "denied the equal protection of the laws accorded them by the Fourteenth Amendment to the Constitution of the United States by virtue of the debasement of their votes."¹⁹⁵ They sought a "declaration that the 1901 statute is unconstitutional and an injunction restraining [state officials] from acting to conduct any further elections under it."¹⁹⁶ This time the Court was politically attuned to make the leap it had resisted in *Colegrove* and succeeding cases.¹⁹⁷

Justice Brennan's opinion for the Court dealt patiently and skillfully one by one with the alleged constitutional obstacles to the result.¹⁹⁸ It

189. *Id.* at 569.

190. 364 U.S. 339 (1960).

191. *Id.* at 346.

192. *Id.* at 349.

193. 369 U.S. 186 (1962).

194. Unlike petitioners in *Colegrove*, the plaintiffs in *Baker v. Carr* challenged only the districting of both houses of the state legislature, not of congressional districts. Their case was uncomplicated by concerns as to Congress' authority under article I. See *supra* notes 172-75. They relied solely on the equal protection clause of the fourteenth amendment.

195. *Baker*, 369 U.S. at 188.

196. *Id.* at 195.

197. *South v. Peters*, 339 U.S. 276 (1950); *MacDougall v. Green*, 328 U.S. 281 (1948) — two cases in which a majority of the Supreme Court explicitly adhered to *Colegrove*.

198. Shortly after his retirement from the Supreme Court Chief Justice Warren was asked to identify the single most important opinion of his period on the Court. Without hesitation the author of *Brown v. Board of Educ.*, 347 U.S. 483 (1954), pointed to Justice Brennan's opinion in *Baker v. Carr*, 369 U.S. 186 (1962). *Recollections of Mr. Justice Warren*, TRIAL LAW. Q., Fall 1973, at 5, 9

left to the usually restrained and mild Justice Clark any response to the heavy handed criticism of Justice Frankfurter (joined by Justice Harlan) in his dissenting opinion.¹⁹⁹

Justice Clark, who had not been expected to join the majority,²⁰⁰ voiced another view of the Court's role in his concurrence:

It is well for this Court to practice self-restraint and discipline in constitutional adjudication, but never in its history have those principles received sanction where the national rights of so many have been infringed for so long a time. National respect for the courts is more enhanced through the forthright enforcement of those rights rather than by rendering them nugatory through the interposition of subterfuges. In my view the ultimate decision today is in the greatest tradition of this Court.²⁰¹

Within two years the Court formulated the standard by which legislative reapportionment was to be judged in state as well as in federal elections. The congressional election rule came down first, in *Wesberry v. Sanders* in 1964: The standard for congressional districting plans enacted by state legislatures "means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's."²⁰² Later in the same Term, in June 1964, the Court held unconstitutional one or both houses of the legislatures of six states. The lead case of this cluster, *Reynolds v. Sims*,²⁰³ is generally credited with establishing the "one person, one vote" formula with respect to voting in statewide elections.²⁰⁴ Chief Justice Warren's opinion stressed that "The Equal Pro-

(excerpts from Chief Justice Warren's conversation with Dr. A. Sacher, Chancellor of Brandeis University, Dec. 11, 1972). *Baker* became a point of departure for the Court, not only in equal protection voting reapportionment, but in matters of Article III standing, subject matter jurisdiction, and political question jurisprudence.

199. Justice Frankfurter led off by expressing chagrin at the Court's disrespect for *stare decisis* "The Court today reverses a uniform course of decision established by a dozen cases, including one by which the very claim now sustained was unanimously rejected only five years ago." *Id.* at 266-67. He then expressed disbelief at the Court's ready containment of the "political question" doctrine, and disregard of the Court's traditional "caution not to undertake decision where standards meet for judicial judgment are lacking." *Id.* at 289. Further, Justice Frankfurter was scornful that the Brennan opinion had suggested no standards for redistricting, either to legislatures or to the district court on remand. There was the "difficulty or impossibility of devising effective judicial remedies in this class of case. . . . A declaration devoid of implied compulsion of injunctive or other relief would be an idle threat." *Id.* at 327-28. Finally, Justice Frankfurter despaired that such judicial overreaching violated the very notion of democratic government. "In a democratic society like ours, relief must come through an aroused popular conscience that sears the conscience of the people's representatives." *Id.* at 270.

200. W. DOUGLAS, *supra* note 2, at 136.

201. *Baker*, 369 U.S. at 262.

202. *Wesberry v. Sanders*, 376 U.S. 1, 8 (1974). The grounding of the decision was that article 1, section 2 of the Constitution prescribed that members of the federal House are to be chosen "by the people."

203. 377 U.S. 533 (1964).

204. The phrase originated in Justice Douglas' opinion for the Court in *Gray v. Sanders*, 372 U.S. 368 (1963), which did not involve legislative redistricting: "[The] conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote." *Id.* at 381.

tection Clause demands no less than substantially equal state legislative representation for all citizens, of all places as well as of all races.”²⁰⁵ This meant, he continued, that a state must “make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable.”²⁰⁶ In his autobiography Justice Douglas records that

Between 1962, when *Baker v. Carr* was decided, and 1970, thirty six states had reapportioned either voluntarily or under pressure of judicial decrees, making a reality of the constitutional standard “one man, one vote,” reversing a long tradition of making certain blocs of voters more powerful than others.²⁰⁷

Once the basic standard of “one person, one vote” had been set, the Supreme Court was faced principally with two sorts of subissues: the extent to which deviation from equality would be tolerated,²⁰⁸ and the kinds of electoral governmental units and public elections to which the equal participation requirement would be extended.²⁰⁹ These line-drawing contexts after the Court has enunciated its basic political decision

205. *Reynolds*, 377 U.S. at 568.

206. *Id.* at 577.

207. W. DOUGLAS, *supra* note 2, at 136; see McKay, *Reapportionment: Success Story of the Warren Court*, 67 MICH. L. REV. 223 (1968).

208. The range of tolerance varied depending on whether congressional or state districting was in question. In congressional districting even “small” departures from the “one-person-one-vote” norm were disallowed. *White v. Weiser*, 412 U.S. 783 (1973). The trend in the 1970’s was to allow greater deviation from the norm in state redistricting plans. In *Abate v. Mundt*, 403 U.S. 182 (1971), an 11.9% deviation from equality in a county legislative apportionment was upheld. And in *Mahan v. Howell*, 410 U.S. 315 (1973), the Court upheld a 16.4% deviation from equality in a state legislature. In *Brown v. Thomson*, 463 U.S. 835 (1983), we see this trend continuing in the 1980’s. The Supreme Court tolerates less deviation from equality in court-ordered apportionment plans than in plans prepared by the legislature. *Connor v. Finch*, 431 U.S. 407 (1977).

209. The one-person-one-vote principle was extended beyond legislatures to units of local government in *Avery v. Midland County*, 390 U.S. 474 (1968). In a one-directional series of cases, it was applied to elections still narrower in scope: a school district election (*Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969)), elections to approve issuance of municipal bonds (which local law had limited to real property taxpayers) (*Phoenix v. Kolodziejski*, 399 U.S. 204 (1970)); *Cipriano v. City of Houma*, 395 U.S. 701 (1969)), and election of trustees of a public junior college district (*Hadley v. Junior College Dist.*, 397 U.S. 50 (1970)). Finally, the Court drew the line at requiring general voter participation in a water district election, where the main purpose of the district was to make available water for farming, and the costs were assessed against landowners. In such circumstances, the Court held, it was permissible that only landowners vote. *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973). At least, there was no fundamental right to vote in members of the general public, and consequently no need (as in the other cases just cited) for a showing of “compelling state interest” to uphold narrowing of the electorate. A minimal rational basis showing would suffice.

Closely aligned with, but distinct from, the one-person-one-vote right-to-vote cases are Supreme Court cases concerning rights of political parties, both as to access to the ballot and as to management of their own affairs without interference from governmental legislation. Since *Williams v. Rhodes*, 393 U.S. 23 (1968), the Court has recognized that these concerns derive from “the [first and fourteenth amendment] rights of individuals to associate for political purposes, as well as the rights of qualified voters to cast their votes effectively. . . .” *Munro v. Socialist Workers Party*, 107 S. Ct. 533, 536 (1986). Like the right-to-vote cases discussed above, these political party cases have produced endless line-drawing by closely divided Courts. Two of the first cases decided in the current

permit the Court to express its current intensity in pursuing the announced policy. Once again²¹⁰ it is politics at retail rather than wholesale.

What was the Court's basic politics in this reapportionment context? Chief Justice Warren put it this way:

A citizen, a qualified voter, is no more nor no less so because he lives in the city or on the farm. This is the clear and strong command of our Constitution's Equal Protection Clause. . . for all citizens, of all places as well as of all races.²¹¹

The political conclusion was not all that clear to Justice Harlan, who vigorously dissented,²¹² nor to some distinguished members of the legal Academy.²¹³

B. "Fundamental" Voting "Interests" or "Rights"

One expansive view of the reach of equal protection by the Warren Court has already been discussed. The "suspect" classification entailing a "compelling state interest" and "no less drastic means" was a formulation adopted by the Court to enforce its political conclusion that the fourteenth amendment's equal protection clause required more protection against governmental discrimination rooted in a racial classification than was afforded by a "traditional" minimal "rational basis" justification.²¹⁴ The Court in the 1960's further concluded that certain categories of interests that were not "rights" in a strict sense could be considered sufficiently "fundamental" to require justification by the strict "compelling state interest" test when they were subjected to equal protection scrutiny.

The first of these categories to be identified²¹⁵ was the denial or limitation of the voting franchise. The first case to stress this point, *Harper v. Virginia Board of Elections*²¹⁶ in 1966, affirmed "that once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause." And, Justice Douglas stated in his opinion for the Court invalidating a state poll tax on voting, "[W]here fundamental rights and liberties are asserted under the Equal Protection

Term— *Munro*, 107 S. Ct. 533, and *Tashjian v. Republican Party of Conn.*, 107 S. Ct. 544 (1986)—furnish particularly apt illustrations.

210. See *supra* text accompanying note 94.

211. *Reynolds*, 377 U.S. at 568.

212. *Id.* at 589-632.

213. See Bickel, *The Supreme Court and Reapportionment*, in REAPPORTIONMENT IN THE 1970's, 57-59 (Polsby ed. 1971); Neal, *Baker v. Carr, Politics in Search of Law*, 1962 SUP. CT. REV. 252.

214. Similarly, increased scrutiny was given sex discrimination, the intermediate variety of *Craig v. Boren*, 429 U.S. 190 (1976); see *supra* text accompanying notes 165-68.

215. The other two accepted categories of "fundamental interests" are indigents' access to the courts, and the so-called right to domestic travel.

216. 383 U.S. 663 (1966).

Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined.”²¹⁷ In this voting context, he concluded “the right to vote is too precious, too fundamental to be so burdened or conditioned.”²¹⁸ Succeeding cases spelled out that

[I]f a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest.²¹⁹

Like the reapportionment cases, these “fundamental interest” decisions assert the Court’s political perception that a constitutional democracy entails equal opportunity to participate in governmental decision-making, and that this requirement merits vigorous judicial enforcement.²²⁰ Explaining the Court’s new “one person, one vote” doctrine in *Reynolds v. Sims*, Chief Justice Warren, like Marshall before him, found the Constitution inevitably “political”:

This is the clear and strong command of our Constitution’s Equal Protection Clause. This is an essential part of the concept of a government of laws and not men. This is at the heart of Lincoln’s vision of “government of the people, by the people, [and] for the people.”²²¹

He might have recalled that Lincoln’s credo from the Gettysburg Address had been anticipated by Chief Justice Marshall: “The government of the Union . . . is, emphatically, and truly, a government of the people.”²²²

In the reapportionment cases the Court selected as its mode of enforcement, mandatory reapportionment on the “one person, one vote” standard. In the “fundamental interest” cases the Court enlisted its strictest constitutional test to implement its view of a fundamental political priority.

II. COUNTERARGUMENT AND REPLY: IS A “POLITICS THESIS” WRONG, INCOMPLETE OR TRIVIAL?

Even a strong partisan of the use of counterarguments as an expository device must reach a bit to find them very helpful here.²²³ One might

217. *Id.* at 670.

218. *Id.*

219. *Id.*

220. *Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621, 627 (1969); *see also* *Dunn v. Blumstein*, 405 U.S. 331 (1972); *Phoenix v. Kolodziejski*, 399 U.S. 204 (1970); *Cipriano v. Houma*, 395 U.S. 701 (1969). The doctrine was extended in *Williams v. Rhodes*, 393 U.S. 23 (1968), to apply to state laws restricting access of a new political party to the ballot, where the right of association secured by the first amendment furnished an additional constitutional ground. In this last variation the Court’s subsequent cases have been uneven—again, politics at retail. *Cf.* *Clements v. Fashing*, 457 U.S. 957 (1982); *Anderson v. Celebrezze*, 460 U.S. 780 (1983).

221. *Reynolds*, 377 U.S. at 568.

222. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 404-05 (1819).

223. In *Affirmative Action After Stotts*, I used arguments and counterarguments which are more

expect resistance to the politics thesis on three grounds: (1) it is wrong; (2) it is incomplete; or (3) it is trivial. But none of these is convincing.

The argument to date for the politics thesis has been simply this: that in presiding over the development of major areas of constitutional law the Supreme Court has been demonstrably engaged in politics. It is not a question of partisan politics, but of the Court's making political choices en route to its interpretative decisions that constitute the body of constitutional law. These choices are political, because they are impelled not by settled "law," but by a selection among constitutional possibilities that are germane to the solution of a case brought before the Court for decision.²²⁴ As we have seen, this proposition is no new insight. It was advanced, among others, by two eminent Justices of a generation ago who would, by contemporary standards be viewed as moderates by some and conservatives by others—Justices Robert H. Jackson and Benjamin N. Cardozo. In support of this politics thesis I have given examples of the Court's "jurisprudential politics"²²⁵ in several highly controversial areas of constitutional interpretation. These slices of constitutional history establish with rare certainty that the politics thesis is not "wrong," whatever one may say as to its being "incomplete" or "trivial."

The counterargument as to "incompleteness" points out that the politics thesis ignores the fact that the Supreme Court in a great part of its work functions like a traditional appellate law court, much like the highest courts of the fifty states. Of course it does, as Justice Jackson recognized in his study,²²⁶ and the politics thesis makes no extensive claims in this area of the Court's work. This is the case, for example, in interpreting congressional statutes, in exercising supervision of the diversity juris-

familiar in philosophical than in legal discourse with respect to various "policy" reasons for affirmative action goals. Broderick, *supra* note 14, at 187-207.

224. 28 U.S.C. § 1257 (1) and (2) with respect to appeals, and 28 U.S.C. § 1257 (3) with respect to certiorari. 28 U.S.C. § 1257 (1982). The "appeal" is of "right." But the grant of "certiorari" is completely within the discretion of the Justices. If four Justices vote "yes," "cert." is granted.

225. The term "jurisprudential politics" was earlier used by the French jurist, Maurice Hauriou, with respect to the functioning of the Conseil d'Etat. Unlike the common law countries, the French do not handle complaints against official action in the ordinary courts of law, but before separate administrative courts presided over by the Conseil d'Etat. Hauriou, long the dean of the law school at the University of Toulouse, wrote 370 notes (or commentaries) to decisions on public law by the Conseil d'Etat which were published currently with the decisions from 1892 to 1929. They were published in three volumes (totalling 2363 pages) in 1929 under the title *NOTES D'ARRÊTS SUR DECISIONS DU CONSEIL D'ETAT ET DU TRIBUNAL DES CONFLITS*. Hauriou suggests that the Conseil d'Etat usually seeks to tie its decisions to some legislative text (however remote), and avoids explicit resort to theory. However, Hauriou has no illusion that the Conseil d'Etat's answers have been found in the texts to which it refers, and he continually points out in his "Notes d'Arrêts" the social, economic and political "reasons" for its decisions. His reference to this High Court's technique as "the jurisprudential politics of the Conseil d'Etat" occurs in *NOTES D'ARRÊTS*, Volume I, at 389, and Volume II at 180. The suggestion here is that "jurisprudential politics," or "constitutional politics," has a striking parallel applicability to describe the actual functioning of the Supreme Court in deciding constitutional cases that are not explicitly controlled by a clear constitutional text.

226. R. JACKSON, *supra* note 15, at 28-48.

diction of the lower federal courts,²²⁷ and, ordinarily, in functioning as the highest court of the national judicial system in matters where no special constitutional issue is at stake. This counterargument continues: the politics thesis is also incomplete in ignoring the question that has chiefly occupied academic critics of the Court— what constitutes the preferred mode of functioning by the Supreme Court if it is to fulfill its role in the constitutional plan. Again, the politics thesis pleads *nolo contendere*. To be sure this difficult and worthy concern remains to be dealt with. But the problem of “good” vs “bad” politics is not within the claimed reach of the politics thesis. It describes how the Supreme Court has functioned, not how it should function.

But, continues the counterargument, surely such a limited politics thesis is vulnerable to the charge of triviality. What claim can it have to our interest if it refuses to grapple with such significant questions as “good” constitutional methodology, or “good” politics? Surely the most critical question facing the Supreme Court is the one which has sparked such disagreement in recent years, on and off the Court, the appropriate limits of judicial review.²²⁸ And of this the politics thesis says not a word. Also ignored by the politics thesis is the nagging complaint that an appointive, lifetime, activist Supreme Court is undemocratic in character.²²⁹

I shall defer a full reply to this charge of triviality until Section VI, below. For the moment this summary will suffice: The politics thesis makes a contribution to current constitutional discourse by focusing upon the political fashions which the Supreme Court has used in constitutional interpretation across its entire history. The sole unifying factor among them is that they have been different, the particular political choices of particular Supreme Courts of a particular age. In the absence of broad concurrence or compelling evidence (which is absent from the academic debate) as to “appropriate” constitutional method, the competing proposals remain just that—proposals. Moreover, they are political

227. But a constitutional federalism thread is apparent even here. In the leading modern diversity case, *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), the Supreme Court overruled a decision of almost a century's standing, *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), stating constitutional grounds. In *Erie* the controlling constitutional ground seems to have been the Court's conclusion that *Swift* had wrongly assumed that the federal courts had power to make decisional law in areas where Congress lacked power to enact statutes. In short, the Court viewed *Erie* as correcting a judicial intrusion upon the tenth amendment (although the Court also spoke of “grave discrimination by non-citizens against citizens” under the *Swift* doctrine which “rendered impossible equal protection of the law.” *Erie*, 304 U.S. at 74-75.) In the Supreme Court's most recent full-bodied pronouncement on the subject of application of state law in federal diversity cases, in *Hanna v. Plumer*, 380 U.S. 460 (1965), the Court stressed the equal protection clause as the foundation of the *Erie* doctrine. (Between 1938 and 1965, of course, the Court had considerably expanded the constitutional reach of equal protection. See *supra* text accompanying notes 109-17, 139-69, and 193-221).

228. Recall that judicial review, as a doctrine, refers directly to *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

229. See, e.g., J. ELY, *DEMOCRACY AND DISTRUST* 4-9 (1980).

proposals, in the sense discussed here, whether specifically grounded in some version of economics, history, political or moral philosophy, or statistical "facts." Some of these proposals are immediately recognizable as extreme, including recent proposals from high places.²³⁰ The most extreme identify themselves either as elements of a theater of the absurd, or (more likely) as laying political groundwork for a substantial revision of the constitutional system, perhaps through the device of the proposed constitutional convention. The welcome revival of interest in principled legal theory has produced some more conventional jurisprudential views. Some of these highlight still another attribute of the politics thesis: its perception that general legal theory and constitutional theory are significantly different, and that each will profit by our keeping focus on that difference.

The core of the difference is this: Both general law and constitutional law are in a constant state of enactment. With general law the enactment is both decisional and statutory. With constitutional law the enactment is exclusively decisional, the amending process by design is difficult and has, in fact, rarely been successful.²³¹ Paradoxically, the ready availability of corrective legislative oversight has reinforced in general law what was originally a very conservative doctrine of the common law — the hostility to judicial decisional change embodied in *stare decisis*. No such inflexible rigidity is required or feasible in constitutional interpretation. Noting the controlling significance of this distinction was one of the fundamental insights of Chief Justice Marshall. Not once but twice, in *McCulloch v. Maryland*,²³² he called attention to this principled distinction between interpreting general law and interpreting a constitution. First, he was inquiring whether the Constitution's assignment of powers to Congress must be interpreted literally. Marshall concluded that enumerated powers did not exclude implied powers: "In considering this question, then, we must never forget it is *a constitution* we are expounding."²³³ Shortly thereafter, rejecting a narrow interpretation of the "necessary and proper" clause of article 1, section 8, clause 19, Marshall returned to his theme:

This provision is made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs. To have prescribed the [particular] means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code.²³⁴

230. See *infra* notes 404 and 409.

231. See *infra* note 411.

232. 17 U.S. (4 Wheat.) 316 (1819).

233. *Id.* at 407.

234. *Id.* at 415.

III. THE AFFIRMATIVE ACTION CASES: AN EXAMPLE OF CONSTITUTIONAL POLITICS IN OPERATION

In the years after *Brown v. Board of Education*²³⁵ in 1954, the Supreme Court uniformly struck down instances of racial discrimination in governmental facilities. However, not until 1974 did the Court agree to hear a case involving the constitutionality of affirmative action programs. In that year the Court heard argument in *DeFunis v. Odegaard*,²³⁶ in which DeFunis, a white student, challenged a University of Washington Law School admissions program which allotted a percentage of entering seats to black students. After oral argument the Court declined to decide the merits of the case. Instead, it dismissed the case on the ground of mootness, as DeFunis had been admitted subsequently and was on the verge of graduation.²³⁷

The issue returned to the Court three years later.²³⁸ Allan Bakke, a white applicant for admission to the Medical School of the University of California at Davis, challenged the School's preferential racial admission program on equal protection grounds, and the California courts upheld his claim. The Supreme Court affirmed, ordering the medical school to admit Bakke. The Court was hopelessly divided as to the grounds for its decision. Four Justices (in an opinion by Justice Stevens) found that the state institution's racial preference program violated title VI of the Civil Rights Act of 1964,²³⁹ thus failing to reach the constitutional issue of equal protection.²⁴⁰ The fifth Justice supporting the judgment in favor of Bakke, Justice Powell, found it necessary to reach the equal protection issue and did so, ruling that Bakke's equal protection rights had been violated by the medical school's use of race as a classification for admission. There were four dissenting Justices who (in an opinion by Justice Brennan) considered the constitutional issue, but ruled that the preferential admissions program, though racially specific, did not violate Bakke's constitutional rights.²⁴¹ Having cast his vote with the four title VI Justices to constitute a majority in favor of Bakke's admission, Justice Powell then agreed with Justice Brennan's four to form a separate 5-4 majority holding that a racially specific affirmative action program could, in certain circumstances, be supportable against an equal protection challenge.²⁴²

235. 347 U.S. 483 (1954).

236. 416 U.S. 312 (1974).

237. Four Justices dissented and would have reached the merits, favorably to the law school's affirmative action admissions program. *Id.* at 320, 348.

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

239. 42 U.S.C. § 2000d-1 to -6 (1982).

240. *Bakke*, 438 U.S. at 412, 421.

241. *Id.* at 379.

242. *Id.* at 272, 320.

Central to the differences between Justice Powell's and the Brennan Four with respect to Bakke's equal protection rights was Justice Powell's insistence upon the most demanding constitutional standard, the "compelling state interest" test. This test required a governmental body using a racial classification in dispensing a state benefit to demonstrate that the racial classification was necessary to satisfy a "compelling state interest," and show that "no less drastic means" other than the racial classification, as used, would satisfy that interest.²⁴³ Justice Powell's controlling opinion on the equal protection issue held that a rigid quota, such as the 16 of 100 seats reserved for minorities by the medical school, was *per se* unconstitutional.²⁴⁴ However, he went on to allow that, provided there were findings of past racial discrimination at the medical school, a racial preference affirmative action program might pass constitutional equal protection muster, as a remedy for the past race discrimination. Remedying such actual past discrimination (but not merely societal discrimination) would constitute the required "compelling state interest." If "necessary" to remedy the past discrimination a racial preference program could be upheld.²⁴⁵

Although Justice Powell spoke just for himself, his vote was also crucial to establishing the majority of the Court on the secondary question, whether racial preferences could ever be constitutionally upheld. Thereafter, his strict "compelling state interest" test, rather than the intermediate "substantial relation to a compelling state interest"²⁴⁶ test of the Brennan Four was taken by most federal courts as the Supreme Court's measure of the constitutionality of a racially specific affirmative action plan.²⁴⁷

The following year, in 1979, the Supreme Court heard another affirmative action case, *United Steelworkers v. Weber*.²⁴⁸ *Weber* raised the question whether title VII of the Civil Rights Act of 1964²⁴⁹ permitted a voluntary affirmative action plan that resulted in a white senior worker, Weber, being excluded from a plant training program designed to train unskilled workers for higher paying jobs. Under the affirmative action

243. *Id.* at 299, 305. Justice Powell offered two variations of this "means" requirement: (1) that the means (racial classification) be "precisely tailored to serve a compelling governmental interest," *id.* at 299; and (2) that the means be "necessary. . . to the accomplishment of its purpose or the safeguarding of its [compelling] interest." *Id.* at 305.

244. *Id.* at 307, 319-20.

245. *Id.* at 307-08; see *id.* at 299, 305.

246. See *supra* text accompanying notes 165-67 (discussion of *Craig v. Boren* test for sex discrimination).

247. Only the Court of Appeals for the Sixth Circuit declined to accept this Powell test as constitutionally required. Its preference for the Brennan Four test (in *Bakke*) was finally reproved by the Supreme Court last Term in *Wygant v. Jackson Bd. of Educ.*, 106 S. Ct. 1842 (1986). See *infra* text accompanying notes 280-90 for discussion of *Wygant*.

248. 443 U.S. 193 (1979).

249. 42 U.S.C. § 2000e (1982).

plan adopted by the plant management and the union "at least fifty percent of the new trainees were to be black until the percentage of black skilled workers in the Gramercy plant approximated the percentage of blacks in the local labor force."²⁵⁰ Justice Brennan's opinion for a 5-2 Court upheld the plan, as permitted by title VII, noting that no constitutional issue was involved.²⁵¹

The *Weber* Court did not suggest that every voluntary affirmative action plan would be valid, but listed criteria that, if satisfied, would be sufficient to satisfy title VII. These criteria were met in *Weber*: (1) the plan was designed "to eliminate conspicuous racial imbalance in traditionally segregated job categories";²⁵² (2) the plan did "not unnecessarily trammel the interests of white employees";²⁵³ and (3) the plan was temporary, with the racial preference terminating when "the percentage of black skilled craft workers in the Gramercy plant approximates the percentage of blacks in the local labor force."²⁵⁴

One year later, the Court addressed the constitutional equal protection issue as it relates to affirmative action for the first time since *Bakke*. In *Fullilove v. Klutznick*²⁵⁵ the Supreme Court upheld, by a 6-3 vote, a congressional set aside of ten percent of the \$4,200,000,000 appropriation of the Public Works Employment Act of 1977²⁵⁶ for qualified "minority business enterprises" against an equal protection challenge.

In *Fullilove*, as in *Bakke*²⁵⁷ a Court majority did not identify a single test of the constitutionality of a racial preference affirmative action program. This time only three Justices²⁵⁸ adhered to the less demanding Brennan Four test from *Bakke*.²⁵⁹ The opinion of Chief Justice Burger, to which Justices Powell and White adhered, supplied the other three votes of the six-Justice majority. This opinion specified only that the plan under attack passed constitutional muster under the *Bakke* opinions of either Justice Powell or Justice Brennan.²⁶⁰ Once again, then, after *Fullilove* one must refer to Justice Powell's restrictive *Bakke* opinion to conclude (or conjecture) the standard of the Supreme Court for upholding affirmative action. Still, the Burger opinion in *Fullilove* did seem to find support for its conclusion in the factors suggested in the non-constitu-

250. *Weber*, 443 U.S. at 197.

251. Justices Powell and Stevens did not participate in the case. *Id.* at 195.

252. *Weber*, 443 U.S. at 209.

253. *Id.* at 208.

254. *Id.*

255. 448 U.S. 448 (1980).

256. 42 U.S.C. §§ 6701-6736 (1982).

257. See *supra* text accompanying notes 238-47.

258. Justices Marshall (who wrote the opinion), Brennan and Blackmun. *Fullilove*, 448 U.S. at 516-17.

259. See *supra* text accompanying note 246.

260. *Fullilove*, 448 U.S. at 492.

tional context of *Weber*. There was an adequate Congressional designation in the legislative history that the purpose of the minority set-aside was to remedy past racial discrimination in the building trades.²⁶¹ The set-aside did not “unnecessarily trammel the interests of white” contractors.²⁶² The program was temporary as it was limited to the funds appropriated in the 1977 statute.²⁶³ Finally, one can see in the Burger opinion consonance with the *Weber* stress that an affirmative action program be “designed to eliminate conspicuous racial imbalance [discrimination] in traditionally segregated [business] categories.”²⁶⁴ The Burger opinion laid particular stress on the fact that there was no rigid quota here, as there had been in *Bakke*, but rather a “flexible” allotment that would be made only to those minority contractors who had in fact suffered from the effects of the prior discrimination. In this context, “where the burden on non-minority firms [was] relatively light,”²⁶⁵ the race-specific preference was “equitable and reasonably necessary to the redress of identified discrimination.”²⁶⁶ While joining the Burger opinion, Justice Powell also wrote separately,²⁶⁷ and seemed to mitigate somewhat the rigor of his *Bakke* test.²⁶⁸

In 1981 and 1983 the Supreme Court heard arguments in two affirmative action cases but did not reach the merits.²⁶⁹ However, immediately after dismissing the 1983 *Boston Firefighters* case, the Court granted certiorari in a case involving the same issue— whether a court-approved affirmative action plan supersedes the protection afforded majority workers under the “last-hired first-fired” provisions of a bona fide seniority system.²⁷⁰

The Courts decision in *Stotts*²⁷¹ at the end of the 1983 Term created consternation as to the future, if any, of affirmative action. The Court’s decision on “the issue at the heart of the case,”²⁷² while disappointing to advocates of affirmative action, was not totally unexpected. Writing the opinion for a 5-4 Court, Justice White stated this question succinctly:

Whether the district court exceeded its powers in entering an injunction

261. *Id.* at 473.

262. *Weber*, 443 U.S. at 208; *Fullilove*, 448 U.S. at 484.

263. *Fullilove*, 448 U.S. at 489; cf. *Weber*, 443 U.S. at 208.

264. Cf. *Fullilove*, 448 U.S. at 478; *Weber*, 443 U.S. at 197.

265. *Weber*, 443 U.S. at 197; see *Fullilove* 448 U.S. at 478.

266. *Fullilove*, 448 U.S. at 484.

267. *Id.* at 510.

268. *Bakke*, 438 U.S. at 305, 320; *Fullilove*, 448 U.S. at 510.

269. *Minnick v. California Dep’t of Corrections*, 452 U.S. 105 (1981) (judgment appealed from was not “final” within the meaning of 28 U.S.C. § 1257(3) (1982), and want of a properly presented constitutional question); *Boston Firefighters Union, Local 718 v. Boston Chapter NAACP*, 461 U.S. 477 (1983) (dismissed as moot).

270. *Stotts v. Memphis Fire Dep’t*, 679 F.2d 541 (6th Cir.), 467 U.S. 1105 (1983).

271. *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984).

272. *Id.* at 572.

requiring white employees to be laid off, when the otherwise applicable seniority system would have called for the layoff of black employees with less seniority.²⁷³

His answer to this question, spoken for the Court, was "Yes," and the court of appeals decision was reversed as a violation of title VII.²⁷⁴ There was no constitutional holding or discussion in *Stotts*. However, towards the close of his majority opinion, Justice White intimated: (1) that no race-specific relief could be given under title VII except to persons who were shown to be specific victims of the identified race discrimination;²⁷⁵ and (2) that no relief could be extracted from the terms of a consent decree under title VII beyond that which a district court was entitled to award after a litigated action.²⁷⁶ The first of these intimations, if insisted on by the Supreme Court, would effectively eliminate the design of the extraordinary remedy of affirmative action goals against recalcitrant employers who had failed to respond to less drastic remedies for race discrimination. The second would remove considerable incentive from parties in discrimination actions to settle their differences, in preference to fully litigating them at trial. The structure of title VII, the Court had agreed, showed a strong congressional preference for conciliation and settlement.²⁷⁷

In the ensuing year, 1984-85, the courts of appeal showed a remarkable reluctance to take literally these intimations.²⁷⁸ The Supreme Court explicitly rejected the intimations just discussed in two of the three affirmative action cases decided in the 1985 Term.²⁷⁹

Two of the 1985 Term cases, *Wygant*,²⁸⁰ and *Sheet Metal Workers*,²⁸¹ gave new attention to the constitutional standard under equal protection. Once again it was Justice Powell who was the controlling vote in these equal protection cases, and who took great pains to refine the standard.²⁸² At the end of the 1985 Term there was still no majority equal protection standard for race-preference cases. However, it was clearer

273. *Id.* at 572-73.

274. *Id.* at 583.

275. *Id.* at 579-80.

276. *Id.* at 576 n.9.

277. *See id.* at 616 (citing *Carson v. American Brands Inc.*, 450 U.S. 79, 88 n.14 (1981): "Congress expressed a strong preference for encouraging voluntary settlement of employment discrimination claims.").

278. The cases are discussed in Broderick, *supra* note 14.

279. *Local 93 v. City of Cleveland*, 106 S. Ct. 3063 (1986); *Sheet Metal Workers' Int'l Ass'n v. EEOC*, 106 S. Ct. 3019 (1986). But it was in the third case, *Wygant v. Jackson Bd. of Educ.*, 106 S. Ct. 1842 (1986) that Justice Powell went back to the drawing board with respect to the constitutional test for remedial racial preferences. In his opinion for the Court he overturned a public body's affirmative action plan as beyond permissible limits. *See infra* text accompanying notes 280-90.

280. *Wygant v. Jackson Bd. of Educ.*, 106 S. Ct. 1842 (1986).

281. *Local 28 of Sheet Metal Workers Int'l Ass'n v. EEOC*, 106 S. Ct. 3019 (1986).

282. Since the Court majority in *Sheet Metal Workers* found the plan valid under title VII, it was compelled to consider the equal protection issue. *Id.* at 3052 (Brennan opinion), and 3054 (Powell

than ever that any race-conscious (or sex-conscious) affirmative action case must pass the test refined by Justice Powell, or not survive.

In *Wygant*, the Jackson Board of Education's affirmative action program with its teachers union contained a provision protecting minority teachers against layoffs that would reduce minority teachers below a certain percentage at the majority black school. Although there was no identified race discrimination in evidence, the district court upheld the plan. It was acceptable "as an attempt to remedy societal discrimination by providing role models' for minority schoolchildren."²⁸³ The Court of Appeals for the Sixth Circuit affirmed, and the Supreme Court granted certiorari.

The opinion of the 6-3 Court reversing the court of appeals was written by Justice Powell. Faced with the equal protection claim of a white school teacher who had been laid off as the result of the racial preference, Justice Powell moved firmly to state the applicable test. Citing other cases, but principally *Bakke* and *Fullilove*, Justice Powell simply clarified the "compelling state interest" test he had stated in *Bakke*. There are, he wrote, "two prongs" to the "most searching examination." The first dealt with the purpose of the racial classification: "any racial classification must be justified by a compelling governmental interest."²⁸⁴ This part of the test was not met, because there had been no showing of "prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination."²⁸⁵

The second prong of the test is that "the means chosen by the State to effectuate its purpose must be 'narrowly tailored to the achievement of that goal.'"²⁸⁶ Recognizing that there had been some restlessness at the term "narrowly tailored," and whether it represented a softening of his *Bakke* approach, Justice Powell elaborated: "The term may be used to require consideration whether lawful alternative and less restrictive means could have been used." Or, he added, "narrowly tailored" may mean that "the classification at issue must 'fit' with greater precision than any alternative means."²⁸⁷ Justice Powell conceded that the "narrowly tailored" means requirement left room for some "sharing of the burden" by innocent parties."²⁸⁸ However, the burden imposed by layoffs was excessive. "Though hiring goals may burden some innocent individuals, they simply do not impose the same kind of injury that layoffs impose."

opinion). As these opinions pointed out, the constitutional provision in question here was "the equal protection component of the Due Process Clause of the Fifth Amendment." *Id.*

283. *Wygant*, 106 S. Ct. at 1846.

284. *Id.*

285. *Id.* at 1847.

286. Citing *Fullilove*, 448 U.S. at 480 (Burger, C.J.).

287. *Wygant*, 106 S. Ct. at 1850.

288. *Id.*

The Powell opinion in *Wygant* denied that the layoff plan satisfied either prong; there was no "compelling state interest" because there had been no sufficient showing of past discrimination.²⁸⁹ Nor was the second prong satisfied: the "burden to be borne by innocent individuals" was too great for the remedial means to be considered "narrowly tailored". "Other, less intrusive means of accomplishing similar purposes— such as the adoption of hiring goals— are available."²⁹⁰

Sheet Metal Workers was principally concerned with title VII.²⁹¹ As Justice Brennan put it at the outset of his plurality opinion, the central issue was "whether the remedial provision of title VII empowers a district court to order race-conscious relief that may benefit individuals who are not identified victims of unlawful discrimination."²⁹² The Court answered this question "Yes," with Justice Powell, who wrote a concurring opinion, joining the judgment of a 5-4 Supreme Court.

Once the title VII question had been answered it was necessary to ascertain whether the affirmative action ordered by the district court violated "the equal protection component of the Due Process Clause of the Fifth Amendment because they deny benefits to white individuals based on race." Justice Brennan for the plurality (that included Justices Marshall, Blackmun and Stevens) referred to the disagreement on the Court as to the proper test, and simply concluded that "the relief ordered in this case passes even the most rigorous test—it is narrowly tailored to further the Government's compelling interest in remedying past discrimination."²⁹³

In his concurrence, which was essential to the result reached by the majority, Justice Powell reiterated verbatim his two-prong end-and-means test, and his statements from *Wygant* (set out above) were repeated verbatim. As to the end, or purpose, the lower courts' findings "that petitioners have engaged in egregious violations of Title VII establishes, without doubt, a compelling governmental interest sufficient to justify the imposition of a racially classified remedy."²⁹⁴ The lower courts had approved a percentage membership goal as a remedy, and Justice Powell referred to his *Wygant* specifications in focusing on whether the remedy was "narrowly tailored" to "eradicating the discrimination."²⁹⁵ Justice Powell also referred to four factors he had stressed in *Fullilove*²⁹⁶ "when considering the proper scope of race-conscious hiring

289. "[T]he trial court must make a factual determination that the employer had a strong basis in evidence for its conclusion that remedial action was necessary." *Id.* at 1848.

290. *Id.* at 1852.

291. 42 U.S.C. § 2000e-5(g) (1982).

292. *Sheet Metal Workers*, 106 S. Ct. at 3019, 3025.

293. *Id.* at 3053.

294. *Id.* at 3055.

295. *Id.*

296. See *supra* text accompanying note 262.

remedies”: “(i) the efficacy of alternative remedies; (ii) the planned duration of the remedy; (iii) the relationship between the percentage of minority workers to be employed and the percentage of minority group members in the relevant population or work force; and (iv) the availability of waiver provisions if the hiring plan could not be met.” Justice Powell then adverted to still another standard, “A final factor of primary importance that I considered in *Fullilove*, as well as in *Wygant*” — “the effect of the [remedy] upon innocent third-parties.”²⁹⁷ Justice Powell found these five factors satisfied in *Sheet Metal Workers*. The “imposition of flexible goals as a remedy for past discrimination” did not unduly burden “particular [majority] individuals” as had the “layoff provision in *Wygant*.”²⁹⁸

Justice Powell had foreshadowed the *Sheet Metal Workers* result as to hiring goals in his *Wygant* opinion, and he used precisely the same refinements of the same two-prong formula in both *Wygant* and *Sheet Metal Workers*. However, at the end of his *Sheet Metal Workers* opinion he cautioned against a formalistic categorization of the results in the two cases—and presumably in others:

Of course, it is too simplistic to conclude from the combined holdings in *Wygant* and this case that hiring goals withstand constitutional muster whereas layoff goals and fixed quotas do not. There may be cases, for example, where a hiring goal in a particularly specialized area of employment would have the same pernicious effect as the layoff goal in *Wygant*. The proper constitutional inquiry focuses on the effect, if any, and the diffuseness of the burden imposed on innocent nonminorities, not on the label applied to the particular employment plan at issue.²⁹⁹

IV. THE 1986 TERM CASES: *JOHNSON* AND *PARADISE*

The common factor in *Johnson*³⁰⁰ and *Paradise*³⁰¹ concerns promotions, unlike the 1985 Term cases,³⁰² which concerned layoffs and hiring goals. Beyond this common note, the two cases involve distinctive issues. Although both *Johnson* and *Paradise* concern public employers, and therefore potentially concern the constitutional equal protection issue,

297. *Sheet Metal Workers*, 106 S. Ct. at 3055 (quoting *Fullilove*, 448 U.S. at 514).

298. *Id.* at 3057.

299. *Id.* at 3057 n.3.

300. *Johnson v. Transportation Agency, Santa Clara County, Calif.*, 748 F.2d 1308 (9th Cir. 1984), cert. granted, 106 S. Ct. 3331 (1986). The Question accepted for review in *Johnson* was: “May a public employer lawfully promote a less-qualified female candidate over a more-qualified male employee allegedly pursuant to affirmative action plan adopted solely to eliminate statistical disparity in workforce unrelated to sex discrimination.” *Id.*

301. *Paradise v. Prescott*, 767 F.2d 1514 (11th Cir. 1985), cert. granted sub nom. *United States v. Paradise*, 106 S. Ct. 3331 (1986). The sole question accepted by the Court for review in *Paradise* was: “Is promotion quota permissible under equal protection guarantees of Fourteenth and Fifth Amendments?” *Id.*

302. See *supra* text accompanying notes 280-99.

the white female plaintiff in *Johnson* did not challenge the governmental agency's affirmative action plan on equal protection grounds, but only as a violation of title VII. Should the Court agree with the court of appeals that the affirmative action plan passed the title VII *Weber* test,³⁰³ and identify the equal protection test as more strict,³⁰⁴ it might also measure the plan against the constitutional standard. I will discuss *Johnson* here solely as involving title VII. In any event *Paradise* raises the equal protection issue, and solely that, by the specific terms of the grant of certiorari.³⁰⁵

Johnson

The *Johnson* case is unlikely to make large waves with respect to affirmative action. The fact that the case deals with sex discrimination, rather than race discrimination, can hardly be viewed as relevant under title VII, which bars sex and race discrimination alike. An interpretation of title VII which afforded lesser affirmative remedies for past sex discrimination than for past race discrimination would be bizarre, and considered so by the Court.³⁰⁶

Close technical questions may well determine the Court's disposition of *Johnson* should the Court address solely the question whether the voluntary government plan satisfied the *Weber* title VII test. Was the court of appeals' view "that women had been traditionally underrepresented in the relevant job classifications"³⁰⁷ properly equated to the *Weber* "mani-

303. See *supra* text accompanying notes 252-254.

304. Some courts of appeals have read the Supreme Court as having, by *Fullilove v. Klutznick*, 448 U.S. 448 (1980), in effect, equated the *Weber* (title VII) and the equal protection standards for affirmative action. *Kromnick v. School Dist.*, 739 F.2d 894 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 782 (1985); *Williams v. City of New Orleans*, 729 F.2d 1554 (5th Cir. 1984)(en banc); *Boston Chapter, NAACP v. Beecher*, 679 F.2d 965 (1st Cir. 1982), *cert. denied*, 105 S. Ct. 2154 (1985); see also *Setser v. Novack Inv. Co.*, 657 F.2d 962, 967 n.4 (8th Cir.)(en banc), *cert. denied*, 454 U.S. 1064 (1981). It is somewhat clearer after *Sheet Metal Workers* (see *supra* text accompanying notes 291-99) that the Supreme Court views the title VII (*Weber*) test and the equal protection test as distinct.

305. See *supra* note 301.

306. Should the Supreme Court affirm *Johnson* on title VII grounds, and go on to consider whether the government plan in this sex discrimination case ran afoul of equal protection, the Court would have an opportunity to reconsider an incoherence in its equal protection case law. Presently, its test for benign (and for invidious) sex discrimination is the "substantial relation to an important state interest" test of *Craig v. Boren*, 429 U.S. 190 (1976) (see *supra* text accompanying notes 165-68). Recall that the Brennan Four's attempt in *Bakke* to apply this intermediate test to remedial racial preferences failed. See *supra* text accompanying note 246. The Court has not rejected Justice Powell's insistence in *Bakke* upon a more rigorous (compelling state interest) test for remedial racial preferences, than for remedial sexual affirmative action. For Justice Powell's remarkable defense of this odd result, see *Bakke*, 438 U.S. at 302-03:

Gender-based distinctions are less likely to create the analytical and practical problems in preferential programs premised on racial or ethnic criteria. With respect to gender there are only two possible classifications. The incidence of the burdens imposed by preferential classifications is clear. There are no rival groups which can claim that they, too, are entitled to preferential treatment. . . .

307. *Johnson*, 748 F.2d at 1308, 1310.

fest racial imbalances in traditionally segregated job categories?"³⁰⁸ Did the court of appeals' reversal of the district court's determination that on the facts the *Weber* test had not been satisfied by the government agency's affirmative action plan violate the "clearly erroneous" standard for appellate review?³⁰⁹ Still more likely to be scrutinized by the Court is whether the sexual preference with respect to promotions in a small employment unit ran afoul of *Weber's* caution that "[t]he plan does not unnecessarily trammel the interests of white [male] employees."³¹⁰ The problem of affirmative action with respect to the promotions question will likely receive the Court's close attention, particularly in view of the small promotion pool, and the consequent greater burden on the affected male employees, considerations underscored by Justice Powell in *Wygant*. The possibility looms large that the Court will remand the *Johnson* case to the district court (perhaps via the court of appeals) for further fact-finding in light of the Court's likely reaction to some of the "technical" questions presented. Still, the *Johnson* case is in the stream of the "politics" theme stressed in this article. A narrow or more flexible interpretation of the *Weber* test here will carry a further signal with respect to the Court's hospitality for affirmative action plans for identified employment discrimination—sexual or racial.

*Paradise*³¹¹

In 1972 the NAACP brought a class action suit against the Alabama Department of Public Safety (the Department), alleging racial discrimination by the defendant Department against blacks in hiring in violation of the fourteenth amendment and various federal civil rights statutes. The United States was made a party plaintiff, and Phillip Paradise, Jr. was allowed to intervene on behalf of a class of black discriminatees. After a hearing Chief District Judge Frank M. Johnson, Jr. found that the Department had "engaged in a blatant and continuous pattern and practice of" discriminating against blacks in hiring. In addition to injunctive relief he ordered the Department to hire one black trooper for each white trooper hired until the state trooper force comprised approximately twenty-five percent blacks.³¹² The Court of Appeals for the Fifth Circuit affirmed the district court, rejecting the Department's contention

308. *Weber*, 443 U.S. at 197.

309. In *Pullman-Standard v. Swint*, 456 U.S. 273 (1982), the Supreme Court held for the first time that "an intent to discriminate on account of race. . . is a pure question of fact, subject to Rule 52(a)'s [of the Federal Rules of Civil Procedure] clearly erroneous standard. It is not a question of law and not a mixed question of law and fact. . . ." *Id.* at 288-89.

310. *Weber*, 443 U.S. at 195. A further "technical" question raised by the *Johnson* review is not of special interest to us here: who has the burden of proof when an employer claims a "valid" affirmative action plan as an affirmative defense to a (sex) discrimination claim under title VII?

311. See *supra* note 301.

312. *NAACP v. Allen*, 340 F. Supp. 703 (M.D. Ala. 1972).

that the race-specific hiring relief violated the fourteenth amendment. The court also held that the affirmative hiring relief "was essential to make meaningful progress towards eliminating the [Department's] unconstitutional practices and to overcome the patrol's [Department's] thirty-seven year reputation as an all-white organization."³¹³

In 1975, the plaintiffs moved the district court for further relief, and after hearing evidence, the court enjoined the Department "from artificially restricting the size of the troopers force for the purpose or with the effect of delaying or frustrating achievement of the goal of having blacks comprise 25% of the trooper force."³¹⁴

Relief with respect to the discrimination of the Department as to promotions did not surface until September, 1977, when plaintiffs asked for supplemental relief. As a result of extensive discovery, a partial consent decree was agreed to by the parties and approved by the district court in February, 1979.³¹⁵ In this 1979 consent decree defendants "agreed to develop a promotion procedure which would be fair to all applicants and have 'little or no adverse impact on blacks seeking promotion to corporal.'" ³¹⁶ Two years later the Department submitted to the district court a proposed procedure for promotion to corporal. Objections were raised by both plaintiffs and the United States, but the parties resolved their differences in another consent decree (1981 decree). The parties agreed to try to mutually resolve future differences concerning selection procedures for corporals. However, they agreed (in the 1981 decree) that if they were "unable to resolve their differences, the matter was to be submitted to the district court for resolution."³¹⁷

The Present Proceedings

The particular *Paradise* case now before the Supreme Court was initiated on April 7, 1983 when plaintiffs moved the district court to enforce the terms of the 1979 and 1981 consent decrees. In view of the fact that no progress had been made by the Department in formulating the "fair" promotion procedure, plaintiffs sought a district court order requiring the Department to promote blacks to the corporal rank "at the same rate at which they have been hired, 1 for 1, until such time as the defendants

313. NAACP v. Allen, 493 F.2d 614, 620-21 (5th Cir. 1974).

314. This passage is taken from the court of appeals opinion in *Paradise v. Prescott*, 767 F.2d 1514 (11th Cir. 1985), the case presently before the Supreme Court. The Eleventh Circuit was carved out of the old Fifth Circuit. It has adopted as precedents decisions of the former Fifth Circuit that were handed down prior to October 1, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981)(en banc).

315. *Paradise*, 767 F.2d at 1519.

316. *Id.*

317. *Id.* at 1521.

implement a valid promotional procedure."³¹⁸ After extensive hearings, and consideration of the Department's proposed promotion procedure, the district court enjoined the Department from using the procedure, ruling that it "adversely impacted on blacks."³¹⁹ Subsequently, on November 10, 1983, the Department submitted another promotion procedure for corporals, which plaintiffs opposed. Finally, on December 15, 1983 the district court issued the order which is the subject of present review in the Supreme Court. Citing the Department's urgent plea of an "immediate need to promote 15 new corporals,"³²⁰ and the parties failure to agree on a promotion procedure, the district court "in accordance with" the 1979 and 1981 decrees "undertook to fashion a [promotion] procedure."³²¹

The provisions of the district court's order, which are the subject of the present Supreme Court review, in pertinent part are as follows: "[T]emporarily, at least, 50% of all promotions to corporal and to higher ranks must be filled by qualified black troopers."³²² Due to the district court's "concern over the Department's delay in developing acceptable promotion procedures for all ranks,"³²³ "the Department [shall] promote one black trooper for each white trooper promoted to a higher rank, if there is a black trooper objectively qualified to be promoted to the rank, until either (1) approximately 25% of the rank is comprised of black troopers, or (2) the defendants have developed and implemented a promotion plan for the rank conforming with the prior orders and decrees in the case and all other legal requirements."³²⁴ Subsequently, after a hearing, the district court denied motions to reconsider or alter this order. The Department, the United States and the intervenors appealed to the court of appeal, which affirmed the district court order in its entirety, ruling that the plan was permissible, both under title VII and the fourteenth amendment.³²⁵ As we have seen only the fourteenth amendment equal protection question was granted review by the Supreme Court.

The court of appeals, after citing *Bakke* and *Fullilove*, complained "of the absence of a definitive Supreme Court standard for judging the constitutionality of affirmative action."³²⁶ It is not helpful to our present task to review the Fifth Circuit cases on which the court of appeals re-

318. *Id.* at 1522.

319. *Id.* at 1523.

320. *Id.*

321. *Id.* at 1524.

322. *Id.*

323. *Id.*

324. *Id.*

325. *Paradise v. Prescott*, 767 F.2d 1514 (11th Cir. 1985).

326. *Id.* at 1531.

lied.³²⁷ However, it is not only germane, but indispensable, to consider the findings and statements which the district court identified as the predicate to its promotion order.³²⁸ First, consider the findings and statements of the district court opinion of December 15, 1983, with the emphasis in the original:

On February 10, 1984, less than two months from today, twelve years will have passed since this court condemned the racially discriminatory policies and practices of the Alabama Department of Public Safety. Nevertheless, the effects of these policies and practices remain pervasive and conspicuous at all ranks above the entry-level position. Of the 6 majors, *there is still not one black*. Of the 65 sergeants, *there is still not one black*. And of the 66 corporals, *only four are black*. . . . Moreover, the department is *still* without acceptable procedures for advancement of black troopers into this structure, and it does not appear that any procedures will be in place within the near future. The preceding scenario is intolerable and must not continue. The time has now arrived for the department to take affirmative and substantial steps to open the upper ranks to black troopers.³²⁹

Next, consider the district court's conclusions, as derived from its perception of the applicable legal standards, for both title VII and equal protection: "Quota relief was appropriate. . . because such relief was necessary and reasonable." "The relief was necessary because the history of this case made it clear that the 'intolerable' and 'egregious' racial disparities in the upper ranks of the Department would not be eradicated absent 'immediate, affirmative, race-conscious action.'" "The quota relief was reasonable because: (1) it was a temporary measure; (2) it did not require the discharge, demotion, or replacement of any white troopers; (3) it did not require the promotion of any unqualified black trooper; (4) it did not unnecessarily trammel the interests of white troopers; and (5) it was specifically tailored to redress the present effects of past discrimination." And finally, the Department had "the prerogative to end the promotional quotas at any time, simply by developing acceptable promotion procedures."³³⁰

V. SCENARIOS FOR RESOLUTION OF THE 1986 TERM'S AFFIRMATIVE ACTION CASES

Does the politics thesis suggest any particular resolution by the

327. The court of appeals decision was handed down prior to the Supreme Court decisions in the 1985 Term affirmative action cases that I have been considering.

328. And, incidentally, which the court of appeals relied on as the predicate for its affirmance of the district court order.

329. *Paradise v. Prescott*, 585 F. Supp. 72, 74 (M.D. Ala. 1983) (cited in *Paradise v. Prescott*, 767 F.2d 1514, 1524 (11th Cir. 1985)).

330. *Paradise v. Prescott*, 585 F. Supp. at 75-76.

Supreme Court of *Johnson*³³¹ and *Paradise*,³³² the two affirmative action cases scheduled for decision this Term? It does. But first we should recognize the role of other institutions in presenting to the Court the issues raised by these cases. When this is done we are ready to identify the brand, or brands, of politics that have characterized the ten affirmative action cases previously decided by the Court.³³³

Cases that arrive at the Court for decision have generally been selected by the Justices for that distinction by their discretionary certiorari process. This circumstance obscures the fact that, at least when a major constitutional issue is at stake, other litigating institutions—public as well as private—have a hand. This year's pair of affirmative action cases is no exception. Private litigating institutions, such as the NAACP Legal Defense & Educational Fund (LDF), and the National Organization for Women (NOW), have figured prominently in cases considered earlier in the article. While not litigants in these cases, they have submitted amicus briefs (LDF in *Paradise*, and NOW in *Johnson*). In such cases the United States, through the Department of Justice, often has a role. In *Paradise* it was the Solicitor General, on behalf of the United States, who alone petitioned for certiorari, and is an active party, once again (as in last Term's three cases) seeking to restrict the reach of affirmative action. In the previous (Carter) administration the national government also lent its political and legal weight in affirmative action cases but towards expanding, not limiting such remedial relief. In recent years, conservative litigating foundations have taken a prominent role in major civil rights litigation, and in *Johnson* one of these organizations, through its legal staff, represented the male employee claiming sex discrimination in *Johnson*. On occasion, these institutional briefs sharpen the issues and even foreshadow a result. One reads the briefs in *Paradise* and *Johnson* and, aside from having a better grasp of the facts, is little wiser than before.

In *Paradise* the Solicitor General, as petitioner, insists that the judicial one-and-one black-white promotion quota is not sufficiently "narrowly tailored" to pass constitutional muster under *Wygant-Sheet Metal Workers*. *Paradise*, representing the class of black plaintiffs, and the LDF, in separate briefs, insist that it is. In *Johnson*, the male plaintiff argues that Santa Clara County's sex affirmative action plan violates both title VII (and *Weber*), and equal protection (and *Wygant*), and the County dis-

331. See *supra* note 300.

332. See *supra* note 301.

333. The cases in order of decision were: *DeFunis v. Odegaard*, 416 U.S. 312 (1974); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *United Steelworkers v. Weber*, 443 U.S. 193 (1979); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Minnick v. California Dep't of Corrections*, 452 U.S. 105 (1981); *Boston Firefighters Union, Local 719 v. Boston Chapter, NAACP*, 461 U.S. 477 (1983); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984); *Wygant v. Jackson Bd. of Educ.*, 106 S. Ct. 1842 (1986); *Sheet Metal Workers' v. EEOC*, 106 S. Ct. 3019 (1986); *Local Number 93 v. City of Cleveland*, 106 S. Ct. 3063 (1986).

agrees. As in *Paradise* the briefs dispute whether promotions are more like hiring or more like layoffs. The oral arguments shed little more light.³³⁴ The participants go home and wait to see how the Court will draw the line. Will the politics thesis help? Let's distinguish various modes or brands of politics.

1. Brands of politics.

I have previously suggested various identifiable brands of politics that gave impetus to decisions of the Supreme Court: federalism politics,³³⁵ fair-trial politics,³³⁶ race³³⁷ and sex politics,³³⁸ democracy politics.³³⁹ Other, more subtle, political considerations play an evident role in Supreme Court process: consensus politics,³⁴⁰ stability politics,³⁴¹ and a politics of institutional respectability that includes a reasonable consistency in decisions and pursuit of a principled coherence in constitutional doctrine.³⁴² There is another brand of politics that seems distinct from any of the above: what might be called a politics of moderation or

334. *Paradise* and *Johnson* were argued in the Supreme Court on November 12, 1986. See brief report of argument in 55 U.S.L.W. 3345-47. I have consulted the principal briefs. The editor of this publication, Allen Patterson, attended the oral argument. I am grateful to him for his careful account and for his other considerable assistance in the preparation of this article.

335. See *supra* text accompanying notes 31-50.

336. See *supra* text accompanying notes 51-94.

337. See *supra* text accompanying notes 95-118.

338. See *supra* text accompanying notes 119-69.

339. See *supra* text accompanying notes 170-221.

340. Consensus politics, as bearing on constitutional decision-making, can be understood in two different ways. First there is the familiar saying of Mr. Dooley: "[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). Dean Harry Wellington (building on Cardozo) articulates a more nuanced variety of consensus as a source of law "available to the Court in constitutional cases . . . [t]he moral ideals of the community. [They] do not necessarily purport to be right answers. They constitute conventional moral obligations and aspirations—particularly aspirations. For moral aspirations may well receive too little attention in the accommodations that characterize the legislative process." Wellington, *History and Morals in Constitutional Adjudication*, 97 HARV. L. REV. 326, 334 (1983). See also Wellington, *The Nature of Judicial Review*, 91 YALE L.J. 486, 509-20 (1982). One senses that Justices who would bridle if charged with following Mr. Dooley, would not be too uncomfortable with the Wellington-Cardozo version. Chief Justice Hughes' reference to what he termed the Court's three "self-inflicted wounds" mirrors the Justices' sensitivity to public acceptability of their decisions. C. HUGHES, THE SUPREME COURT OF THE UNITED STATES 50-54 (1928). Hughes cited: *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856); *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603 (1869); *The Income Tax Cases*, *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429; 158 U.S. 601 (1895).

341. The concept of order or social peace as a constitutional principle was recognized in the Preamble of the Constitution ("to . . . insure domestic Tranquility," see *infra* text accompanying note 410). It was highlighted by Justice Cardozo in his much-cited *Palko* formula for "due process," as furthering rights "that are of the essence of ordered liberty." See *supra* text accompanying notes 71-75.

342. Despite the poor credentials of *stare decisis* in constitutional matters (see *supra* note 47), one may fairly anticipate consistency as to recent decisions, at least—if not always what Karl Llewellyn called "reasonable reckonability of decision." K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 348 (1960).

compromise.³⁴³

2. Brands of politics and affirmative action.

Considering the end-product of the series of ten affirmative action cases decided by the Court, and the mode of achieving it, it can be argued that the Court has been chiefly influenced by the politics of moderation, or compromise. I noted above³⁴⁴ the constitutional formula on which the Court seems to have settled, in a fragmented way, in last Term's cases.³⁴⁵ Considered as the end-product of the ten-case series the *Wygant-Sheet Metal Workers* version of the "compelling state interest" formula may well constitute "moderation." However, from the standpoint of the advocates of strongly held opposing positions concerning affirmative action, none of whom can be satisfied with the result, the indi-

343. In the sense intended here "moderation" or "compromise" confronts two conflicting positions and opts for a middle ground. This choice may ignore what seemed to be a principle underlying some recent decisions (e.g. *Harris v. McRae*, 448 U.S. 297 (1980) in light of *Roe v. Wade*, 410 U.S. 113 (1973)). It may even ignore specific language articulated in recent decisions (e.g. *Sheet Metal Workers*, 106 S. Ct. 3019, 3049 (1986) in light of *Stotts*, 467 U.S. 561, 579-80 (1984)). Unlike consensus politics' concern for public acceptability, moderation politics chiefly seeks for an interim resolution that will mitigate the felt injustice (and possible ensuing social unrest) that would result from a flat decision for one of two contesting social groups. Laurence Tribe's comment on the Supreme Court's product in *Bakke* caught the spirit of this nicely:

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

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

344. See *supra* text accompanying notes 280-99.

345. In his brief in *Sheet Metal Workers*, 106 S. Ct. 3019 (1986), Solicitor General Fried argued that "Notwithstanding petitioners' patently contumacious conduct . . . Section 706(g) of Title VII prohibits the award of relief such as union membership to persons who are not the actual victims of illegal discrimination." Brief for the Equal Employment Opportunity Commission, at 10-11, 26. He also contended that "the membership quota at issue here contravenes the equal protection component of the Due Process Clause of the Fifth Amendment." *Id.* at 35. As we have seen, see *supra* text accompanying notes 278-99, the Supreme Court rejected these arguments. Nevertheless, the Solicitor General and the Attorney General seemed to claim partial victory. Solicitor General Fried: "We have said that race-conscious remedies which are not victim-specific are never permissible. . . . The Court has said: 'Not never, but hardly ever.'" N.Y. Times, July 3, 1986, at B9, col. 1. Attorney General Meese: "The court has accepted the general position of this administration that racial preferences are not a good thing to have. . . . What they have done is carved out various exceptions to that general rule, even while affirming the rule itself." Wash. Post, July 3, 1986, at A7, col. 1.

In his "Brief for the United States" in *Paradise*, the Solicitor General, talking now to the Court and not the press, recalled that the United States had sought certiorari in *Paradise* to vindicate the same "actual victims" approach the Court subsequently rejected in *Sheet Metal Workers*. *Id.* at 16. Recognizing that this argument was no longer available to him, the Solicitor General conceded that "remedying racial discrimination practiced by a public employer" constituted a "compelling interest" under the Court's cases. *Id.* at 19. He then staked his bid for reversal in *Paradise* on the argument that the "non-victims" affirmative action plan was not "narrowly tailored," as he contended was constitutionally required by the "compelling interest" strict scrutiny test. *Id.* at 21-30.

vidual cases in the series have been a procession of disappointments. Their view might characterize this cluster of cases as prompted by race or consensus politics well distanced from moderation.

In *Bakke*,³⁴⁶ as we have seen, the controlling opinion of Justice Powell rejected the argument (accepted by four Justices in dissent) that societal discrimination against blacks should itself justify the remedy of affirmative action.³⁴⁷ While acknowledging that the fourteenth amendment had been recognized in *Slaughter-House*³⁴⁸ as having special remedial significance for black citizens, Justice Powell abruptly dismissed this historical and decisional preference as outdated by later developments.³⁴⁹ As a consequence, his crucial opinion concluded that "strict scrutiny," in effect, limited the availability of affirmative remedial racial relief to identified discrimination. Still, Justice Powell's *Bakke* opinion did salvage affirmative action as a possible remedy for past identified racial discrimination.

The *Weber*³⁵⁰ result in 1979 (with Justice Powell not sitting) encouraged affirmative action advocates, and was a significant setback for their opponents. But *Weber* was a title VII case, and expressly disclaimed constitutional implications.³⁵¹ Further, *Weber* addressed only voluntary negotiated private affirmative action plans.³⁵² *Fullilove* in 1980 was favorable to racial preferences, but weighted with cautions.³⁵³ Opponents of affirmative action could take heart in Chief Justice Burger's warning that the Court might view more strictly judicially-ordered racial preferences than it did the Congressionally-designed racial set-asides at issue in *Fullilove*. Four years later, in *Stotts* in 1984, the Court refused to protect against lay-offs black employees hired under an affirmative action plan contained in a consent decree. The future of affirmative action was further clouded when the Court's opinion suggested that only "specific victims" of the identified race discrimination could be beneficiaries of title VII remedial relief, and that judicial consent decrees could not approve any affirmative action remedy which a federal court could not prescribe after a full trial. We have seen that these last two hinted

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

347. See *supra* text accompanying notes 244-45.

348. 83 U.S. (16 Wall.) 36 (1873).

349. For Justice Powell's express rejection of this historical event as outdated by the wider use of equal protection in non-racial areas, and the arrival on the American scene of racial minorities other than blacks, see *Bakke*, 438 U.S. at 293-95.

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

351. *Id.* at 200.

352. *Id.*

353. "[T]his Court has not required remedial plans to be limited to the least restrictive means of implementation. We have recognized that the choice of remedies to redress racial discrimination is a 'balancing process left, within appropriate limits, to the sound discretion of the trial court.'" *Fullilove*, 448 U.S. at 508. Justice Powell also concluded "that the Enforcement Clauses of the Thirteenth and Fourteenth Amendments confer upon Congress the authority to select reasonable remedies to advance the compelling state interest in repairing the effects of discrimination." *Id.* at 510.

abridgements were expressly repudiated in the Court's 1985 Term cases.³⁵⁴ But the stress, even there, was on "egregious" racial discrimination, on unavailability of other effective relief, and on the lack of undue burden on majority individuals. The door to affirmative action was kept open, but not wide open, perhaps just ajar.

3. "Prophecies of what the [Supreme Court] will do in fact."³⁵⁵

The above canvass of the road the Court has most recently travelled in remedial affirmative action situations suggests that although *Johnson* and *Paradise*³⁵⁶ each concern affirmative action plans in promotions, the same result may not be reached in both cases. The central *Weber* theme for a title VII case such as *Johnson* is that the plan must not "unnecessarily trammel" the interests of white (or, in the *Johnson* context, male) employees.³⁵⁷ The comparable emphasis in the equal protection analysis, as made clearer by Justice Powell in *Wygant-Sheet Metal Workers*,³⁵⁸ is that the Court will be reluctant to find measures "narrowly tailored" which, like layoffs, "impose the entire burden"³⁵⁹ of achieving racial equality on particular individuals.³⁶⁰

In the small scale setting of *Johnson*³⁶¹ the promotion plan might well run afoul of the *Wygant* suggestion that "Other, less intrusive means of accomplishing similar purposes—such as the adoption of hiring goals—

354. See *supra* text accompanying notes 279-99.

355. Justice Oliver Wendell Holmes once defined "the law" as simply "prophecies of what the courts will do in fact." Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897).

356. See *supra* notes 300-01.

357. *Weber*, 443 U.S. at 208. See *supra* text accompanying notes 247-53.

358. *Wygant*, 106 S. Ct. at 1846; *Sheet Metal Workers*, 106 S. Ct. at 3055-57. See *supra* text accompanying notes 279-98.

359. Or, perhaps, an "undue" burden.

360. *Wygant*, 106 S. Ct. at 1851-52; *Sheet Metal Workers*, 106 S. Ct. at 3057.

361. The Supreme Court has not directly adjudicated the question of promotions, as such. *Local No. 93 v. City of Cleveland*, 106 S. Ct. 3063 (1986), the third of the 1985 Term's affirmative action cases, did involve promotion goals (contained in a consent decree). Justice O'Connor's concurring opinion points out, *id.* at 3080, that the Supreme Court did not decide whether the specific relief provided in the consent decree (including promotions) passed title VII or equal protection standards, so that it would foreclose those not parties to the consent decree—or could be ordered as an equitable remedy by a district court. The majority opinion agreed that this question concerning promotions was left open in *Local No. 93*: "The only issue before us is whether § 706(g) [the remedial section of title VII] barred the District Court from approving this consent decree. We hold that it did not." *Id.* at 3063.

In a section of his plurality opinion in *Sheet Metal Workers* in which only four Justices joined, Justice Brennan routinely coupled promotions with hiring goals: "[A] district court may find it necessary to order interim hiring or promotional goals pending the development of nondiscriminatory hiring or promotion procedures. In these cases, the use of numerical goals provides a compromise between two unacceptable alternatives: an outright ban on hiring or promotions, or continued use of a discriminatory selection procedure." *Id.* at 3037. Justice Powell, who provided the crucial fifth vote in the *Sheet Metal Workers* affirmance, studiously limited his concurrence to hiring goals, saying nothing at all about promotions. But see *supra* text accompanying note 299. Small wonder that the granting of certiorari in *Johnson* and *Paradise* on the promotions issue followed promptly.

are available.”³⁶² Justice O’Connor, concurring in that “equal protection” case, suggested that

[T]he Court is at least in accord. . . that a public employer, consistent with the Constitution, may undertake an affirmative action program [assuming a constitutional remedial purpose] which implements that purpose by means that do not impose disproportionate harm on the interests, or unnecessarily trammel the rights of innocent individuals directly and adversely affected by a plan’s racial preference.³⁶³

On the other hand, in *Paradise* there were dense findings of egregious racial discrimination and “exceptional intransigence,” and the practical unavailability of less drastic measures to eliminate the proven discrimination. These considerations could well lead the Court a step beyond *Sheet Metal Workers*, which concerned union membership goals, to sustain even the more-burdensome-to-majority-parties remedy of race-conscious promotions. Such a result is particularly plausible in light of the specific findings of the district court in *Paradise*³⁶⁴ that such a plan would not dislodge any majority individual from a position he had in hand—burden, perhaps, but not dislodge. Under the formulas we have just reviewed that determination would arguably be enough to sustain the plan.

The 1985 Term cases failed to produce a majority litmus test for the constitutionality of affirmative action. However, a step backward is not to be anticipated from the narrow Court majority that would go as far as Justice Powell. True, the 1985 Term cases dealt with hiring and union membership, and not promotions. Yet the egregious discrimination laid bare in *Paradise* resonates the remedial concerns of *Sheet Metal Workers*. Certainly, if ever there were a case in which an affirmative action plan for promotions would be upheld, it is *Paradise*.³⁶⁵ A reversal would surprise, and what’s more, send out further confusing signals as to the future of affirmative action. On the other hand, *Johnson*, like *Wygant* among the 1985 Term cases, could be reversed without impairing the availability of affirmative action programs for promotions, particularly if the Court affirms *Paradise*. The fact that *Johnson* is the first affirmative action sex case to reach the Court could tilt towards a narrow affirmance. But the warnings of both Justice Powell and Justice O’Connor of the vulnerability of affirmative actions plans that bear too directly on “innocent individuals” make affirmance in *Johnson* problematic, at best.³⁶⁶

362. *Wygant*, 106 S. Ct. at 1852.

363. *Id.* at 1853-54.

364. See *supra* text accompanying notes 329-30.

365. Unless the Court seizes the possible, but unlikely, course of mooted *Paradise* because of developments in the litigation subsequent to the adoption of the racial preference promotions plan. See *Paradise v. Prescott*, 767 F.2d 1514, 1534-38 (11th Cir. 1985) (“*Paradise II*”).

366. See *supra* text accompanying note 299.

VI. CONSTITUTIONAL POLITICS: ITS POINT, LIMITS, ALTERNATIVES, SUPPLEMENTS, AND VALUE

Earlier in this article I recalled Justice Jackson's proposition that the Supreme Court cannot "be regarded merely as another law court."³⁶⁷ He further suggested that the Supreme Court was, in its most significant work, a "political institution."³⁶⁸ This insight prompted consideration of a thesis of constitutional politics by examining the way the Court has actually functioned in some crucial areas of constitutional life. This examination has led us down to consideration of the affirmative action cases presently before the Court.

It is apparent that this thesis of constitutional politics is purely descriptive of the way the Court has functioned. It says nothing of such questions as how the Court "ought" to have functioned, and why. Nor does it deal with the distinction of "good" or "bad" politics, and what criteria are available to justify this distinction. A thesis which abstracts from such significant questions as these can at most furnish the beginning of an adequate constitutional jurisprudence. It is time to summarize the case that a constitutional politics thesis is both adequate and indispensable, as such a beginning. Consideration here of the central point of the constitutional politics thesis, and of its limits, alternatives, supplements and value, will serve as our conclusion.

1. The Point.

In stressing the central point of the constitutional politics thesis it is again helpful to return to Justice Jackson, this time to hear his reminder that, at its beginnings, the Court wrote on a blank page:

[N]either the text of the Constitution nor the debates in the Constitutional Convention gave any clear forecast of the part the Court was expected to play. . . . The Constitution and the Judiciary Act of 1789³⁶⁹ so far as federal cases were concerned launched a Court without a jurisprudence, which is somewhat like launching a ship without a rudder. The Court of course had no tradition of its own. . . . The Supreme Court was not bound to any particular body of learning for guidance. . . . In five of Marshall's great opinions he cited not a single precedent.³⁷⁰

Thus, the Court filled the blank page. What's more, it wrote, and continues to write, the entire book, the process and product we know as constitutional law.³⁷¹ The Court has done so, the thesis suggests, under

367. R. JACKSON, *supra* note 15, at 2.

368. *Id.* at 53-54.

369. An Act to establish the Judicial Courts of the United States, ch. XX, 1 Stat. 73 (1789).

370. R. JACKSON, *supra* note 15, at 28-30.

371. There are limited restrictions on this freedom beyond the text: (1) Congress' constitutional interventions with respect to jurisdiction, and (at least since *South Carolina v. Katzenbach*, 383 U.S. 301 (1966); *Katzenbach v. Morgan*, 384 U.S. 641 (1966)), with respect to the enforcement clauses of

the stimulus of a particular brand, or brands, of its constitutional politics.³⁷² Chief Justice Marshall cautioned almost at the outset that "[W]e must never forget that it is *a constitution* we are expounding."³⁷³ Looking back over a century and a half of the Court's work, Justice Jackson reminds us that "The Constitution has gone through several cycles of interpretation, each of which is related to the political and economic condition of the period." He identifies three pre-World War I cycles:

Federal powers were consolidated and invigorated under Marshall. A reaction marked by conflict over the very nature and binding force of the compact embittered the time of Taney. There followed a period when attention turned to nationalism and to railroad building and industrial growth stimulated by a long period of almost uninterrupted peace. That came to an end in 1914. . . .³⁷⁴

The above passage, written in 1954, qualifies as a masterpiece of insensitivity. It considers constitutional history, as Jackson was wont to do, principally in terms of economics and the tensions of federalism. There is not a line there to suggest that the nation nearly dissolved over race, and remained divided even as he wrote. Yet Jackson furnishes the necessary ingredients of the politics thesis:

- (1) It is inescapable in our form of government that authority exist somewhere to interpret an instrument which sets up our whole structure and defines the powers of the Federal Government in about 4,000 words, to which a century and a half have added only about half as many amendatory words.³⁷⁵
- (2) From 1803³⁷⁶ the Supreme Court staked out, and maintained its constitutional claim to be this "authority",³⁷⁷ and
- (3) The Court has exercised this authority across history in decisional

the 13th, 14th and 15th amendments. (2) The infrequent constitutional amendments: The most significant of these after the bloc passage of the first ten amendments (Bill of Rights) in 1791, of course, have been the post-Civil War Amendments (13th, 14th and 15th). Only two amendments were expressly adopted to counter a Supreme Court decision: the 11th in 1798 (reversing the Court's decision in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), permitting citizens' suits against states), and the 16th amendment in 1916 (to authorize a federal income tax, which the Court had blocked in *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895)).

372. See *supra* text accompanying notes 335-54 for discussion of "brands" of politics.

373. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

374. R. JACKSON, *supra* note 15, at 23.

375. *Id.*

376. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803): "It is emphatically the province and duty of the judicial department to say what the law is. . . . The judicial power of the United States is extended to all cases arising under the constitution." *Id.* at 177-78.

377. *Cooper v. Aaron*, 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.'" In *United States v. Nixon*, 418 U.S. 683, 705 (1974), the Court concluded: "We therefore reaffirm that it is the duty of this Court 'to say what the law is' with respect to the claim of [presidential] privilege presented in this case" (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

acts and language that do not flow inevitably from Constitutional text, but from political judgments (wise and unwise) by the Justices of the day according to their perception of "the political and economic condition of the period."³⁷⁸

Without attending to the Court's constitutional politics, there is no understanding the product of that politics, which we know as constitutional law. This is the central point of the thesis of constitutional politics.

2. The Limits.

There are constitutional and practical limits on the Court.³⁷⁹ There are also limits on the illuminative force of the politics thesis.³⁸⁰ I will mention two.

(1) In large areas of its activity the Supreme Court *does* function like an ordinary law court, where political concerns are less inevitable or appropriate. For example, there is the entire area of diversity jurisdiction in which, under *Erie R.R. v. Tompkins*,³⁸¹ state substantive law is invariably applied.³⁸² In its interpretation of federal statutes that do not raise constitutional issues the Supreme Court also ordinarily functions like an ordinary law court.³⁸³

(2) Since the politics thesis takes no account of what might be considered "good" or "bad" politics it is incomplete—and concededly so—as an explanatory constitutional jurisprudence. This point was discussed above,³⁸⁴ and will be returned to below.³⁸⁵

3. The Alternatives.

The Supreme Court throughout history has hardly been impeded in its political choices.³⁸⁶ This practical conclusion has been advanced by a variety of the Justices themselves. The most familiar instance is Chief Justice Hughes' statement that "We live under a Constitution, but the

378. R. JACKSON, *supra* note 15, at 23.

379. See, e.g., *infra* text accompanying notes 418-20.

380. See *supra* note 370 and *infra* text accompanying notes 399-407.

381. 304 U.S. 64 (1938).

382. It can be argued that the Court's repudiation of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), a decision of almost a century standing, in *Erie* was itself a political decision rooted in federalistic concerns and the Court's long hostility to diversity jurisdiction. See *supra* note 227.

383. An exception might be seen with respect to congressional statutes (such as the Sherman Anti-Trust Act) which use broad language that entrusts to the courts wide zones for decisional development. Judicial interpretation of title VII of the Civil Rights Act of 1964 (heavily discussed in this article with respect to affirmative action) may belong within this exception, especially with respect to equitable remedies. But any interpretation of a congressional statute by the Supreme Court may be countermanded by further congressional legislation.

384. See *supra* text accompanying note 228.

385. See *infra* text accompanying notes 402-14, under "The Supplements."

386. But see *supra* note 371 and *infra* text accompanying notes 419-21.

Constitution is what the judges say it is."³⁸⁷ Justice Harlan Stone, who would succeed Hughes as chief justice, bitterly dissented when his conservative colleagues on the Hughes Court found the first Agricultural Adjustment Act of the Roosevelt administration unconstitutional. Stone called the majority decision "A tortured construction of the Constitution. . . ."³⁸⁸ However, he acknowledged, "the only check upon our own exercise of power is our own sense of self restraint."³⁸⁹ More recently, Justice White, in his spirited dissent (joined only by Justice Rehnquist) against the Burger Court's abortion decision in *Roe v. Wade*,³⁹⁰ stated that "As an exercise of raw judicial power, the Court perhaps has authority to do what it does today. . . ."³⁹¹ Justice White added, in effect, that his complaint was not against "politics," but against what he considered "bad" politics: "[In] my view [the Court's] judgment is an improvident and extravagant exercise of the power of judicial review that the Constitution extends to this Court."³⁹²

Since the Court has functioned, and is functioning, on the basis of constitutional politics, those who desire constitutional change are faced with two questions: (1) what alternatives are considered preferable, and (2) what steps are necessary in order to bring about a chosen alternative.

a) Possible alternatives

Among alternatives that might be considered, the most obvious is to provide for elected federal (or simply Supreme Court) judges for a term of years, rather than the present appointments for life.³⁹³ A second approach would leave the lifetime appointments intact, but curtail the scope of judicial review. President Roosevelt considered, and rejected, the possibility of requiring more than a simple majority of Justices to declare legislation unconstitutional. Another possibility within this second approach would be to exclude certain issues from federal, or Supreme Court, review. A third approach would be that actually proposed by Roosevelt, but rejected by the Senate, the addition of Justices to the Supreme Court.

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

388. *United States v. Butler*, 297 U.S. 1, 87 (1936) (Stone, J., dissenting).

389. *Id.* at 79.

390. 410 U.S. 113 (1973).

391. *Id.* at 222. Justice White's dissent in the companion case of *Doe v. Bolton*, 410 U.S. 179 (1973), was applicable to *Roe v. Wade*, 410 U.S. at 221 n.*. Justice Rehnquist joined this dissent, and also dissented separately.

392. *Doe*, 410 U.S. at 222.

393. Tom Wicker's recent articles in the New York Times' Op-Ed page on the 1986 judicial election campaign in California, in which the movement to oust Chief Justice Rose Bird was the centerpiece, are hardly dispassionate appraisals of the pros and cons of judicial elections. But they make relevant points for consideration before changing the federal lifetime system. Wicker, *Rose Bird and Rehnquist*, N.Y. Times, Sept. 12, 1986, at 27, col. 5; Wicker, *A Naked Power Grab*, N.Y. Times, Sept. 14, 1986, at 25, col. 1.

b) Means of achieving an alternative

Any alternative that contemplated changing the lifetime appointment status of federal judges would require a constitutional amendment. President Roosevelt rejected on constitutional grounds a legislative numerical curtailment of judicial review, and most constitutional scholars today would likely concur in his constitutional judgment.³⁹⁴ The problem of withdrawing selected issues from Supreme Court, or general federal court, constitutional consideration, using present congressional control over federal court jurisdiction, has been proposed in recent Congresses.³⁹⁵ Constitutional scholars have differed on the constitutionality of these plans. More important, practically speaking, is the fact that selective tampering with federal jurisdiction has not yet found favor in Congress. Despite a broad dissatisfaction in many quarters with some recent decisions of the Supreme Court, the problem of passage of any of these alternatives remains as real an obstacle as the question of their constitutionality. One remembers that the highly popular President Roosevelt could not persuade an overwhelming Democratic Congress to pass his "Court-packing" plan, months after he won the largest presidential election ever scored up to that time.³⁹⁶ Justice Jackson who, as a high Roosevelt Administration official, had supported the "Court-packing" plan, later wrote as a Supreme Court Justice: "The Rooseveltian struggle with the Court did not impair the power, which is as positively asserted today [in 1954] as in pre-Roosevelt days."³⁹⁷ Jackson immediately added prophetically: "But neither did that struggle end the controversy over the proper use of the power, a controversy which lies just beneath the surface and is likely to break forth from time to time as long as the Republic shall last."³⁹⁸

The problem of alternatives is complicated by the public's hesitation to curb the Court, even while recognizing its warts. Again, Justice Jackson's words, written at a time when he was himself unhappy with impending new directions on the Court, bear consideration today:

394. See concerning the "Court-packing" plan, Leuchtenburg, *The Origins of Franklin D. Roosevelt's "Court-Packing Plan,"* 1966 SUP. CT. REV. 347; Mason, *Harlan Fiske Stone and FDR's Court Plan,* 61 YALE L.J. 791 (1952).

395. Consider Senator Jesse Helms' amendment (annexed to other proposed legislation), which was first introduced in 1979 (S. 438, 96th Cong., 1st Sess., 125 CONG. REC. 2868 (1979)). This amendment would 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 practical effect of the amendment is to give finality to state courts' interpretation of the Constitution on the matter of school prayer, which the Supreme Court had held, in *Engel v. Vitale*, 370 U.S. 421 (1962), violated the establishment clause of the first amendment.

396. See sources cited *supra* note 394.

397. R. JACKSON, *supra* note 15, at 22-23.

398. *Id.* at 23.

Public opinion. . . seems always to sustain the power of the Court, even against attack by popular executives and even though the public more than once has repudiated particular decisions. . . . The people have seemed to feel that the Supreme Court, whatever its defects, is still the most detached, dispassionate, and trustworthy custodian that our system affords for the translation of abstract into concrete constitutional commands.³⁹⁹

4. The Supplements.

A significant virtue of the politics thesis is that it is demonstrable. Perhaps I have sufficiently made that demonstration.⁴⁰⁰ Without reinforcement from such sources as history, political philosophy, ethics (moral philosophy), and, some would say, from the social sciences,⁴⁰¹ the political thesis would be vulnerable to a charge of mindless nihilism. From time to time the Supreme Court, in its opinions, expressly draws upon one or another of these supplementary human disciplines⁴⁰² to convince its constituency that its politics is "good," not "bad," or "indifferent."⁴⁰³ More often it does not. However, one or another of these supplemental disciplines will commonly furnish the starting point (major premise) of academic lawyers, or historians, or philosophers, social scientists, or lawyer-journalists, who present themselves as supremely self-confident critics of the Court.⁴⁰⁴

399. *Id.*

400. See *supra* text accompanying notes 23-221.

401. One need only recall that the massive change repudiating American constitutional racism in *Brown v. Board of Educ.*, 347 U.S. 483 (1954), occurred under cover of the psychological data cited in the famous footnote 11 in that case.

402. The notion of "supplement" is used here in the sense that when the constitutional answer is not furnished by the text or clear legislative history, the Court (or its critic) may call upon another discipline to portray, or supplement its political conclusion.

403. See *Linkletter v. Walker*, 381 U.S. 618 (1965), the first modern case in which the Supreme Court denied retroactive effect to a new constitutional ruling. In his opinion for the Court, Justice Clark sought to justify a practical political judgment by a purported philosophical preference for John Austin over William Blackstone. In later decisions the Court frankly avowed the political factors involved in its new doctrine of non-retroactivity. See *Stovall v. Denno*, 388 U.S. 618 (1967).

404. Two current fashions among critics of the Court are the use of a so-called resort to "history" with a "framers intent" doctrine, and the fresh illuminations perceived by the arguably still budding "law and economics" school. (See Easterbrook, *Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4 (1984) (pro); Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency?*, 98 HARV. L. REV. 592 (1985) (con)). The question of "framers' intent," even with respect to the foundational question—the doctrine of judicial review itself, see *supra* note 19, has never been settled to general satisfaction. The essay of Leonard W. Levy exploring the conflicting views remains highly useful. L. Levy, *Judicial Review, History and Democracy*, in JUDICIAL REVIEW AND THE SUPREME COURT 1-42 (L. Levy ed. 1967). Approaching slapstick, by contrast, is the recent report in the press of Attorney General Edwin Meese's address of October 21, 1986 at Tulane University:

Noting that the Supreme Court can and has overruled its own rulings, [Meese] said citizens and officials need not assume, as the former Chief Justice Charles Evans Hughes once quipped, "that the Constitution is 'what the judges say it is.'" Rather than "submit to government by judiciary," he said, "we as citizens may respond to a decision we disagree with. . . . Each of the

When the Court selects one of these supplements to resolve a constitutional issue (leaving aside all the others), or the critic selects another supplement to belabor the Court's conclusion, this first selectivity is compounded by another. Within the particular supplementary discipline chosen there is usually a variety of views that could lead via that discipline to different results.⁴⁰⁵ The difficulty in this selective use of these supplements is twofold: (1) The academic lawyer (or other critic) proceeds from personally held premises that are not shared by other, equally respected, critics within their own discipline;⁴⁰⁶ and (2) any one contested viewpoint

three coordinate branches of government created and empowered by the Constitution- the executive and legislative no less than the judicial- has a duty to interpret the Constitution in the performance of its official functions." In his speech, Mr. Meese singled out for particular criticism the Supreme Court's statement in a 1958 decision, *Cooper v. Aaron* [358 U.S. 1. (1958)] that its historic 1954 ruling [in *Brown v. Board of Education*, 347 U.S. 483] that the Constitution barred official segregation of schools was "the supreme law of the land." Mr. Meese said: "Obviously the decision was binding on the parties in the case; but the implication that everyone would have to accept its judgments uncritically, . . . was, and is, at war with the Constitution, at war with the basic principles of democratic government, and at war with the very meaning of the rule of law."

N.Y. Times, Oct. 23, 1986, at 14, col. 1.

Assistant Attorney General William Bradford Reynolds explained, in an address three weeks later, that Meese's Tulane speech had set out "to help educate the public about our constitutional heritage during the Bicentennial celebration." As reported in the press, Mr. Reynolds added:

[M]ost law schools "have largely abdicated their responsibility to educate the future members of our profession on the Constitution," partly because courses on constitutional law focus "almost exclusively on specific rulings of the Supreme Court," neglecting the Constitution's text and history and "the intent of the framers."

N.Y. Times, Nov. 16, 1986, at 14, col. 1.

Leadership in the popularization of the law and economics fashion has been taken by Judge Richard A. Posner of the United States Court of Appeals for the Seventh Circuit. See R. POSNER, *THE ECONOMICS OF JUSTICE* (1983). A convenient grouping of various approaches is contained in the report of a symposium entitled *The Place of Economics Legal Education*, J. LEGAL EDUC., June 1983, at 183-368.

405. For example, within the supplementary discipline of "philosophy" divergent results are inevitably reached depending on whether the "philosophy" used is utilitarian or rights-oriented (or contractarian). A valuable compilation of this particular divergence among philosophers is contained in *UTILITY AND RIGHTS* (R. Frey ed. 1984). A classic instance of philosophers at opposite poles is J. RAWLS, *A THEORY OF JUSTICE* (1971), and R. NOZICK, *ANARCHY, STATE AND UTOPIA* (1974) and *PHILOSOPHICAL EXPLANATIONS* (1981); see also N. DANIELS, *READING RAWLS* (n.d.).

The confession by a distinguished utilitarian philosopher that there are limits to the answers that philosophy can furnish B. WILLIAMS, *ETHICS AND THE LIMITS OF PHILOSOPHY* (1985) was rebutted, but very softly, by a fellow utilitarian. H.L.A. Hart, *Who Can Tell Right from Wrong*, N.Y. REV. OF BOOKS, July 17, 1986, at 49-52.

See Stick, *Can Nihilism Be Pragmatic*, 100 HARV. L. REV. 332 (1986) for a careful demonstration that academic lawyers produce different results depending on their selection and use (often "mis-use") of philosophers. *Id.* at 335. Stick's target is a wing of the critical legal studies (CLS) movement. But his point has broader application.

406. B. Cardozo's *THE NATURE OF THE JUDICIAL PROCESS* (1921) is the not quite forgotten point of departure for what has become American academic lawyers' obsession with judicial methodology. Cardozo's book was about appellate judging on a state, largely private law, court. The other pioneer of judicial studies of the last generation, Karl Llewellyn, also wrote largely of state appellate judging. K. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* (1960). Unlike Cardozo, Llewellyn burst on the Academy scene as the brashest of American Realists, whose very name he coined. "And if to make you see the movement [of judicial law-making] we must shout down the pious words with which courts have pretended that no change occurred—then we must

within a supplemental discipline may be "right" or "true" but, unless this "rightness" or "truth" or "justice" or "fairness" is broadly acceptable, this viewpoint must battle in the field of politics to establish its alleged primacy for the right.⁴⁰⁷ In the American constitutional pluralism viewpoints are disparate, and rarely apt candidates for convincing intellectual demonstration. Some settlement procedure is necessary. To date, subject to certain democratic checks,⁴⁰⁸ we have entrusted this settlement to nine Justices constituted as a Supreme Court, without furnishing them guidelines on how to proceed. They are, indeed, turned loose among the "supplements." It is in their selection among the wide variety of supplements, and in their choice among viewpoints within the supplement selected, that the Justices' "politics" is most likely to be revealed and refined.

The Academy, the academic critics,⁴⁰⁹ proceed much like the Justices,

shout, shout disbelief. We must blaspheme the legal oracles." K. LLEWELLYN, *THE BRAMBLE BUSH* 124 (1930). But by 1960, his views had moderated. No longer a "rule sceptic," Llewellyn concluded that the courts achieve a "reasonable reckonability of decision." K. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 216, and that judges, not scholars, have the superior "situation-sense." *Id.* at 352, 447. While the "drive for justice [was] the prime good in law" *id.* at n. 24, there was place for the value of "order," *id.* at 341, and there was not necessarily a "single right answer" in a case, *id.* at n.25. Often forgotten is Llewellyn's concluding salute: "The degree to which my book rests on the American pioneer in the field, Cardozo, speaks again and again. . . ." *Id.* at 520. But Llewellyn, like Cardozo, was dealing primarily with the judicial process of the common law appellate judge. The phenomenon of a branch of the Academy that would deal exclusively with constitutional law was still a decade or more away. Small question that the Warren Court's concern with due process rights, with remedying racial constitutional neglect, and with energizing equal protection, stimulated the new attention given by the Academy to constitutional theory.

The output of this branch of the Academy, particularly in the nation's law reviews, in the last twenty years has been overwhelming. In addition, there has been available a number of excellent constitutional case books for law school courses which give more attention than before to constitutional theory and method. Any selection among these theorists must be arbitrary. But a mixed sampling will be instructive as to two points I have been making, (1) that, without reputable exception, the academic critics of the Supreme Court recognize the Court's constitutional power to establish constitutional law, while differing as to the most suitable guidelines for exercise of this power; and (2) that constitutional judicial law-making is best understood as a project distinct, in its essence, from the decision-making of common law judges.

407. The German legal philosopher von Ihering characterized this phenomenon as "the battle for the right," and the French public lawyer, Maurice Hauriou, *see supra* note 225, calls it the "risk for the right." According to Hauriou,

Society needs proof that an individual right, requested as an attribute of the human person, is really necessary to this person. There is no more convincing proof than the risk of life or fortune. . . . Society consents, then, to recognize as well-founded an individual right, or to put it more generally, what is called a social claim, only when the men interested in it show that they are ready to sacrifice their lives or, at the very least, their goods to obtain it. . . . And in the same way, vested individual rights are not assured forever; they need to be defended. . . . If these beneficiaries desert what Ihering calls the 'battle for the right' and what we call the 'risk for the right,' their right is lost.

Hauriou, *The Separation of the Individual and the State*, in *THE FRENCH INSTITUTIONALISTS* 67 (A. Broderick ed., K. Welling tr. 1970).

408. *See infra* text accompanying notes 419-21.

409. I am considering here only serious academic critics, not obviously counter-political thrusts such as recent attacks on the Supreme Court by Attorney General Edwin Meese, and Assistant

using a particular viewpoint within a selected disciplinary supplement as the take-off point for their criticism. Unlike their critics, the Justices have been designated as constitutional officials to interpret and develop constitutional law. The Constitution charges them that this be done in a fashion congenial, as they see it, to the guiding principles set down at the head of the Constitution: "to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity."⁴¹⁰ In carrying out their charge in major areas the Justices are forced to make political choices, case by case selections among constitutional alternatives. In doing so they draw on their own experience as citizens of the Republic, and not just as lawyers.⁴¹¹

Attorney General William Bradford Reynolds. See *supra* note 404. Undoubtedly, Mr. Reynolds will view this comment as verification of his recent charge that

The overwhelming majority of tenured professors in our law schools today are aligned philosophically with the liberal left, and they view their mission much less in terms of teaching 'first principles' than in terms of cultivating new recruits to advance their social reform agendas.

N.Y. Times, Nov. 16, 1986, at 14, col. 1; see *supra* note 404.

Of course, the very thrust of the politics thesis is that Mr. Reynolds and Mr. Meese, as members of the conservative (one might fairly say radical) right, are free to compete with the "liberal left" by advancing their political views as to how the Constitution should be applied. What is an abuse of fair debate, and of their office, is to misstate constitutional history by proposing that their current political views constitute the "true" Constitution because they represent what is evident from constitutional text and history and "the intent of the Framers." Mr. Reynolds, probably unwittingly, let his cat out of the bag when he said in his Chicago speech of November 14, 1986: "Regrettably, it has become the accepted understanding of generations of law students that the 'Constitution is what the judges say it is.'" *Id.* at 14, col. 2. For he knows, as well as we, that this has been the "accepted understanding" not only of law students, but of lawyers, and of generations of Justices of the Supreme Court, and judges of the state and federal courts. Desirable or not, this is the present state of our political system. Meese and Reynolds seek to change it. It is their right to seek "to reshape American society to their moral liking" *id.*, including the doctrine of judicial review. See *supra* text accompanying notes 23-30. What is likely to gall the public is their untrue suggestion that the Meese-Reynolds remarks are a "useful and much-needed explanation of the judicial process." *Id.* Taxpayers, and other citizens and persons, have the right to hope that the Meese-Reynolds program "to help educate the public about our constitutional heritage during the Bicentennial celebration," *id.* at 14, col. 1, will henceforth shed more light and plain truth, and less heat and plain error.

Eugene C. Thomas, president of the American Bar Association, issued a statement taking issue with the Meese Tulane speech. "He [Thomas] asserted that Supreme Court decisions 'are the law of the land,' that 'public officials and private citizens alike are not free simply to disregard' their status as law and that such disregard would 'shake the foundations of our system.'" N.Y. Times, Oct. 24, 1986, at 14, col. 1.

410. U.S. CONST. preamble. In 1791, only four years after ratification of the Constitution, the first ten amendments, known as the "Bill of Rights" were adopted, as additional textual elaborations of these principles. In 1798 the eleventh amendment was adopted, reversing *Chisholm v. Georgia*. See *supra* note 371. Save for the sweeping post-Civil War Amendments (the 13th (1865), the 14th (1868) and the 15th (1870)), subsequent amendments to the original document have been either technical, or minor, save for one notable exception—the extension of franchise to women (the 19th amendment (1920)).

411. When Justices reach the Court they are mature persons, often with well-developed views. However, these views may be substantially altered in the give and take of High Court experience and collegueship. In their first two years on the Supreme Court, Chief Justice Burger and Justice Blackmun, both from Minnesota, were so often on the same side that they were dubbed the "Minnesota Twins" (familiar to baseball fans). Court fans know this liason did not last.

They also draw upon acceptable products of history, philosophy, morality, and, occasionally, the social sciences (which were unknown in 1787). As argued above, these "acceptable" products are rarely universally perceived as "best." Different Justices, like the citizenry from which they come, draw their politics from different supplements.

Academic (and political) critics may well convince some of us that particular choices which the Justices make are "good," or "bad." The severest critics of some current choices are often fellow Justices in dissent. And past choices may provoke the mildest Justice to blister an earlier Court in retrospect.⁴¹² Or a unanimous Supreme Court may overrule a particularly odious past product of the Court without a severe word.⁴¹³

Like their co-citizens, the Justices may sometimes act on "good" politics, sometimes follow "bad" politics, and sometimes just "indifferent" politics. The proper characterization of the quality of their politics may have to await history's verdict. Meanwhile, to fashion "good" constitutional law is their task, the core of their job description. But the models—the supplements—are themselves in conflict. Why should it surprise us that the Justices, among themselves and with their critics, are as well.⁴¹⁴ Still, the search for the true measure of "good" must go on, sometimes with indignation, but hopefully without arrogance.

5. The Value

What is the value of the politics thesis? It furnishes us with a starting point for understanding the actual operation of the Supreme Court. In the present absence of a crystal text or a foreordained methodology the politics thesis recognizes that the Supreme Court works through nine individual Justices whose background differences will, ideally, mirror the differences in American society.

In its most significant work this Court has limited guidance from constitutional text.⁴¹⁵ Unlike the Marshall Court, it does not write on a

412. Justice Powell wrote in *Fullilove*, perhaps more in sorrow than in anger: "Indeed, our own decisions played no small part in the tragic legacy of government-sanctioned discrimination. See *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Dred Scott v. Sandford*, 19 How. 393 (1857) [sic]." *Fullilove*, 448 U.S. at 516.

413. For example, the bland psychological explanation in *Brown v. Board of Educ.* for the rejection of *Plessy*'s "separate but equal" formula. *Brown*, 347 U.S. at 494.

414. Valuable, but mutually discordant, approaches in most recent academic writing on constitutional decision-making include: Michelman, *Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986); Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984); Cover, *Foreword: NOMOS and Narrative*, 97 HARV. L. REV. 4 (1983); Wellington, *The Nature of Judicial Review*, 91 YALE L.J. 548 (1982), and J. ELY, *DEMOCRACY AND DISTRUST* (1980). Ronald Dworkin's influential rights-oriented studies, see *infra* note 424, are not included here because, although he thrives on discussing constitutional matters, he professes to be fashioning a theory of judicial law-making in general law, and not in constitutional law as such.

415. Consider "due process," "equal protection," "freedom of speech," "Commerce. . . among the several States," "the judicial power of the United States," "Privileges and Immunities of Citizens

blank page, or in a blank book, but in a book that contains the historical record of its (and our) past successes and failures.⁴¹⁶ The Court continues to write, mindful of its past, of our present, and of the nation's future.⁴¹⁷ Subject to real, if limited, external constraint, the Supreme Court must maintain or reformulate past interpretations of a sparse and honored text. Its politics aspires to constitute, in the old phrase, the *juris prudentia*, the wisdom of "right" law. And it needs all the help it can get.

While recognizing that much of the Court's work, if not all, is open to change, the politics thesis permits us to identify extravagant and radically dissonant accounts of the constitutional process by dissenting voices from the extreme wings of the society—right and left—for what they are, hardly descriptions of what is, but competing bids for political change.⁴¹⁸

Further value in the political thesis may be seen in its opening our eyes to political shortcomings in aspects of our constitutional system that can hardly be laid at the feet of the Court. Take the constitutionally given external controls on the Court. The correction of Court decisions by constitutional amendment is, practically speaking, a noncontrol.⁴¹⁹ Congressional control over the jurisdiction of the Supreme Court, and the lower federal courts, is viable. Although Congress has rejected recent proposals to limit jurisdiction that were designed to penalize the Court for specific decisions⁴²⁰ the power exists when Congress elects to use it.⁴²¹ Acknowledgement of the broad and legitimate political role of the Court in the constitutional system as presently accepted should trigger the most exacting perusal of nominees for this lifetime career. For this job description character and professional expertise should be only the introduction to senatorial interrogation. With rare exceptions⁴²² this interrogation has ranged from slim (for nominees with judicial track records) to none (for nominees hailing from the Senate itself). How often is a nomi-

in the several States," "privileges or immunities of citizens of the United States," "unreasonable searches and seizures," "cruel and unusual punishments," etc.

416. Rather, a series of volumes entitled the United States Reports.

417. Cf. U.S. CONST. preamble: "... secure the Blessings of Liberty to ourselves and our Posterity," and Chief Justice Marshall's "a constitution intended to endure for ages to come. . . ."

418. See *supra* text accompanying notes 23-221 and 404, 409.

419. See sources cited *supra* note 371.

420. See *supra* note 395.

421. Charles Black puts particular stress upon the factor of congressional control:

[T]he problem of the power of Congress over the jurisdiction of the federal courts—including the Supreme Court—I see as absolutely vital. 'Jurisdiction' is the *power to decide*. If Congress has wide and deep-going power over the courts' jurisdiction, then the courts' *power to decide* is a continuing and visible concession from a democratically formed Congress. . . . I would despair of defending the judicial power, as we now see and know it, if I believed that the national Congress had no choice but to let the courts perpetually enjoy such power as the courts themselves might hold to be theirs.

C. BLACK, *DECISION ACCORDING TO LAW* 18 (1981).

422. Notable exceptions were the confirmation hearing of Justice Brandeis, the second confirmation hearing of Chief Justice Hughes, and, of course, the recent second confirmation hearing of Chief Justice Rehnquist.

nee permitted gracefully to turn aside a senatorial question that might shed light on the nominee's political orientation on crucial issues with "I cannot comment on an issue that might come before the Court."⁴²³ With the breadth of political choice that lies before a Justice, the public may well be entitled to an answer to such questions as "Where do you place yourself in terms of political or moral philosophy, the use of social science data, or even, the 'rights thesis'⁴²⁴ or (forgive me) the 'politics thesis'?" Why would it be inappropriate to ask a nominee—especially one with no political or judicial track record: "What kind of society do you want this to be? What is the Supreme Court's role in achieving it?"

Finally, a corollary of the politics thesis suggests a crucial, if limited, educational reform. With eighteen year old citizens voting, there is need to equip them no later than high school with specific information on the true functioning of the Supreme Court as a political institution. A generation ago it was suggested that law is too important to be left to lawyers, with the design of inspiring college-level law courses.⁴²⁵ The politics the-

423. The confirmation hearings of the two most recent appointees, Justices O'Connor and Scalia, were paradigms of senatorial non-interrogation. The confirmation hearing of Chief Justice Rehnquist is the recent exception to senatorial self-restraint. It should be recalled that two of President Nixon's designees for the Court, after a heavy senatorial barrage, failed to receive confirmation. See Rees, *Questions for Supreme Court Nominees at Confirmation Hearings: Excluding the Constitution*, 17 GA. L. REV. 913 (1983). The O'Connor hearings are discussed fully, *id.* at 918-29. Professor Rees characterizes the nominee's testimony as "stonewalling of the Judiciary Committee" which he notes, "posed no obstacle at all to her confirmation." *Id.* at 922. Professor Laurence Tribe largely concurs with Rees, and Senator Orrin Hatch entirely disagrees. See L. TRIBE, *GOD SAVE THIS HONORABLE COURT* 40, 92 (1985); Hatch, *Save The Court From What?*, 99 HARV. L. REV. 1347, 1350-53 (1986). As a member of the Senate, Hatch has recently been mentioned as a prospective Reagan nominee who would have no trouble being confirmed.

424. The "rights thesis" is Ronald Dworkin's central contribution to contemporary jurisprudential debate. His first step is to distinguish what he calls "arguments of principle" from "arguments of policy": "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). Then, 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. An entire issue of the Georgia Law Review was given over to critiques of Dworkin's "rights thesis" by several scholars, and to Dworkin's rebuttals. *Jurisprudence Symposium*, 11 GA. L. REV. 969 (1977). In *MATTER OF PRINCIPLE* (1985), Dworkin has included a selection of his later articles. In *LAW'S EMPIRE* (1986), his latest volume, Dworkin proposes a general theory of law, which is just beginning to spark commentary in the academic literature. See, e.g., Michelman, *Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 66-73 (1986). See RONALD DWORKIN and CONTEMPORARY JURISPRUDENCE (M. Cohen ed. 1984), in which thirteen academic lawyers criticize elements of the ample Dworkin corpus, and Dworkin replies copiously.

425. H. BERMAN, *ON THE TEACHING OF LAW IN THE LIBERAL ARTS CURRICULUM* (1956)[hereinafter BERMAN]: "Law, to quote Lord Keynes' paraphrase of Clemenceau, is too important a matter to be left to the lawyers." *Id.* at 28. Clemenceau's comment, made during World War I while he was prime minister of France, had been that war was too important to be left to the generals. Berman's study was largely a report of a 1954 Harvard Conference on the subject. A 1964 Catholic University conference entitled "Law in the Liberal Arts: the Social Dimension," which replicated concerns voiced at Harvard, is reported in *LAW AND THE LIBERAL ARTS* (A. Broderick

sis underscores that "constitutional law" is a far cry from "just plain law." We might well leave ordinary law to lawyers, as we leave surgery to doctors. But the operation of the constitutional aspects of the judicial system is at least "high civics" and should be made available to all. Will it be soon, when we are just getting around to the problem of literacy?⁴²⁶ There seems no reason to wait any longer for either. Perhaps former Chief Justice Burger would stimulate such education as part of his second centenary program⁴²⁷ — even if he could not digest the politics thesis.

ed. 1964). For a summary of the limited subsequent penetration of law into the undergraduate curriculum see Bonsignore, *Law School Involvement in Undergraduate Legal Studies*, 32 J. LEGAL EDUC. 53 (1982). Reasons of pre-professionalism, interdisciplinary education, humanism, and pure apologetics (lessening hostility to lawyers), that were previously advanced, have run out of whatever steam they ever had. The justification suggested here goes back to Keynes, and to Woodrow Wilson, who said in 1894 when he was president of Princeton University:

[N]othing will steady us like a body of citizens instructed in the essential nature and processes of law and a school of lawyers deeply versed in the methods by which the law has grown, the vital principles by which, under every system, it has been pervaded, its means of serving society and its means of guiding it. We need laymen who understand the necessity for law, and the right uses of it too well to be unduly impatient of its restraints. . . . Law is a branch of political science, and in this day especially we need to insist in very plain terms upon its study as such. . . .

Wilson, *Legal Education of Undergraduates*, 17 REP. A.B.A. 439 (1894), (cited in BERMAN, *supra*, at 159.) In this spirit almost a century later, constitutional law in the making, as high politics, becomes high civics. And high school students (as well as undergraduates) are entitled to explore it as basic education for citizenship.

426. "It is estimated that nearly 23 million Americans are functionally illiterate: unable to read well enough to understand a job application, medicine label or a telephone directory." Mattleman & Torsella, *The Shame—and Costs—of Illiteracy*, N.Y. Times, Sept. 13, 1986, at 17, col. 2. Later in that month the U.S. Department of Education released a report entitled "Literacy: Profiles of America's Young Adults," based on a survey of 3,600 young people between twenty-one and twenty-five. This report put the illiteracy figure at ten million. As James Reston writes, "Either way this is not merely a problem but a national disgrace that is obviously getting less attention than it deserves." Reston, *Read It If You Can*, N.Y. Times, Sept. 28, 1986, at 25, col. 5.

427. On June 17, 1986 Chief Justice Burger announced his forthcoming retirement from the Court, to supervise the second centennial of the Constitution celebration.