

ARTICLES

The Judicial Process in Equal Protection Cases

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Introduction

Among the principal issues in American constitutional law is that concerning the extent to which the Supreme Court, in order to give shape and substance to the more open ended constitutional clauses, may go beyond the text in a search for values. For the most part, this particular dispute has centered on the due process clause of the Fourteenth Amendment. The historic era of substantive due process, the incorporation debate, and the contemporary controversy over the Court's recent expansion of fundamental rights—all have served as focal points for a debate not only over the meaning of the due process clause, but also concerning the broader question of the proper role of the judiciary in our constitutional scheme. The other great clause of the Fourteenth Amendment—the equal protection clause—while providing the stage for the greatest constitutional dramas of our time has seemed somehow relatively value neutral, or at least to contain its own values within a relatively forthright mechanical scheme.

Although the equal protection clause has been the subject of considerable scholarly commentary, such commentary focuses on methodology and mechanics, not values.¹ This aura of value neutrality surrounding the equal protection clause is rooted in the notion that the values which underlie the clause are somehow of a different order—are values that reflect an American consensus or at least are peculiarly fit for judicial articulation and use.

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1. This focus may be traced to that watershed discussion of equal protection by Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949), which set the pattern of so much of the discussion that has followed.

Among the most recent and compelling examples of this notion is John Hart Ely's *Democracy and Distrust*.² In his book, Professor Ely undertakes to make the case for a theory of judicial review that is process oriented. This "third theory of judicial review,"³ he argues, succumbs neither to the false allure of interpretivism⁴ nor to the licentious search for fundamental values.⁵ Its greatest virtue is that it keeps faith with the "evident spirit" of the Constitution, without invoking value sources external to it. The inspiration for this middle theory is that famous and potent footnote in *United States v. Carolene Products Co.*,⁶ particularly its last two paragraphs.⁷ Upon reading the footnote, one notes that the last paragraph especially has to do with discrimination, the special care of the equal protection clause. The implication, then, is that this clause somehow carries its own values that represent something approaching a national consensus.

Professor Ely contends that the Warren Court best exemplified this confined judicial attitude. No Supreme Court has, of course, wielded the equal protection clause, or perhaps any other clause with such vigor, imagination and consequence.⁸ One may ask, however, in what sense that Court's shaping of modern equal protection doctrine was either value neutral or confined to values implicit in the clause itself. Ely explains that the Warren Court's values were "participational"⁹ and

2. J. ELY, *DEMOCRACY AND DISTRUST* (1980).

3. *Id.* at vii.

4. *Id.* at chs. 1 & 2.

5. *Id.* at ch. 3.

6. 304 U.S. 144 (1938).

7. The footnote states, "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. . . ."

"It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation"

"Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religions, . . . or national, or racial minorities, . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." *Id.* at 152 n.4 (citations omitted).

Louis Lusky has recently revealed that the first paragraph was inserted only at the request of Chief Justice Hughes. See L. LUSKY, *BY WHAT RIGHT?: A COMMENTARY ON THE SUPREME COURT'S RIGHT TO REVISE THE CONSTITUTION* 108-12 (1975).

8. *E.g.*, *Reynolds v. Sims*, 377 U.S. 533 (1964); *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

9. Professor Ely uses "participational" to describe judicial review that "concerns itself with how decisions effecting value choices and distributing the resultant costs and benefits are made." J. ELY, *supra* note 2, at 75. He contrasts this method of review with that of

not substantive, and therefore were aligned with the implicit and relatively certain central concerns of our American constitutional democracy. Moreover, the argument proceeds, the Court's special extrapolitical vantage makes these sorts of processes or participational values stable bases for judicial decision.¹⁰

Are these participational values, as drawn from the equal protection clause, truly distinctive with respect to the jurisprudence of values that the Court necessarily brings to bear in such cases? Are they somehow more neutral, stable and uncontroversial? Other commentators have not been quite sure.¹¹ If not, is there nevertheless something especially proper about placing process or participation values in the Court's hands?

I recall, even as a student, the puzzling nature of equal protection decisions, especially those participational decisions such as *Harper v. Virginia Board of Elections*,¹² which demanded unequal treatment to assure equality of participation. Such decisions seemed to me to pack most radical implications. In an endeavor to discover what about equal protection pushed the Court in that direction, I attempted to master the Court's methodology and nomenclature; yet while I mastered tools of analysis such as invidiousness, strict scrutiny, suspect classifications and the like, the solution to my problem continued to elude me. Further reflection revealed that even the simplest cases were not truly solved by methodology but rested on underlying and ordinarily implicit premises. This article represents an attempt to discover what was "really" happening.

This article first looks at standard equal protection methodology. The methodology that does not appear value neutral will be examined to discover the means by which the Court injects values into it and the effect that value choices may have on constitutional doctrine. The source of these values, and the propriety of the Court's use of such values, are then discussed. Finally, this article considers what devices or principles might confine the Court to its proper function.

"value imposition" which designates rights "as so important that they must be insulated from whatever inhibition the political process might impose . . ." *Id.*

10. *Id.* It is worth contrasting Ely's notions with those of J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* (1980), who would steer the Court away from considering such structural problems as federalism and separation of powers, leaving it to concentrate efforts on the more value laden issues of personal liberty.

11. *See, e.g.*, A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 155, 172 (1970).

12. 383 U.S. 663 (1966).

I. Standard Methodology

Common constitutional lore, especially in its most distilled form—hornbooks, outline series, and bar review lectures—declares that all equal protection cases are divided into two, lately three, parts: low scrutiny, high (strict) scrutiny, and intermediate scrutiny.¹³ The distinction emphasized by these terms has, of course, to do with levels of judicial review. These levels affect, even determine, the outcome of the case. Nevertheless, they are couched in procedural terms and, in fact, do operate as procedural mechanisms. As an illustration of low intensity review, the standard casebook will contain, as a principal case, *Railway Express Agency, Inc. v. New York*.¹⁴ This case, with its staunch presumption of constitutionality, places a heavy burden on the challenger to show that the challenged classification is unreasonable, which in this context means wholly irrational and fundamentally indefensible. The challenger's burden is made no lighter by the willingness of the Court to indulge its imagination on behalf of the government in a search for plausible bases for the imperfections of the scheme. For example, Justice Douglas tells us, "local authorities may well have concluded that those who advertise their own wares on their trucks do not present the same traffic problem"¹⁵ The deferential technique, where appropriate, continues to permit considerable legislative latitude.¹⁶ Almost never will a legislative scheme fall before this mild wind.

It was early recognized, however, if sometimes forgotten, that in certain cases the equal protection clause "is to be construed liberally."¹⁷ In modern parlance, there are certain contexts in which the Court will apply strict scrutiny: where "a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage"¹⁸ Here, upon a *prima facie* showing of such intentional discrimination, the Court stiffens. The presumption is reversed and the government, if unable to undermine the *prima facie*

13. See, e.g., L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 16-6 to 16-32 (1978).

14. 336 U.S. 106 (1949).

15. *Id.* at 110.

16. See, e.g., *New Orleans v. Dukes*, 427 U.S. 297 (1976). This per curiam opinion, upholding an ordinance preferring established to new street vendors, contains a useful statement of the main aspects of the low level technique. *Id.* at 303-04.

17. *Strauder v. West Virginia*, 100 U.S. 303, 306-07 (1879).

18. *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). See *Carolene Products*, 304 U.S. at 152 n.4 (Stone, J.). See also *Shapiro v. Thompson*, 394 U.S. 618, 658-81 (1969) (Harlan, J., dissenting).

case, is called upon to show compelling interests, least restrictive means and the like.¹⁹

Most recently, the Court has employed a level of scrutiny somewhere between traditional deference and the most stringent form of scrutiny. This intermediate level has been used in gender cases,²⁰ cases involving so-called disfavored classifications,²¹ and by some justices in examining benign racial classifications.²² This middle approach invokes a formula, after a showing of intentional discrimination, requiring the state to show that the classification scheme serves "important governmental objectives and [is] substantially related to achievement of those objectives."²³ In practice, the state must show that its "important" purpose is genuine, not a mere rationalizing afterthought and that the means chosen are closely tailored to the purpose.²⁴

While these techniques have been engraved as textbook law, not everyone has been happy with the inflexibility that two, or even three, tiers of review provide. On the Court, Justice Marshall has been the longest standing critic. His 1970 dissenting opinion in *Dandridge v. Williams*²⁵ criticized the Court's unduly rigid approach and proposed, in effect, a sliding scale of review pegged to "the character of the classification in question, the relative importance to individuals in the class discriminated against of the government benefits that they do not receive, and the asserted state interests in support of the classification."²⁶ In other dissents by Justice Marshall,²⁷ this proposal has been refined and revealed as having a descriptive as well as prescriptive message. In effect, he sees all equal protection challenges as presenting the question of whether or not the means are reasonable, although the measure of reasonableness will vary with the factors quoted above.²⁸ Justice Ste-

19. See, e.g., *Castaneda v. Partida*, 430 U.S. 482 (1977); *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252 (1977); *Washington v. Davis*, 426 U.S. 229 (1976); *Shapiro v. Thompson*, 394 U.S. 618 (1969).

20. See, e.g., *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142 (1980); *Califano v. Webster*, 430 U.S. 313 (1977); *Craig v. Boren*, 429 U.S. 190 (1976).

21. See, e.g., *Lalli v. Lalli*, 439 U.S. 259 (1978) (discrimination against illegitimate children).

22. See, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 324 (1978) (Brennan, J., concurring and dissenting).

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

24. For a useful analysis of this middle or intermediate level of review, see L. TRIBE, *supra* note 13, at §§ 16-30 to 16-32.

25. 397 U.S. 471, 508 (1970) (Marshall, J., dissenting).

26. *Id.* at 521.

27. E.g., *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 317 (1976) (Marshall, J., dissenting); *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 70 (1973) (Marshall, J., dissenting).

28. See *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 70, 124 (1973) (Marshall, J., dissenting).

vens has also voiced his dissatisfaction with the rigidly tiered models.²⁹

Nonjudicial commentary has also criticized standard stratification and has proposed alternative approaches.³⁰ Gerald Gunther, for example, detected in some early decisions of the Burger Court³¹ what he took to be a shift toward a more intensified scrutiny of legislative means. Professor Gunther foresaw this intensified form of review as becoming a general model for equal protection cases, excepting the well-settled instances in which the Warren Court applied strict scrutiny. This trend, which Gunther judged mainly a happy one, at least would cut the distance between the tiers and would put teeth into general equal protection analysis. The demand that legislative means truly be shown to further legislative ends carried another virtue as well—somehow it promised “avoidance of ultimate value judgments about the legitimacy and importance of legislative purposes.”³² While certainly not wholly “mechanical nor value-free,” the “value judgments involved . . . would be drastically narrower.”³³ For better or worse, the Court surely has not adhered with any consistency to the Gunther scenario.³⁴

We see again in this brief description of Professor Gunther's article emphasis on technique and the yearning for something approaching value neutrality in resolving equal protection claims. I do not mean to suggest, however, that he or other commentators are unaware of the value laden nature of equal protection analysis. Indeed, such awareness pervades his article, albeit as the principal evil to be exorcised. I do mean to suggest that the hope of value free application of the equal

29. “I am inclined to believe that what has become known as the two-tiered analysis of equal protection claims does not describe a completely logical method of deciding cases, but rather is a method the court has employed to explain decisions that actually apply a single standard in a reasonably consistent fashion. I also suspect that a careful explanation of the reasons motivating particular decisions may contribute more to an identification of that standard than an attempt to articulate it in all-encompassing terms.” *Craig v. Boren*, 429 U.S. 190, 212 (1976) (Stevens, J., concurring).

30. See, e.g., Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); Yarbrough, *The Burger Court and Unspecified Rights: On Protecting Fundamental and Not-So-Fundamental “Rights” or “Interests” Through a Flexible Conception of Equal Protection*, 1977 DUKE L.J. 143.

31. See, e.g., *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972), and *Reed v. Reed*, 404 U.S. 71 (1971) (Court refrained from its usual selection of tiers and placed limits on its traditional legislative deference).

32. Gunther, *supra* note 30, at 21-22. See also *id.* at 24.

33. *Id.* at 47-48.

34. Dissatisfaction with the rigidity of the tiered model, particularly the “sham” nature of low scrutiny, however, continues to surface. See, e.g., *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 183 (1980) (Brennan, J., dissenting). *Fritz* is discussed more fully at notes 101-08 and accompanying text *infra*.

protection clause cannot be fulfilled. Moreover, I intend to show that the emphasis on the mechanics of equal protection has resulted in insufficient attention to and articulation of values, leaving these critical, value laden premises of equal protection decisions not only unexplored but also unmentioned.

Undoubtedly, there is a mechanistic aspect about the nature of equal protection analysis having to do with the congruence between the burdened class and the legislative purpose—a congruence which lends itself, as Tussman and tenBroek's classic article³⁵ so well exploits, to graphic illustration. Anyone who has undertaken to explain equal protection doctrine to students will recognize its special allure—the promise of certainty, implied by its use of circles within circles and symbolic equivalences. The very terms under- and over-inclusive promise a tangible handhold, an empirical relationship. That “all *T*'s are *M*'s and all *M*'s are [or are not] *T*'s”³⁶ can somehow seem a comforting and almost inexorable guide to the solution. Here, if anywhere, Justice Roberts' wonderous dictum on judicial review may seem apropos:

All legislation must conform to the principles [that the Constitution] lays down. When an act . . . is appropriately challenged in the courts as not conforming to the constitutional mandate the judicial branch of the Government has only one duty,—to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former.³⁷

The modern Court has itself contributed to this sense of the mechanical by its focus on levels of review and its conclusory statements concerning legislative purpose and reasonableness, as if providing an ineluctable glide from premise to conclusion.³⁸ Much more, of course, is involved.

The mechanistic aspect of equal protection analysis has even deeper roots. If the basic demand of the equal protection clause is that persons similarly situated be similarly treated,³⁹ we find a principle apparently reducible to an algebraic formula. What is just, as Aristotle told us, “involves at least four terms; for the persons for whom it is in fact Just are two, and the things in which it is manifested, the objects

35. Tussman & tenBroek, *supra* note 1.

36. *Id.* at 347 (citation omitted).

37. *United States v. Butler*, 297 U.S. 1, 62 (1936).

38. *See, e.g., Reed v. Reed*, 404 U.S. 71 (1971).

39. *See, e.g., J. NOWAK, R. ROTUNDA & N. YOUNG, CONSTITUTIONAL LAW 519 (1978); Tussman & tenBroek, supra* note 1, at 345.

distributed, are two."⁴⁰ In contemporary parlance, the burden distributed (B) should bear a ratio equal to that of the classes' relevant traits (C), or $\frac{B_1}{B_2} = \frac{C_1}{C_2}$, a pleasing device in the wilderness of constitutional law, but the process of filling in the terms presents the hard decisions.⁴¹

All of this may seem clear to anyone who has considered any number of equal protection cases. It has not, however, been made apparent by the language of the justices.

II. The Inevitability of Moral Choice

When one has mastered the jargon of equal protection—strict scrutiny, rationality and congruence, invidiousness, traits and mischiefs, burdens, suspect classifications, least restrictive alternatives—one might suppose one has the tools to understand, order and resolve equal protection claims. But, in fact, one thus equipped is a mere landsman; standard equal protection jargon can no more produce results than a sailor's lexicon can control the sea's wiles. In contrast to the often forthright discussion of values and sources that has come to characterize modern due process decisions,⁴² the premises and perplexing issues raised by equal protection decisions are papered over with the standard nomenclature. The stranger, seeking reasons within the four corners of an opinion, is left with an unresolved puzzle. In short, standard equal protection methodology neither explains nor justifies decisions.

The concept of fairness, the core value of equal protection, never exists meaningfully apart from a host of concepts, assumptions and premises and, as events have developed, cannot be derived from formulae, from the constitutional clause itself, nor, with a notable exception, from the history of its framing. That exception may be said to grace the Court's first major encounter with the Fourteenth Amendment in the *Slaughter-House Cases*.⁴³ Speaking of the equal protection claim of the dissentient butchers, Justice Miller doubted that "any action . . . not directed by way of discrimination against the negroes as a class, or

40. ARISTOTLE, *Nicomachean Ethics: Justice*, reprinted in JUSTICE: SELECTED READINGS 18 (J. Feinberg & H. Gross eds. 1977).

41. See, e.g., N. RESCHER, *DISTRIBUTIVE JUSTICE: A CONSTRUCTIVE CRITIQUE OF THE UTILITARIAN THEORY OF DISTRIBUTION* (1966) (extent to which mathematical tools can be brought to bear upon some moral problems).

42. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973).

43. 83 U.S. (16 Wall.) 36 (1872).

on account of their race, will ever be held to come within the purview of this provision."⁴⁴

Indeed, seven years later this narrow perspective was exploited on behalf of Mr. Strauder who was convicted of murder in West Virginia where "no colored man was eligible to be a member of the grand jury or to serve on a petit jury in the State"⁴⁵ Again the Court recognized the equal protection clause as designed to secure for the recently emancipated race "all the civil rights that the superior race enjoy."⁴⁶ As such, "it is to be construed liberally, to carry out the purposes of its framers."⁴⁷ This central purpose has been given service, with varying results, ever since. Here the fundamental premise is made clear: it is wrong to discriminate against blacks, at least with respect to jury service. Only when this premise is recognized is the Court's conclusion that the West Virginia law constitutes a denial of equal protection, as an unreasonable discrimination, given a solid grounding; it is easy enough to imagine a formal racism that makes such a discrimination quite reasonable, or to imagine a short sighted pragmatism which, recognizing the endemic illiteracy of West Virginia blacks in 1879, reasons that a more able group of jurors would result from a jury selection of only whites.

Another case that is exceptional for the forthright exposure of its moral underpinnings is *Brown v. Board of Education*,⁴⁸ an opinion remarkably free of the usual trappings of equal protection analysis. Building on the premise recognized in the *Slaughter-House Cases*, and blurring the question of historical intent,⁴⁹ the Chief Justice's opinion is frank to state that "[w]e cannot turn the clock back to 1868" and to conclude that relegation of black children to segregated schools "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."⁵⁰ In short, we recognize here a division of people that is, by definition, bad.⁵¹ The evidence for this "*finding*, although amply supported by

44. *Id.* at 81.

45. *Strauder v. West Virginia*, 100 U.S. 303, 304 (1879).

46. *Id.* at 306. Even here, some doubt exists as to any purpose that the Framers had to assure blacks a jury role. See R. BERGER, *GOVERNMENT BY JUDICIARY* 27, 103 (1977).

47. *Strauder v. West Virginia*, 100 U.S. 303, 307 (1879).

48. 347 U.S. 483 (1954). Here again, there is significant doubt concerning the Framers' intent to outlaw segregated schools. See, e.g., R. BERGER, *supra* note 46, at ch. 7; Bickel, *The Original Understanding and The Segregation Decision*, 69 HARV. L. REV. 1 (1955).

49. 347 U.S. at 489. The Chief Justice, in effect, repudiates the relevance of the Framers' intent, which, according to R. BERGER, *supra* note 46, at 241-45, was not at all cloudy on the matter of segregation.

50. 347 U.S. at 492, 494.

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

modern authority,"⁵² rests on a moral perception that was not, for example, prevalent a half century earlier in *Plessy v. Ferguson* when the Court told the plaintiff that the "underlying fallacy" of his argument was his supposition that "enforced separation of the two races stamps the colored race with a badge of inferiority."⁵³ The distance between *Plessy* and *Brown* is a moral one which cannot be measured by any standard of reasonableness.

A similar evolution in values can be seen in the sex discrimination cases. In *Strauder v. West Virginia*,⁵⁴ Justice Strong, emphasizing the narrow focus of the equal protection clause, assured the states that they might well "confine the selection [of jurors] to *males*, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications."⁵⁵ Six years earlier, the not altogether benighted Justice Bradley, on behalf of himself and Justices Swayne and Field, reiterated what seemed to him the obvious when he concurred in the Court's refusal to compel states to admit women to the bar: "[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman."⁵⁶ Similar observations, with hardly a shade less confidence, can be found, of course, up through the 1960's.⁵⁷ It is hardly necessary to describe the sudden light that the Court discerned in 1971 in *Reed v. Reed*,⁵⁸ which has guided it ever since,⁵⁹ except to emphasize that what was once reasonable had become "the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause."⁶⁰ A nation's perceptions had changed, and with change had come necessarily a shift in what was to

52. 347 U.S. at 494 (emphasis added). This "modern authority" refers, of course, to the psychological studies cited in the Court's famous and controversial footnote 11 which, it has become clear, was regarded only as confirmatory, not essential.

53. *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896).

54. 100 U.S. 303 (1879).

55. *Id.* at 310 (emphasis added).

56. *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring). For a continuation of this quotation, see text accompanying note 221 *infra*. It should be noted that the argument of counsel and the opinion for the Court by Justice Miller regarded only the privileges and immunities clauses and concluded that admission to the Bar was not part of national citizenship, protection of which was regarded as the sole concern of that clause.

57. *See, e.g.*, *Hoyt v. Florida*, 368 U.S. 57 (1961). "Despite the enlightened emancipation of women from the restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved to men, woman is still regarded as the center of home and family life." *Id.* at 61-62 (different treatment of women with respect to jury service was, therefore, neither arbitrary nor unreasonable); *Goesaert v. Cleary*, 335 U.S. 464 (1948); *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1874).

58. 404 U.S. 71 (1971).

59. *See, e.g.*, *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142 (1980).

60. *Reed v. Reed*, 404 U.S. 71, 76 (1971).

be considered "reasonable," but to suppose that cases such as *Reed* or *Stanton v. Stanton*⁶¹ have to do with "rationality" *vel non* is to miss the critical moral shift that had occurred.

Perhaps in no area is the moral shift quite so apparent as in matters of electoral rights. Just as jury service could once be conditioned, with Court approval, on property ownership,⁶² at one time the franchise was conditioned on wealth,⁶³ as recently as 1937, the Court upheld the imposition of a poll tax. Nevertheless, in 1966 a minimal Virginia exaction of \$1.50 fell before Justice Douglas' *ipse dixit* that "voter qualifications have no relation to wealth nor to paying or not paying this or any other tax."⁶⁴ Justice Douglas' candor is refreshing: "In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change."⁶⁵ Indeed they do. One has only to skim the dissenting opinions of Justices Black and Harlan to get a sense of the rationality that, from one now-outmoded vantage, underlay poll taxes. Most to the point is Justice Harlan's observation that what is really involved is the "Court's own views of how modern American representative government should be run,"⁶⁶ that is, that "property and poll-tax qualifications, very simply, are not in accord with current egalitarian notions of how a modern democracy should be organized."⁶⁷ Similar insight may be found in the dissenting opinion of Justice Harlan in *Reynolds v. Sims*.⁶⁸ Once again, it is the political assumptions and not the logic of the scheme nor the level of review which are determinative.

Among the more singular examples of a morally premised decision is *Eisenstadt v. Baird*,⁶⁹ which considered a Massachusetts law that prohibited the distribution of contraceptive devices for purposes of birth control except to married persons and then only through a pharmacist or physician. An additional exception to the general prohibi-

61. 421 U.S. 7 (1975).

62. See Justice Strong's quotation in text accompanying note 55 *supra*.

63. See, for example, authorities cited in *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 684 nn.6 & 7 (1966) (Harlan, J., dissenting).

64. *Id.* at 666 (opinion of Court).

65. *Id.* at 669.

66. *Id.* at 682 (Harlan, J., dissenting).

67. *Id.* at 686.

68. 377 U.S. 533, 589 (1964) (Harlan, J., dissenting). See also, *e.g.*, *Baker v. Carr*, 369 U.S. 186, 330 (1962) (Frankfurter & Harlan, JJ., dissenting).

69. 405 U.S. 438 (1972). *Eisenstadt* has been the subject of much, largely critical, discussion. See, *e.g.*, P. BREST, PROCESSES OF CONSTITUTIONAL DECISION-MAKING: CASES AND MATERIALS 572 *passim* (1975).

tion, as construed by the Massachusetts Supreme Court, allowed distribution for the prevention of disease.⁷⁰ Justice Brennan eschewed a fundamental rights analysis in favor of a straightforward application of the equal protection clause. This ostensibly mild approach proved equal to the task of invalidation. One by one, the Court rejected the state's proffered justifications. Prevention of marital infidelity and premarital sexual activity—preservation of morality—were rejected as plausible state purposes. The former were rejected because contraceptives were available to married persons; the latter because the ban bore, at best, only “a marginal relation to the proffered objective,” and because “it would be plainly unreasonable to assume that Massachusetts has prescribed pregnancy and the birth of an unwanted child as punishment for fornication”⁷¹ While doubting any health objective, the Court concluded that, in any case, the ban would be “both discriminatory and overbroad.”⁷² Finally, judged simply as a ban on contraception, the greater prohibition imposed upon unmarried persons was found to be invidious and arbitrary.

Whatever else may be said about Justice Brennan's divide and conquer approach, his conclusions are hard to justify except as they are perceived to be based on unarticulated moral premises. First, his rejection of the “moral” purposes is simply too glib.⁷³ Second, to suppose that fear of pregnancy is not a deterrent to sexual activity is, at best, to rest on an assumption contrary to common sense and experience; surely belief in the deterrent effect is not irrational. As surprising is Justice Brennan's notion that because all devices are not potentially dangerous, the scheme is overbroad. Here, if anywhere, the state's interest in regulation has traditionally been given full play.⁷⁴ Most startling, but least morally neutral, is the Court's conclusion that discrimination against unmarried persons with respect to procreation is arbitrary.⁷⁵ Surely this conclusion challenges “pattern[s] so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis.”⁷⁶ In any case, to suppose that this distinction is arbitrary is to smuggle a wholly radical perspective into the

70. *Commonwealth v. Corbett*, 307 Mass. 7, 29 N.E.2d 151 (1940).

71. 405 U.S. at 448.

72. *Id.* at 450.

73. See text accompanying notes 177-206 *infra*.

74. See, e.g., *United States v. Rutherford*, 442 U.S. 544 (1979); *Commonwealth v. Leis*, 355 Mass. 189, 243 N.E.2d 898 (1969).

75. Under this logic, a prohibition on drugs is arbitrary because an addict may suffer.

76. *Poe v. Ullman*, 367 U.S. 497, 546 (1961) (Harlan, J., dissenting).

Fourteenth Amendment. It is that perspective, and not any neutral demand for rational classification, which controls.

The same observation applies to the line of illegitimacy cases running from *Levy v. Louisiana*⁷⁷ to *Lalli v. Lalli*.⁷⁸ Despite the Court's vacillation in these cases on which level of review to use before settling on a "not . . . toothless one,"⁷⁹ the crucial factor was, in fact, the Court's changing attitude toward the propriety of burdening illegitimate children. This is not a matter of logic, although the Court may so mask it,⁸⁰ rather it is a matter of determining the pertinence of the trait of illegitimacy in resolving family property interests. In *Lalli*, the state convinced the Court that the difficulty illegitimates have proving heirship justified discriminating against them in paternal inheritance laws. By 1978 the state had dropped explicit pursuit of its interest in discouraging illegitimate births. Whether or not the ill treatment of illegitimate offspring would truly have such a discouraging effect is an empirical question and plays no part in the Court's conclusion, which is premised on the sometime principle that one should not be burdened through no fault of one's own.⁸¹ Of course, the state would be permitted to offer statistical proof, although such a burden of proof is, if not impossible, extremely difficult and, in the end, unlikely to overcome the Court's sympathies toward the illegitimate child. The point is that for centuries people regarded bastardy as a relevant trait, but our society now finds it pertinent only when considered in the narrow field permitted in *Lalli*.

The cases discussed to this point have concerned race, gender, sexual matters, and the status of illegitimacy. If we turn to what might be regarded as a less morally laden situation, we find, unavoidably, that the same basic notions of fairness control the decision. For example, in *Kotch v. Board of River Port Pilot Commissioners*,⁸² the question presented involved the system for selecting river pilots for pilotage to and from New Orleans. The pilots themselves certified pilots from among those qualified by apprenticeship. Since the apprenticeships in-

77. 391 U.S. 68 (1968).

78. 439 U.S. 259 (1978).

79. *Trimble v. Gordon*, 430 U.S. 762, 767 (1977) (citing *Mathews v. Lucas*, 427 U.S. 495, 510 (1976)).

80. *See, e.g., Levy v. Louisiana*, 391 U.S. at 71: "Though the test has been variously stated, the end result is whether the line drawn is a rational one."

81. Of course, our society is filled with examples of persons burdened through no fault of their own. For example, people born outside the United States are burdened with having to be naturalized in order to become citizens; people who are under five feet tall are often burdened with exclusion from police forces.

82. 330 U.S. 552 (1947).

variably went to sons and friends of the pilots, a closed trade developed and river pilots not so certified complained. To all but Justice Rutledge, the scheme was acceptably rational. Of course, whether or not it was rational depended to some extent on the way the purpose and burdens were described, but ultimately it depended on the Court's perception of fairness and propriety. For Justice Black, writing for the majority, the "highly personalized" nature of the calling demanded an intimate and almost intuitive, rather than formalized, training.⁸³ Thus, the peculiar legacy of pilots provided advantageous friendly supervision and benefits to morale,⁸⁴ and ultimately, an efficient and skilled corps. By contrast, Justice Rutledge found preference by blood to be forbidden by the Fourteenth Amendment as a "wholly arbitrary exercise of power,"⁸⁵ despite acknowledging that "conceivably the familial system would be the most effective possible scheme for training many kinds of artisans or public servants, sheerly from the viewpoint of securing the highest degree of skill and competence."⁸⁶ Clearly, the Court's division has to do with what moral premises are to be found in the Fourteenth Amendment.

Enough cases have been sketched to suggest that the pivotal factors in equal protection cases are apt to be the Court's moral premises. Nevertheless, we have seen that the decisions are draped not with moral considerations as much as with the mechanical verbiage of equal protection analysis. Insofar as the moral factors are not articulated, how does the Court inject them into its decisions? Should it do so? Is it inevitable? Where shall the Court look for guidance?

III. Standard Methodology Revisited: How Value Choices Become Operative

Justice Brennan recently reviewed the basic steps of equal protection jurisprudence: "[A] legislative classification may be upheld only if it bears a rational relationship to a legitimate state purpose."⁸⁷ Therefore, "[w]hen faced with a challenge to a legislative classification under the rational-basis test, the court should ask, first, what the purposes of the statute are, and, second, whether the classification is rationally re-

83. *Id.* at 558.

84. *Id.* at 563.

85. *Id.* at 566 (Rutledge, J., dissenting).

86. *Id.*

87. *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 183 (1980) (Brennan, J., dissenting). *See also* *Western & S. Life Ins. Co. v. State Bd. of Equalization*, 101 S. Ct. 2070, 2082 n.21 (1981). *But see* *Schweiker v. Wilson*, 101 S. Ct. 1074, 1087 n.4 (1981) (Powell, J., dissenting).

lated to achievement of those purposes.”⁸⁸ Superficially, the second is the critical question since the statute lives or dies on the basis of its rationality. Indeed, often enough the Court’s conclusion will sound in rationality, but the two questions are interdependent parts of a single formula. Rationality therefore depends upon purpose. A moment’s thought will reveal that the outcome in any given case will depend as much on how the Court articulates and adjudges the legislative purpose as on any judgment of rationality. Since the solution to any equation depends on the factors used, the purpose factor is almost infinitely manipulable.

More often than not, the Court’s fixing of purpose will seem merely a preliminary matter, a mere reading or echo of the statute.⁸⁹ Nevertheless, difficulties and dangers of ascertaining purpose are sometimes acknowledged. Justice Powell has noted, “Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the ‘dominant’ or ‘primary’ one.”⁹⁰ Justice Marshall has observed that “[i]ndividuals in general and lawmakers in particular frequently act for a variety of reasons Absent an omniscience not commonly attributed to the judiciary, it will often be impossible to ascertain the sole or even dominant purpose of a given statute.”⁹¹ Both justices conclude that the inquiry into purpose seeks to discover only whether an illicit motive was “a motivating factor” or played an “appreciable role.” These are perplexing statements, given the fundamental two-part equal protection analysis outlined by Justice Brennan.⁹²

There are also sporadic denials that the Court has ever “held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it.”⁹³ This is said to be so be-

88. *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. at 183 n.77.

89. *See, e.g., Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 101 S. Ct. 1425, 1432 (1981).

90. *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977).

91. *Personnel Adm’r of Mass. v. Feeney*, 442 U.S. 256, 282 (1979) (Marshall, J., dissenting).

92. *See* note 87 and accompanying text *supra*. In part, the modest nature of those statements stems from the unique context in which they were made. The Court was engaged, not in a preliminary definition of purpose against which to test the rationality of classes, but in an examination of whether the Fourteenth Amendment demand for intentional discrimination had been satisfied. *See also Mobile v. Bolden*, 446 U.S. 55 (1980); *Washington v. Davis*, 426 U.S. 229 (1976). Such cases involve a search for a hidden purpose, the piercing of a mask, and rarely require any further inquiry into rationality. For the use of this technique in other types of equal protection cases, see text accompanying notes 156-66 *infra*.

93. *Palmer v. Thompson*, 403 U.S. 217, 224 (1971).

cause, among other reasons, "it is extremely difficult for a court to ascertain the motivation, or collection of different motivations, that lie behind a legislative enactment."⁹⁴

We are not primarily or solely concerned with what evil lurks in legislators' hearts, the lawmakers' *mens rea*, but rather with the goal, target, or aim of the statute.⁹⁵ Yet, even so, we encounter problems, though of a different nature. It is not the murky realm of motive that troubles us, but rather the very richness of possibilities, the choice of which is confined by no ready standards—certainly not hard, mechanical ones.⁹⁶ Yet it is this very choice which often determines the outcome.

In arguing that no ready standards for ascertainment of purpose exist, it should be noted that not all justices have been insensitive to the difficulties which the matter of purpose entails. In addition to the judicial awareness found in the statements of Justices Marshall and Powell,⁹⁷ there have been a series of skirmishes between Justices Brennan and Rehnquist over certain aspects of determining legislative purpose.⁹⁸ This debate over purpose ascertainment is seen in *United States*

94. *Id.* This modesty surfaces in other areas of constitutional law as well. Thus, in *United States v. O'Brien*, 391 U.S. 367 (1968), Chief Justice Warren iterated "a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *Id.* at 383. The Court, however, seems to be referring to O'Brien's contention that the act under consideration was in fact motivated by an unconstitutional desire to suppress speech, not to the problems of ascertaining the government's proffered or formal goal as ascertained from legislative history, government counsel, the statute itself, or other available sources. *See also* *United States v. Darby*, 312 U.S. 100 (1941) (Court eschews the quest for purpose or motive underlying exercises of the commerce power).

95. *See generally* J. ELY, *supra* note 2, at 136; Brest, *Palmer v. Thompson: An Approach to the Problems of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95; Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970). *See also* *Oestereich v. Selective Service Sys. Local Bd. No. 11*, 393 U.S. 233 (1968); *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Reitman v. Mulkey*, 387 U.S. 369 (1967). In all these cases, discovery of an illicit legislative motive seemed crucial.

96. *But see* *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981). "In equal protection analysis, this Court will assume that the objectives articulated by the legislature are actual purposes of the statute, unless an examination of the circumstances forces us to conclude that they 'could not have been a goal of the legislation.'" *Id.* at 463 n.7 (citing *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 n.16 (1975)). This statement is true enough when the legislature is explicit, although the qualifying clause obviously permits some leeway. For a further discussion of *Cloverleaf*, see text accompanying note 170 *infra*.

97. *See* text accompanying notes 90 & 91 *supra*.

98. One of these skirmishes occurred in the midst of the Iowa truck length limit case, *Kassel v. Consolidated Freightways Corp.*, 101 S. Ct. 1309 (1981). While the plurality in *Kassel* invalidated the Iowa law for imposing a burden on commerce "without any significant countervailing safety interest," *id.* at 1320, Justice Brennan, joined by Justice Marshall, preferred to rest invalidation on the state's illegitimate goal of diverting interstate truck traf-

*Railroad Retirement Board v. Fritz*⁹⁹ and in *Michael M. v. Superior Court*,¹⁰⁰ both of which are discussed below. Though unresolved, the debate is a healthy one, and given the cruciality of the purpose factor, it is to be expected that the main protagonists should be two justices so often opposed on equal protection questions.

IV. Vehicles for Value Manipulation

A. Levels of Generality

Dissenting in *United States Railroad Retirement Board v. Fritz*,¹⁰¹ Justice Brennan discerned one of the least obtrusive but most effective vehicles for manipulation of the purpose factor in equal protection analysis. *Fritz* involved a challenge to the 1974 restructuring of the railroad retirement system, an effort to prevent the windfall available under the 1937 version of the act. Under that version, workers who split their careers between railroad and nonrailroad employment could qualify to receive both social security and railroad retirement benefits. Sensitive to the reliance interests of some workers, Congress adopted a somewhat rough-hewn grandfathering scheme that draws a line between workers with comparable railroad experience. For example, a former railroad worker with ten to twenty-five years of railroad experience could get dual benefits, at least in part, if he had worked for a railroad either in 1974 or for twelve of the preceding thirty months, as long as he had qualified for social security benefits at the time he left the railroad. Thus, a worker with twenty-four years of railroad work who, at the time he left the railroad, had not also qualified for social security benefits and had not worked for the railroad either in 1974 or in twelve of the preceding thirty months lost the dual benefit, whereas a

fic around Iowa. In a lengthy footnote anticipating Justice Rehnquist's dissenting attack, Justice Brennan justified his unwillingness to accept counsel's version of legislative purpose in the face of the "actual purposes." He contended that counsel's version should be attended only "[w]here there is no evidence bearing on the actual purpose." *Id.* at 1322 n.3 (Brennan, J., concurring). Even then, he urged that the Court should receive with some skepticism "post hoc justifications" about legislative purpose. *Id.* As Justice Powell says in *Schweiker v. Wilson*, 450 U.S. 221, 244 n.6 (1981) (Powell, J., dissenting), "Ascertainment of actual purpose to the extent feasible . . . remains the essential step in equal protection." Justice Rehnquist's retort, in his even longer footnote, denies that counsel's proffered justifications are improper sources of legislative purpose and suggests that the notion of "actual purpose" is more hope than reality. *Kassel v. Consolidated Freightways Corp.*, 101 S. Ct. at 1333 n.2 (Rehnquist, J., dissenting). See also *Michael M. v. Superior Ct.*, 450 U.S. 464, 469-70 (1981), "[T]he search for the 'actual' or 'primary' purpose of a statute is likely to be elusive."

99. 449 U.S. 166 (1980).

100. 450 U.S. 464 (1981).

101. 449 U.S. 166 (1980).

ten-year worker retained at least a partial windfall if he had qualified for social security before his railroad employment or had done railroad work either in 1974 or in twelve of the preceding thirty months.¹⁰²

The opinion by Justice Rehnquist deemed the proper level of review to be the "traditional" one requiring only that the classifications have some rational basis.¹⁰³ Without any clear delineation of purpose, the Court concluded that Congress had not "achieved its purpose in a patently arbitrary or irrational way."¹⁰⁴

Justice Brennan bemoaned the toothless nature of the majority's inquiry which, in his view, "virtually immunizes social and economic legislative classifications from judicial review."¹⁰⁵ The flaw lay in the Court's discernment of purpose. Noting that the broad purpose to restore fiscal soundness to the railroad retirement system in no way provided support for the challenged scheme,¹⁰⁶ Justice Brennan discovered the relevant purpose in a congressional report: "[t]o preserve the vested earned benefits of retirees who had already qualified for them."¹⁰⁷ Therefore, the scheme was not only not rationally related, but directly inimical, to its purpose.¹⁰⁸

102. *Id.* at 171-72, 182-83.

103. Responding sharply to Justice Brennan's dissent, the Court cited a long list of "low level" equal protection cases, but tellingly observed, "The most arrogant legal scholar would not claim that all of these cases applied a uniform or consistent test under equal protection principles." *Id.* at 176-77 n.10.

104. *Id.* at 177. Earlier in its opinion, the Court had noted the broad purpose of the 1974 Act to forestall insolvency of the railroad retirement system. *Id.* at 168-69. Although a study commission recommended that "legally vested rights of railroad workers" be preserved, *id.* at 456 n.3, the Court reasoned that "[b]ecause Congress could have eliminated windfall benefits for all classes of employees, it is not constitutionally impermissible for Congress to have drawn lines between groups of employees for the purpose of phasing out those benefits." *Id.* at 177. Thus, "the plain language of [the statute] marks the beginning and end of our inquiry." *Id.* at 176. With respect to the rationality of the scheme, the Court observed that "the only eligible former railroad employees denied full windfall benefits are those, like appellee, who had no statutory entitlement to dual benefits at the time they left the railroad industry, but thereafter became eligible for dual benefits when they subsequently qualified for social security benefits. Congress could properly conclude that persons who had actually acquired statutory entitlement to windfall benefits while still employed in the railroad industry had a greater equitable claim to those benefits than the members of appellee's class who were no longer in railroad employment when they became eligible for dual benefits." *Id.* at 178.

105. *Id.* at 183 (Brennan, J., dissenting).

106. *Id.* at 186.

107. *Id.*

108. *Id.* Justice Brennan then proceeded to chastise the Court for accepting "the *post hoc* justifications offered by Government attorneys." *Id.* at 187. The dissent's approach may be said to have its own blemishes. First, to identify the relevant purpose as the protection of "vested dual benefits" is to beg the question. In the face of the majority's probably accurate observation that Congress could divest all windfall benefits, the phrase "vested dual

Obviously, the justices' conclusions depend on their respective views of purpose. Justice Brennan's point, a sound if arguably inapplicable one, is that insofar as the Court begins and ends its inquiry with the statute's plain language,¹⁰⁹ its analysis is tautological.

It may always be said that Congress intended to do what it in fact did. If that were the extent of our analysis, we would find every statute, no matter how arbitrary or irrational, perfectly tailored to achieve its purpose. But equal protection scrutiny under the rational basis test requires the courts first to deduce the independent objectives of the statute, usually from statements of purpose and other evidence in the statute and legislative history.¹¹⁰

The tautology that Justice Brennan identifies in the *Fritz* majority opinion is perhaps the starkest kind.¹¹¹ Undoubtedly, a statute that creates classes *A* and *B* in straightforward terms will, if its purpose is deemed to be to create classes *A* and *B*, be perfectly tailored, and in one sense, perfectly rational. The classes are by definition perfectly congruent with the design. It is neither underinclusive nor overinclu-

benefits" tells us nothing. Second, there is something unduly simplistic about confining the quest for purpose to committee colloquy, especially when the end result hangs on vague pronouncements and hopes about vested interests and equities. Nor does it seem wise, given the broad goal and the result, to lock Congress into a batch of pronouncements uttered during hearings. Surely, legislative purpose is a more complex and multifaceted matter. See note 252 *infra*. Justice Stevens, whose concurring opinion occupies the middle ground, recognizes the tautological nature of discerning purpose solely from the face of the challenged statute but avoids the simplistic certitude of the dissenters. "Actual purpose," he reminds us, "is sometimes unknown." 449 U.S. at 180 (Stevens, J., concurring). Sometimes we must be satisfied with "a legitimate purpose that we may reasonably presume to have motivated an impartial legislature." *Id.* at 181. Moreover, legislative purpose is oftentimes "multiple and somewhat inconsistent," in short, manifesting the usual legislative result—a compromise. *Id.* Given the broad objective to promote solvency, Congress remained mindful of workers' expectations and came down somewhere in the middle. As will be seen in Part V(A) *infra*, the failure to recognize or acknowledge the complexity and inconsistent nature of the legislative process skews equal protection analysis in a variety of ways. Fidelity, at least to mechanics, requires no less than a reconstruction of the legislative process, beginning to end.

109. See note 104 *supra*.

110. 449 U.S. at 187. It should be noted that the dissent's demand for previously articulated purposes, and many of the cases it cites as authority for that demand, have been recognized aspects of and precedent for the middle level of review. One suspects that Justices Brennan and Marshall are promoting abandonment of the lower parts of the equal protection review spectrum.

111. *Id.* at 166. See also Tussman & tenBroek, *supra* note 1, at 344. For egregious examples of this error committed by the first Justice Harlan, see *Powell v. Pennsylvania*, 127 U.S. 678 (1888). "The objection that the statute is repugnant to the clause of the Fourteenth Amendment forbidding the denial by the State to any person within its jurisdiction of the equal protection of the laws, is untenable. The statute places under the same restrictions, and subjects to like penalties and burdens, all who manufacture, or sell, or offer for sale, or keep in possession to sell, the articles embraced by its prohibitions; thus recognizing and preserving the principle of equality among those engaged in the same business." *Id.* at 687.

sive. This exemplifies how dependent the result of equal protection analysis is on characterization of purpose. Ordinarily courts do not tread such a short circuit; yet the example given is but one of the various levels of generality that can be assigned to legislative purpose with telling consequences.¹¹²

Take the much anthologized case of *Railway Express Agency, Inc. v. New York*.¹¹³ If the legislative purpose is to be drawn from the ordinance's words¹¹⁴—to prohibit advertising on vehicles, except to the extent that it identifies the vehicle owner's business—the ordinance does exactly what it was designed to do. But, of course, purpose is a matter of why such a classification scheme was promulgated. Whatever the source of information about purpose—inference from the statute itself, preambles, legislative history—it can be stated in a variety of ways. Thus, at the highest level of generality, we could describe the purpose of the New York ordinance as being the public welfare, or an interest in safety, or an interest in highway safety. At each level we have a severe, though decreasing, underinclusiveness problem.

Such highly generalized characterizations of purpose have been offered as the basis for challenge. In *Buck v. Bell*,¹¹⁵ the appellant argued that the Virginia statute, which provided for sterilization of only institutionalized feeble-minded persons, given a purpose to prevent reproduction of mentally defective people, was underinclusive. As counsel argued, "The legislature cannot take what might be termed a natural class of persons, split this class in two and then arbitrarily designate the dissevered fractions of the original unit as two classes and thereupon enact different rules for the government of each."¹¹⁶ What, in other words, of the multitudes of mental defectives outside the wall? What of the uncaptured criminals? What of the evildoers whose conduct has not been criminalized? Although it is tempting to point out

112. See generally Comment, *Legislative Purpose, Rationality and Equal Protection*, 82 YALE L.J. 123 (1972). This superb examination of some fundamental aspects of equal protection analysis is among the principal instigators of many of the ideas that inform this article and has been drawn from rather freely throughout this piece.

113. 336 U.S. 106 (1949).

114. "No person shall operate, or cause to be operated, in or upon any street an advertising vehicle; provided that nothing herein contained shall prevent the putting of business notices upon business delivery vehicles, so long as such vehicles are engaged in the usual business or regular work of the owner and not used merely or mainly for advertising." *Id.* at 107-08.

115. 274 U.S. 200 (1927).

116. *Id.* at 102 (quoting *State v. Julow*, 129 Mo. 163 (1895)). It was this argument that provoked the famous comment of Justice Holmes, "It is the usual last resort of constitutional arguments to point out shortcomings of this sort." *Id.* at 208.

that the flaw in counsel's argument is the notion of "natural classes,"¹¹⁷ the argument does point out a type of underinclusiveness. The usual justification is that "the law does all that is needed when it does all that it can, indicates a policy, applies it to all within the lines, and seeks to bring within the lines all similarly situated so far and so fast as its means allow."¹¹⁸

This one step at a time justification is classic, and Justice Douglas makes use of it in *Railway Express Agency, Inc. v. New York*.¹¹⁹ "[I]t is no requirement of equal protection that all evils of the same genus be eradicated or none at all."¹²⁰ That he had to resort to this justification at all raises another question: How was it determined at what level of generality to set the purpose? If not safety in general, why eradication of distractions, or at least, moving distractions? Why not enhance its rationality by describing a more precise purpose; for example, to get rid of moving distractions of the most insidious sort without at the same time unduly burdening small businesses whose vehicles provide an effective and cheap means of advertising? Thus phrased, the ordinance approaches perfect congruence. If it would still be flawed, it must be because such a purpose is improper.¹²¹ It should be noted that the proposed formulation, while resembling the tautology Justice Brennan decried, is not quite so circular and self-verifying. Moreover, it may be said to depict most clearly the reality of the complex and mixed legislative purpose.

As shown above, the level of generalization affects, if not the outcome, then the analysis. What guides the Court to the proper level? The proposed characterization of purpose also involves a recognition of multiple purposes. Why should such multiple and competing purposes ever be ignored? Which of the several purposes shall be counted? These questions move us beyond the manipulation of the purpose according to levels of generalization to other means of manipulating the purpose factor. These techniques are considered next.

117. The acceptability of classes, is, after all, dependent on their purposes. *See, e.g.*, Tussman & tenBroek, *supra* note 1, at 358. The authors suggest that the supposition of "natural classes" is one of the fundamental errors in equal protection analysis. But see text accompanying note 140 *infra*, where it is argued that the notion of "natural classes" plays a crucial role in modern equal protection analysis.

118. *Buck v. Bell*, 274 U.S. at 208.

119. 336 U.S. 106 (1949).

120. *Id.* at 110. *See also, e.g.*, *Katzenbach v. Morgan*, 384 U.S. 641, 656 (1966).

121. Or that somehow all vehicles bearing advertising constitute a "natural class."

B. Forbidden Purposes and Classifications

How different race relations in America might have been had the Court followed the lead of Justice Harlan's dissent in *Plessy v. Ferguson*.¹²² For Justice Harlan, the matter was relatively simple and straightforward; classifications based on race are forbidden.¹²³ Moreover, "[t]he fundamental objection . . . to the statute is that it interferes with the personal freedom of citizens."¹²⁴ Therefore, it is defective in purpose and means; it is, by law, wrong, or, if one prefers, irrational. While Justice Harlan's approach has never won a majority,¹²⁵ the notion of a presumptively forbidden classification or purpose has been crucial to modern equal protection doctrine, especially in the matter of racial discrimination. Thus, for example, the state miscegenation laws that were stricken in *Loving v. Virginia*¹²⁶ were deemed defective because of a forbidden purpose (maintenance of white supremacy) or because of a presumptively forbidden classification (race). With respect to the forbidden purpose, the scheme was, with some exceptions,¹²⁷ almost perfectly rational. Lack of rational means, then, in the sense of congruence between aim and class, was not the flaw. Rather, the flaw was in violating the moral premise central to the Fourteenth Amendment. The statute's "equal application" did not immunize it from attack. The premise was a moral one.

A substantive moral basis also underlies the Court's decision in *Police Department v. Mosley*,¹²⁸ in which the Court struck down an ordinance forbidding picketing in the vicinity of schools (except for picketing involving a labor dispute with the school). Such a distinction violates the proposition that government cannot restrict speech on the basis of content since content is a forbidden basis of classification under the First Amendment.¹²⁹ The case can be explained as well by

122. 163 U.S. 537, 552 (1896) (Harlan, J., dissenting); with regard to the effect of *Plessy*, see D. BERMAN, *IT IS SO ORDERED: THE SUPREME COURT RULES ON DESEGREGATION* (1966).

123. 163 U.S. at 554, 559.

124. *Id.* at 557.

125. It has won adherents, however. See, for example, Justice Stewart's dissenting opinion, joined by Justice Rehnquist, in *Fullilove v. Klutznick*, 448 U.S. 448, 522 (1980), and Stewart's concurring opinions in *Loving v. Virginia*, 388 U.S. 1, 13 (1967), and *McLaughlin v. Florida*, 379 U.S. 184, 198 (1964).

126. 388 U.S. 1 (1967).

127. For example, the "Pocohontas exception": "The exception for persons with less than one-sixteenth 'of the blood of the American Indian' is apparently accounted for . . . by 'the desire of all to recognize as an integral and honored part of the white race the descendant of John Rolfe and Pocohontas.'" *Id.* at 5 n.4 (citations omitted).

128. 408 U.S. 92 (1972).

129. *Id.* at 95.

focus on purpose: a state may not set out to prefer one type of speech to another on the basis of its content.¹³⁰

Other examples of substantively moral-premised approaches to equal protection problems abound,¹³¹ but two more examples, useful for their candor, should suffice. In *Labine v. Vincent*¹³² Justice Brennan, decrying the majority's decision to uphold a statute reducing the likelihood that illegitimate children would inherit from their fathers, devoted the major portion of his dissent to analyzing the rationality of the scheme.¹³³ The opinion, however, is framed by commentary that reveals the crucial sticking point between the majority and Justice Brennan; to him the discrimination is based on "the untenable and discredited moral prejudice of bygone centuries,"¹³⁴ because it involves "only a moral prejudice, prevalent in 1825."¹³⁵

Another unsuccessful attempt to forbid certain schemes based on moral considerations, surfaces in Justice Rutledge's dissent in *Kotch v. Board of River Port Pilot Commissioners*.¹³⁶ He complains:

The result of the decision therefore is to approve as constitutional state regulation which makes admission to the ranks of pilots turn finally on consanguinity. Blood is, in effect, made the crux of selection. That, in my opinion, is forbidden by the Fourteenth Amendment's guaranty against denial of the equal protection of the laws.¹³⁷

While admitting that the "classification based on the purpose to be accomplished may be said abstractly to be sound,"¹³⁸ he finds that further consideration reveals a "wholly arbitrary exercise of power."¹³⁹ Justice Rutledge retains his belief in the forbidden nature of the scheme even in the face of the distinct possibility that it may be the most effective and efficient means of training river pilots.

The foregoing discussion demonstrates that legislation challenged under the equal protection clause often will be adjudged, not simply by

130. Justice Marshall reveals the alternative lines of invalidation in his statement that "in all equal protection cases . . . the crucial question is whether there is an *appropriate governmental interest suitably furthered* by the differential treatment." *Id.* at 95 (emphasis added).

131. See also *Shapiro v. Thompson*, 394 U.S. 618 (1969). "The purpose of inhibiting migration by needy persons into the State is constitutionally impermissible." *Id.* at 629.

132. 401 U.S. 532 (1971).

133. *Id.* at 541 (Brennan, J., dissenting).

134. *Id.*

135. *Id.* at 558.

136. 330 U.S. 552, 564 (1947) (Rutledge, J., dissenting). See also text accompanying notes 82-86 *supra*.

137. 330 U.S. at 565 (Rutledge, J., dissenting).

138. *Id.* at 565-66.

139. *Id.* at 566.

the degree of congruence between purpose and means, but also by the acceptable nature of the scheme's purpose or by the criterion upon which the classification is drawn. The State's resort to forbidden criteria, such as race, is often described as invidious or arbitrary, but its arbitrariness depends on a moral judgment. Whether or not race or blood is irrelevant is a moral, not scientific, judgment. In effect, the Court applies a rule that racial classifications are irrational by law. Insofar, however, as the Court speaks in terms of rationality and concludes, for example, that there is no rational basis for distinguishing between legitimate and illegitimate children, the equal protection clause is the source of "natural classes" which cannot be "artificially" divided.¹⁴⁰ Similarly, blacks and whites are, at least presumptively, one natural class. All but the rarest of cleavages will be forbidden.¹⁴¹

C. Mandatory Purposes

In some circumstances, the scheme may founder because of its lack of rational relationship to a purpose that the legislature has not, but ought to have, pursued. That is, the classifications may relate well enough to various permissible goals, but may fail to promote sufficiently a mandated goal. Although the mandate is portrayed by the Court as flowing from the equal protection or other constitutional clauses, it rests rather on a choice of competing political philosophies that dictate the shape of rationality.

A primary example of the imposed purpose is the line of legislative reapportionment cases ignited by *Baker v. Carr*.¹⁴² Within two years of *Baker*, the Court decided the case of *Wesberry v. Sanders*,¹⁴³ which invalidated a Georgia congressional apportionment scheme. The state's congressional districts were found to violate the command implicit in article I, section 2 of the United States Constitution "that as nearly as is practicable one man's vote . . . is to be worth as much as another's."¹⁴⁴ As Justice Harlan's lengthy dissent argues, "[t]he unstated premise" of the decision is the majority's notions of what are "sound political principles."¹⁴⁵ In the following term, the Court discovered a similar mandate in the equal protection clause. *Reynolds v.*

140. See Tussman & tenBroek, *supra* note 1, at 344, suggesting that the concept of natural classes is one of the common errors of equal protection analysis.

141. See, e.g., Fullilove v. Klutznick, 448 U.S. 448 (1980); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); Korematsu v. United States, 323 U.S. 214 (1944).

142. 369 U.S. 186 (1962).

143. 376 U.S. 1 (1964).

144. *Id.* at 7-8.

145. *Id.* at 42 (Harlan, J., dissenting).

*Sims*¹⁴⁶ arose from a challenge to apportionment of the two houses of the Alabama legislature. The Court's recognition that population is the overriding consideration in legislative apportionment,¹⁴⁷ roughly "one person-one vote,"¹⁴⁸ provoked another extended dissent from Justice Harlan. While it is not our purpose to evaluate the merits of the Court's conclusions,¹⁴⁹ it is difficult to deny the force of Justice Harlan's charge that the Court's decision is a piece of "political ideology"¹⁵⁰ which, whatever its merit, flows neither from the history nor from the language of the Fourteenth Amendment. For better or worse, these cases and their progeny involve a choice of goals that inevitably makes apportionment schemes, designed to promote other aspects of political balance, "irrational."

The use of the mandatory purpose technique to set the standard of rationality is commonplace in voting rights cases. Later cases require that, with rare exceptions,¹⁵¹ residence within a geographical district (and, one would suppose, age) be the sole proper bases for the franchise;¹⁵² wealth or even the willingness to pay a small poll tax are inappropriate voter requirements.¹⁵³ Thus, the only way to understand Justice Douglas' dictate that "wealth or fee paying has, in our view, no relation to voting qualifications"¹⁵⁴ is to see that his finding of invidiousness or irrationality necessarily depends on notions of forbidden or mandatory purposes, or on notions of forbidden or natural classes.¹⁵⁵

D. Detecting the Real or Dominant Purpose, or Finding No Purpose at All

While ordinarily the Court devotes little attention to the means of distilling the purpose factor, sometimes an examination of the circumstances forces the Court to conclude that an actual purpose is lurking

146. 377 U.S. 533 (1964).

147. *See, e.g., id.* at 568-76.

148. *Gray v. Sanders*, 372 U.S. 368, 381 (1963).

149. The merits have provoked much discussion. *See generally* R. BERGER, *supra* note 46, and citations therein.

150. *Reynolds*, 377 U.S. at 590 (Harlan, J., dissenting).

151. *See, e.g., Salyer Land Co. v. Tulare Water Storage Dist.*, 410 U.S. 719 (1973).

152. *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969).

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

154. *Id.* at 670.

155. This variety of equal protection analysis emerges in other areas as well. Thus, cases such as *Griffin v. Illinois*, 351 U.S. 12 (1956) (requiring states to provide indigents with trial transcripts for appeals), despite rational bases for the refusal, may be seen to impose on the state a goal of achieving substantial equality for the indigent caught in the criminal process. That is, whatever other permissible goals one would pursue, this goal must be overriding. *See generally* Comment, *supra* note 112, at 139, 151.

beneath the one avowed by the state. *Yick Wo v. Hopkins*¹⁵⁶ is a stark example. In *Yick Wo*, the extreme disparity in the grant of permission to operate wooden laundries between white and Chinese operators bore no apparent relationship to the ostensible safety purposes of the general requirement for a city permit. As no good reason for the disparity was shown, "the conclusion cannot be resisted, that no reason for it exists except hostility to the [Chinese] race,"¹⁵⁷ a forbidden purpose.¹⁵⁸

In the ordinary contemporary case, however, the state is rarely so clumsy. In *Weinberger v. Wiesenfeld*¹⁵⁹ the Court was presented with a challenge to a Social Security Act provision that allowed death benefits to widows but not to widowers. Among the Government's justifications was that of offsetting "the adverse economic situation of women by providing a widow with financial assistance to supplement or substitute for her own efforts in the marketplace."¹⁶⁰ The Court was not fooled: "[T]he mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme."¹⁶¹ Analysis of the legislation and its history revealed that its true purpose was to encourage single parents to stay at home and give personal parental attention. This "actual" purpose emerged from various committee statements, the fact that Congress considered but rejected extending benefits to childless widows, and the fact that benefits ceased upon the child's ineligibility.¹⁶² Given this purpose, the Court concluded that the scheme's gender based distinction was "entirely irrational."¹⁶³ Even Justice Rehnquist concurred that the provision "does not rationally serve any valid legislative purpose."¹⁶⁴ Whether or not the scheme is as clearly

156. 118 U.S. 356 (1886).

157. *Id.* at 374.

158. For other examples of hidden forbidden purposes, see *Loving v. Virginia*, 388 U.S. 1 (1967), in which the state's avowed general purpose to prevent "a mongrel breed of citizen" was seen as an endorsement of white supremacy. *Id.* at 7. See also *Plessy v. Ferguson*, 163 U.S. 537, 557 (1896). "The thing to accomplish was, under the guise of giving equal accommodation for whites and blacks, to compel the latter to keep to themselves while travelling in railroad passenger coaches." *Id.* (Harlan, J., dissenting).

159. 420 U.S. 636 (1975).

160. *Id.* at 646.

161. *Id.* at 648. The Court footnoted the quoted material as follows: "This Court need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation." *Id.* at 648 n.16.

162. *Id.* at 648-49.

163. *Id.* at 651.

164. *Id.* at 655 (Rehnquist, J., concurring). He continued "This is so because it is irrational to distinguish between mothers and fathers when the sole question is whether a child . . . should have the opportunity to receive the full-time attention of the only parent remain-

irrational as the Justices conclude, it does suffer from a severe degree of underinclusiveness. Yet one need not engage one's imagination too long or hard to come up with several plausible, rational bases for Congress' distinction. At a minimum, why may Congress not proceed a step at a time, preferring to provide help in the situation where it is most likely to be needed?¹⁶⁵ In any case, *Wiesenfeld* iterates one familiar technique: The Court will not always accept the avowed purpose as the real purpose.¹⁶⁶

Sometimes the Court refuses to look past the avowed purpose to find an improper purpose, as the next two cases illustrate. *Takahashi v. Fish and Game Commission*¹⁶⁷ considered the validity of a California statute prohibiting issuance of fishing licenses to persons ineligible for

ing to it." *Id.* See also Justice Powell's conclusion, "I find no legitimate governmental interest that supports this gender classification." *Id.*

165. See United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166 (1980).

166. But see *Craig v. Boren*, 429 U.S. 190 (1976) (invalidating Oklahoma's gender-based differential respecting purchase of beer). The Court cautiously accepted the state's avowed traffic safety purpose, but then commented, "That this was the true purpose is not at all self-evident. The purpose is not apparent from the face of the statute and the Oklahoma Legislature does not preserve statutory history materials capable of clarifying the objectives served by its legislative enactments. The District Court acknowledged the nonexistence of materials necessary 'to reveal what the actual purpose of the legislature was,' but concluded that 'we feel it apparent that a major purpose of the legislature was to promote the safety of the young persons affected and the public generally.' 399 F. Supp., at 1311 n.6. Similarly, the attorney for Oklahoma, while proposing traffic safety as a legitimate rationale for the 3.2% beer law, candidly acknowledged at oral argument that he is unable to assert that traffic safety is 'indeed the reason' for the gender line contained in § 245. Tr. of Oral Arg. 27. For this appeal we find adequate the appellee's representation of legislative purpose, leaving for another day consideration of whether the statement of the State's Assistant Attorney General should suffice to inform this Court of the legislature's objectives, or whether the Court must determine if the litigant simply is selecting a convenient, but false, *post hoc* rationalization." *Id.* at 199 n.7. See also Justice Powell's dissenting comments in *Schweiker v. Wilson*, 450 U.S. 221, 244 (1980) (Powell, J., dissenting): "Yet, the question of whether a statutory classification discriminates arbitrarily cannot be divorced from whether it was enacted to serve an identifiable purpose. When a legislative purpose can be suggested only by the ingenuity of a government lawyer litigating the constitutionality of a statute, a reviewing court may be presented not so much with a legislative policy choice as its absence.

"In my view, the Court should receive with some skepticism *post hoc* hypotheses about legislative purpose, unsupported by the legislative history. When no indication of legislative purpose appears other than the current position of the Secretary, the Court should require that the classification bear a 'fair and substantial relation' to the asserted purpose." *Id.* He further comments that "Congress' failure to make policy judgments can distort our system of separation of powers by encouraging other branches to make essentially legislative decisions." *Id.* at 244 n.5. Justice Powell further noted that "[a]scertainment of actual purpose to the extent feasible, however, remains an essential step in equal protection." *Id.* at 244 n.6.

It is far from clear that the legislative branch is required to do anything but legislate. Inevitably, of course, policy judgments are made, and Congress hardly can avoid making them. That they must be made explicit is another, and questionable, proposition.

167. 334 U.S. 410 (1948).

citizenship, which, by virtue of federal law, included the Japanese. California contended that its law was a means of conserving the supply of fish, surely a legitimate interest.¹⁶⁸ Although Takahashi argued that the law's purpose was to discriminate against the Japanese, the Court was willing to accept the avowed state purpose of fish conservation. Thus viewed, the Court held that the scheme was, absent any showing of special threats posed by the Japanese to the state fish population, underinclusive. In addition to being underinclusive, it was based on a forbidden classification. The concurring opinion of Justice Murphy preferred the frontal moral attack: Clearly, the purpose was to discriminate against the Japanese—a forbidden design, though a perfectly rational scheme.¹⁶⁹ Again, the shape of the outcome is a function of the delineation of the purpose. While under either approach the end result—invalidation—is the same, the key factor is the constitutional impropriety of singling out persons to bear a burden solely because of their race.

Most recently, in *Minnesota v. Cloverleaf Creamery Co.*,¹⁷⁰ the Court was confronted with an explicit legislative declaration of purpose. The challenged statute prohibited the sale of milk in plastic, nonreturnable, nonrefillable bottles. Although the statute was purportedly designed as a resource and energy conservation measure, its opponents contended that the measure would not promote these goals. The evidence of the likely effect of the prohibition was in sharp conflict. Nevertheless, the state trial court concluded that the real purpose of the measure was to discriminate against certain segments of the dairy and plastics industry. On appeal, the Minnesota Supreme Court affirmed. Although it accepted the avowed legitimate purpose of the statute, it concluded that the scheme was not rationally related to this purpose. The Supreme Court, also accepting the avowed purpose,¹⁷¹ reversed. It found that the evidence was sufficiently debatable to conclude that the measure was, if unwise, not irrational. Here the purpose determination appears to be derived from the classification scheme itself, that is, as long as it bore sufficient congruence to the avowed legitimate purpose, that purpose controlled. *Cloverleaf* displays the Court's deferential stance with respect to the purpose factor. Indeed, acceptance of the avowed legislative purpose, as long as it jibes with the scheme, seems appropriate where no fundamental right is at issue.

168. *Id.* at 417-18.

169. *Id.* at 422 (Murphy, J., concurring).

170. 449 U.S. 456 (1981).

171. *Id.* at 463 n.7.

In its deferential stance, the Court will often imagine a hypothetical purpose which allows it to uphold the statute. In fact, in what is often taken as a classic statement of equal protection principles, the Court has suggested the propriety of discerning the purpose by working "backwards" from the scheme. "When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed."¹⁷²

The Court's imagination, however, is not always equal to the task of discerning purpose without an express legislative boost. Sometimes it comes up empty-handed, as the following two cases illustrate. In *Gulf, Colorado & Santa Fe Railway Co. v. Ellis*,¹⁷³ the Court struck down a Texas statute allowing plaintiffs to recover attorney fees in certain small claims against railroads. Justice Brewer's opinion methodically canvassed a variety of possible goals all of which he found unrelated to the classification. In essence, he found no purpose. Yet the dissenting justices had little difficulty supposing lawful goals, for example, to discourage the unconscionable tendency of the railroads to resist petty claims. In *Mayflower Farms v. Ten Eyck*,¹⁷⁴ the Court examined a milk price differential that allowed small dealers to charge a lower price as long as they had been in business by a certain date. All other dealers, large or, like appellant, latecoming, had to charge the prescribed minimum. The Court could discern no reason for discrimination, nor could it imagine a connection between the burden complained of and a goal of preserving competition. Various suggestions were rejected, including a most plausible explanation offered by Justice Cardozo in dissent: the legislators sought to assure that small, unknown dealers could compete, without opening the field so much that the large dealers would be overwhelmed by a glut of new dealers taking advantage of the lower price.¹⁷⁵ In each case, the Court, however, preferred to conclude that no proper purpose was operative.¹⁷⁶ The reason is not explained. This ignoring of purposes may also take other forms.

E. Ignoring and Isolating Purposes

The "shell-game" aspect of Justice Brennan's majority opinion in

172. *Lindsley v. National Carbonic Gas Co.*, 220 U.S. 61, 78 (1911).

173. 165 U.S. 150 (1897).

174. 297 U.S. 266 (1936).

175. *Id.* at 274-78 (Cardozo, J., dissenting).

176. *See also* *Royster Guano Co. v. Virginia*, 253 U.S. 412 (1920). Again, the majority could discern no purpose, although Justice Brandeis did. *Id.* at 417 (Brandeis, J., dissenting).

*Eisenstadt v. Baird*¹⁷⁷ has been noted by others.¹⁷⁸ The purposes proffered by the state on behalf of its statute, which forbid the distribution of contraceptives except to married persons who have a prescription, were threefold: a) to preserve sexual morality; b) to protect health; and c) to limit contraception.¹⁷⁹ It also appeared by judicial construction that the bans did not apply to distribution of contraceptives for the prevention of disease.¹⁸⁰ Rather than reconstructing the legislative process to show the extent to which the statute represented an amalgam of competing and even conflicting purposes,¹⁸¹ Justice Brennan's analysis chiseled each purpose free for isolated consideration. With respect to the purpose to preserve sexual morality, he found the statute to be so riddled with exceptions (the availability to married persons, the general availability for disease prevention) and so harsh in its prescription of "pregnancy and the birth of an unwanted child as punishment"¹⁸² as to doubt that its purpose could have been to discourage pre- or extramarital sex. With respect to its proffered health purpose, he found that its codification among sex crimes, its discrimination against unmarried persons, and its overbreadth with respect to the varying health hazards compelled the conclusion that health could not have been its aim.¹⁸³ Finally, turning his focus to the remaining purpose—to limit contraception—Justice Brennan declared that because the rights to privacy discovered in *Griswold v. Connecticut*¹⁸⁴ necessarily inhere in the individual without regard to marital status,¹⁸⁵ the distinction was invidious.

Even granting, reluctantly, the probity of Justice Brennan's resolution of the statute's purposes, one is at a loss to discover why they should be tested in isolation rather than as a synthesis. The latter approach might formulate the purpose as a complex compromise: insofar

177. 405 U.S. 438 (1972). For an earlier discussion of this case, see text accompanying notes 69-76 *supra*.

178. See, e.g., P. BREST, *supra* note 69, at 572 (1975); Comment, *supra* note 112, at 124 *passim*.

179. 405 U.S. at 442-43.

180. *Id.* at 449 (citing *Commonwealth v. Corbett*, 307 Mass. 7, 29 N.E.2d 151 (1940)).

181. See, for example, the formulation of purpose proposed in Comment, *supra* note 112. "The legislature's overall purpose might have been defined as follows: to discourage premarital sex by making contraceptives harder to obtain to the extent that this would not increase the risks of venereal disease; to provide for the medical supervision of the distribution of contraceptives to the extent that this would not increase the availability of contraceptives to the unmarried; and to discourage the use of contraceptives to the extent that this would not interfere with the private behavior of married persons." *Id.* at 127.

182. 405 U.S. at 448-49.

183. *Id.* at 452.

184. 381 U.S. 479 (1965).

185. The opinions in *Griswold* mention the critical nature of the marriage relationship no fewer than twenty times.

as possible, to set the state's face against illicit sexual relations by removing protection against pregnancy without an undue intrusion on marital privacy, and without an undue increase of the risk of venereal disease. Whether or not the statute, thus reformulated, would pass muster remains a question, but its genesis surely is more accurately depicted.

Eisenstadt is not an isolated case. The Court has demonstrated its way with statutory purposes in other cases, notably the Louisiana bastardy cases. A pair of early cases, *Levy v. Louisiana*¹⁸⁶ and *Glon v. American Guarantee & Liability Insurance Co.*,¹⁸⁷ concern, respectively, state laws that bar illegitimate children from recovering damages for the wrongful death of their mothers and mothers from recovering for the wrongful death of their illegitimate children. Justice Douglas' brief opinions proceed almost exclusively on the implicit supposition that the statutes' purposes are to be narrowly characterized as providing compensation to those who most suffer a loss because of another's death. Thus viewed, "legitimacy or illegitimacy of birth has no relation to the nature of the wrong allegedly inflicted on the mother."¹⁸⁸ The classification, however, as it relates to the state's purpose to discourage "sin"¹⁸⁹ (children out of wedlock)¹⁹⁰ and promote stable family units¹⁹¹ is hardly assayed. It seems clear that the purpose for the classification was not to provide compensation; on the contrary, it was to discourage the birth of illegitimate children by denying compensation.

Four years later, in *Weber v. Aetna Casualty & Surety Co.*,¹⁹² the Court struck down another Louisiana provision which denied worker's compensation death benefits to unacknowledged illegitimate children. Justice Powell treated the purpose as providing some measure of support for persons dependent on the decedent.¹⁹³ Of course, the classification in no way promoted that purpose; but here the Court was forced to a greater degree of candor, admitting for discussion, the state's contention that the scheme was designed, *inter alia*, to promote legitimate family relationships.¹⁹⁴ While acknowledging the general propriety of such an interest, the Court overran the difficult empirical question by

186. 391 U.S. 68 (1968).

187. 391 U.S. 73 (1968).

188. *Levy v. Louisiana*, 391 U.S. at 72.

189. *Glon v. American Guar. & Liab. Ins. Co.*, 391 U.S. at 73.

190. *Levy v. Louisiana*, 391 U.S. at 70.

191. *Glon v. American Guar. & Liab. Ins. Co.*, 391 U.S. at 75, 80.

192. 406 U.S. 164 (1972).

193. *Id.* at 171.

194. *Id.* at 173, 175.

concluding that the statute simply failed to promote that interest.¹⁹⁵ Even when the Court in *Lalli v. Lalli*¹⁹⁶ approved the mildest sort of discrimination against illegitimate children, it clung to its conclusion in *Weber* that the state's interest in preserving family relationships is simply not served by drawing lines on the basis of illegitimacy.¹⁹⁷

That the justices recognize the moral purposes underlying these classifications is clear;¹⁹⁸ but analysis of what is surely a difficult empirical, moral and constitutional question is simply dismissed by fiat, and the crucial purpose is essentially and analytically ignored. The question of the extent to which the statutes, singly or as part of a broad fabric, might indeed serve the state's purposes is never broached.¹⁹⁹

An example in a wholly unrelated area helps to illustrate the technique under discussion. In *Smith v. Cahoon*,²⁰⁰ the Court had before it a Florida statute that required motor carriers to provide a bond unless the carrier was in the business of transporting agricultural goods. This policy of providing public protection against highway injuries was deemed appropriate but unrelated to the agricultural exception. As such, the statute was deemed invalid as applied to appellant, a nonagricultural carrier. Again, however, no explanation was given as to why

195. *Id.* at 173. The "family" interest is also dismissed as not rationally promoted in *Trimble v. Gordon*, 430 U.S. 762, 768-70 (1977). Only in *Labine v. Vincent*, 401 U.S. 532, 536 (1971), does the Court give it much weight. See also *Stanton v. Stanton*, 421 U.S. 7, 13-14 (1975).

196. 439 U.S. 259 (1978).

197. *Id.* at 265.

198. See, for example, Justice Brennan's dissent in *Labine v. Vincent*, 401 U.S. 532 (1971). "The state court below explicitly upheld the statute on the ground that the punishment of the child might encourage the parents to marry. If that is the State's objective, it can obviously be attained far more directly by focusing on the parents whose actions the State seeks to influence. . . . In my judgment, only a moral prejudice, prevalent in 1825 when the Louisiana statutes under consideration were adopted, can support Louisiana's discrimination against illegitimate children. Since I can find no rational basis to justify the distinction Louisiana creates between an acknowledged illegitimate child and a legitimate one, that discrimination is clearly invidious." *Id.* at 558. Thus, Justice Brennan teeters atop one "moral prejudice" to espy another.

199. Were it to be, the Court might still strike the statute down as insufficiently rational or as using a forbidden classification. The latter reason, of course, is boldly moral in nature. See text accompanying note 126 *supra*.

Other cases in which the Court, or a portion thereof, simply refuses to deal with "real purposes" include *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 183 (1980) (Brennan, J., dissenting), *Stanton v. Stanton*, 421 U.S. 7, 13 (1975), and *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648-52 (1975). In *Weinberger*, the Court employed a technique which has been identified as an aspect of so-called intermediate review—requiring that the purpose have been previously "articulated" and not merely proffered as an afterthought. See *L. TRIBE*, *supra* note 13, at § 16-30. See also *Schweiker v. Wilson*, 450 U.S. 221, 244 (1981) (Powell, J., dissenting).

200. 283 U.S. 553 (1931).

the Court refused to confront the obvious purpose underlying the exception: to grant a boon to agricultural interests. Thus viewed, the statute, whether or not constitutional, is surely rational.²⁰¹

The purpose ignored in *Smith v. Cahoon*, promotion of agricultural interests, may be described as a complementary or countervailing purpose, a common aspect of legislation. The Court's division in the recent case of *Michael M. v. Superior Court*²⁰² portrays a related distinction. At stake was California's statutory rape law that punished only males. A majority of justices found the statutory purpose to be the one proffered by the state—prevention of teenage pregnancies.²⁰³ The dissenting justices were less gullible. Because he was unconvinced that the males only, rather than a gender neutral approach, would better serve the proffered goal, Justice Brennan found the actual purpose to be "to further [existing] outmoded sexual stereotypes,"²⁰⁴ an obviously bad or forbidden purpose. Surely, that alone, even if a prevalent premise at the time of enactment and arguably an effect of the statute, was not the sole legislative purpose. In a separate dissent, Justice Stevens expresses his dissatisfaction which, like Justice Brennan's, stems from the failure of the state to show how its males-only scheme would be more effective in preventing pregnancies than would a gender-neutral scheme.²⁰⁵ The state's justification is not that the males-only scheme is necessarily the most effective one, however, but rather that broader sanctions are unnecessary and would, given that the female must bear the child, doubly punish her.²⁰⁶ The dissenters' narrow vision thus ignores the existence of complementary and countervailing legislative considerations. Once considered, would anyone say the scheme is arbitrary?

F. The Time Factor

As previously noted,²⁰⁷ the Court's frequently cited opinion in *Lindsley v. Natural Carbonic Gas Co.*²⁰⁸ contains, among the basic rules of equal protection analysis, the proposition that "[w]hen the classifica-

201. See P. BREST, *supra* note 69, at 133; Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1226 (1970); Comment, *supra* note 112, at 113.

202. 450 U.S. 464 (1981).

203. *Id.* at 470.

204. *Id.* at 496 (Brennan, J., dissenting).

205. *Id.* at 499-502 (Stevens, J., dissenting). In effect, it would appear that Justice Stevens is invoking a "least restrictive means" test, which is normally associated with the strict scrutiny level of review.

206. *Id.* at 473.

207. See note 172 and accompanying text *supra*.

208. 220 U.S. 61 (1911).

tion in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, *the existence of that state of facts at the time the law was enacted* must be assumed."²⁰⁹ Whether or not the emphasized clause is properly a mandate, it does suggest another variable in the equal protection process: the time factor. Although a statute may be rational when enacted, the passage of time may change facts and premises which support the rational basis. At what point should the law be tested? As Professor Linde, now a justice on the Oregon Supreme Court, pointed out, the answer depends to some extent on one's concept of the function of judicial review.²¹⁰ If the Court's task is to assure a responsible lawmaking process, the situation at the time of enactment must be assayed. If, however, the Court is conceived of as an ever-watchful shepherd of substantive limits, then current considerations are controlling, and a law's constitutionality is never settled. Linde cited the example of *Cleveland Board of Education v. LaFleur*,²¹¹ which involved a challenge to rules requiring pregnant teachers to take a leave of absence at least five months before the expected birth. Justice Stewart noted in passing that one of the original justifications for the rule was to save pregnant teachers from embarrassment "at the hands of giggling school children" and "to insulate school children from the sight of conspicuously pregnant women."²¹² Seen in that light, the rule may have been perfectly rational when promulgated, though it now seems curious at best. *Michael M. v. Superior Court*,²¹³ discussed earlier,²¹⁴ furnishes a comparable example. It will be recalled that a dissenting Justice Brennan concluded that the real purpose of the California statutory rape law was to protect the virtue of young women who were deemed legally incapable of consent, a purpose based on an "outmoded sexual stereotype."²¹⁵ If this premise now seems quaint, it certainly was once prevalent and may well have corresponded to a state of innocence imposed on young women in the nineteenth century. Justice Brennan is convinced that time and attitude have changed; however, it is less clear whether or not it is within the province of the judiciary to keep law current with popular morality. Surely the *Carbonic Gas* rule grants courts a more modest license.

209. *Id.* at 78 (emphasis added).

210. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 215-22 (1976).

211. 414 U.S. 632 (1974).

212. *Id.* at 641 n.9. The school boards had abandoned any attempt to support the rules on the basis of these "outmoded taboos."

213. 450 U.S. 464 (1981).

214. See text accompanying notes 202-06 *supra*.

215. *Id.* at 496 (Brennan, J., dissenting).

G. The Evidence Filter

At stake in the case of *Stanton v. Stanton*²¹⁶ was the validity of a Utah statute specifying a greater age of majority for males than for females. The justifications offered were that men have primary responsibility for family support and therefore require greater education and training and that women mature faster than men and marry earlier.²¹⁷ The Court could find "nothing rational in the distinction drawn by [the statute]."²¹⁸ After noting that in these modern days the female is no longer destined solely for home and family, Justice Blackmun observed that "if any weight remains in this day to the claim of earlier maturity of the female . . . we fail to perceive its unquestioned truth or significance . . ."²¹⁹ This is a telling remark, through it the Court reveals not so much the meaning of rationality, but rather its perception of what sort of evidence will be given weight.

Gender discrimination cases from *Bradwell v. Illinois*²²⁰ in 1872 to the present portray the significant shift in our notions of proper sexual roles. Thus, in *Bradwell*, Justice Bradley could confidently assert that:

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 constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. So firmly fixed was this sentiment in the founders of the common law that it became a maxim of that system of jurisprudence that a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state; and, notwithstanding some recent modifications of this civil status, many of the special rules of law flowing from and dependent upon this cardinal principle still exist in full force in most States.²²¹

This sentiment was echoed as recently as 1961 when in *Hoyt v. Florida*,²²² Justice Harlan noted that a "woman is still regarded as the

216. 421 U.S. 7 (1975).

217. *Id.* at 14.

218. *Id.*

219. *Id.* at 15.

220. 83 U.S. (16 Wall.) 130 (1872).

221. *Id.* at 141 (Bradley, J., concurring).

222. 368 U.S. 57 (1961).

center of home and family life.”²²³ The Court’s belated shift since 1971 is well known.²²⁴ If the principles of rational thought are immutable, one might suppose that the Court has simply discarded its faulty logic. The shift, however, has neither involved a mere repair of shoddy reasoning, nor reflected a mere shift in view of what proper sexual roles should be, though the latter has, to be sure, occurred. More fundamentally, a shift has occurred in the Court’s perceptions of what constitutes an acceptable justification for discrimination—a shift which has the most profound of consequences. In the days when Myra Bradwell sought admission to the bar, it was enough to justify her rejection by citing the “wisdom of the centuries”: Women should not practice law because they are women.²²⁵ Today, in this scientific age, empirical and statistical proof is wanted—tangible verification of a sort which, by the very nature of the distinction, cannot be produced, or if produced, cannot be admitted. As Justice Stevens has recently noted, in gender cases under the equal protection clause it is often impossible to tell which sex bears the burden,²²⁶ because the burden is the distinction itself, the validity of which depends on values and epistemology. Does the all-male draft burden men or women or neither? It depends on what values are accounted as relevant. If, for example, status is the predominant cultural pattern, we would expect different values to control than in a society, such as ours, that honors function.

This shift in what constitutes an acceptable justification is not, however, confined to sex discrimination cases. Compare the opinion in *Plessy v. Ferguson*²²⁷ with that in *Brown v. Board of Education*.²²⁸ Justice Brown accords weight to “established usages, customs and traditions of the people,”²²⁹ while Chief Justice Warren repudiates them;²³⁰ Justice Brown rests his decision on “racial instincts [and] distinction based upon physical differences,”²³¹ while Chief Justice Warren finds none.²³²

Nowhere is this shift in evaluation apt to have greater consequences than in the area of morally based regulations. For example, in

223. *Id.* at 62.

224. For a discussion of this shift, see text accompanying notes 54-61 *supra*.

225. *Bradwell*, 83 U.S. (16 Wall.) at 140-41 (Bradley, J., concurring).

226. See *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 154-55 (1980) (Stevens, J., concurring).

227. 163 U.S. 537 (1896).

228. 347 U.S. 483 (1954).

229. 163 U.S. at 550.

230. 347 U.S. at 494-95.

231. 163 U.S. at 551.

232. 347 U.S. at 494-95.

Carey v. Population Services International,²³³ the state's contention that the prohibition of contraceptives to minors is "in furtherance of the State's policy against promiscuous sexual intercourse among the young,"²³⁴ did not convince the justices that the prohibition had a deterrent effect.²³⁵ Yet as Justice Stevens suggests, the state's real justification was of a different quality; the prohibition was deemed to have an "important *symbolic* effect of communicating disapproval of sexual activities by minors."²³⁶ We have already seen the fate of a similar justification offered on behalf of state laws burdening illegitimate children; that is, the justification that the state may set its face against certain activity in such a way that the impact of the laws blends efficaciously into the entire fabric, even though the impact cannot be definitively and empirically traced.²³⁷ Even if one could imagine a state undertaking a study sufficient to prove the symbolic effect of the prohibition in *Carey*, cases involving regulation of marriage or adult sexual activity present a truly impossible burden of proof. Under the "old regime," the Court was satisfied that prohibiting polygamy was justified because it "has always been odious" and may lead to "the patriarchal principle" which "fetters the people in stationary despotism."²³⁸ Will similar justifications carry the day in contemporary times?

State courts have often felt compelled to strike down prohibitions on incest when no empirical support for the ban has been forthcoming.²³⁹ One wonders how a state faced with the burden of supporting its incest laws could ever marshal any satisfactory empirical proof that incest threatens the social fabric. History holds no examples of sufficiently contrasting cultures. Courts that have held the line against, for example, homosexuals' applications for marriage licenses, or against sodomy, have been forced to rely on a type of moral bedrock that is becoming less sufficient as a form of justification. Thus, a Washington State court of appeals rejected such a license application in part because "marriage as now defined [*i.e.*, between a man and a woman] is deeply rooted in our society."²⁴⁰ Similarly, a federal district court repulsed an attack on a sodomy law, noting that such a law is not "an

233. 431 U.S. 678 (1977).

234. *Id.* at 692.

235. *Id.* at 695; *id.* at 702 (White, J., concurring).

236. *Id.* at 715 (Stevens, J., concurring) (emphasis in original). See also *Michael M. v. Superior Ct.*, 450 U.S. at 496-502 (Stevens, J., dissenting).

237. See text accompanying note 77 *supra*. Cf. *Maier v. Roe*, 432 U.S. 464 (1977) (acknowledging the propriety of the state's favoring childbirth over abortion).

238. *Reynolds v. United States*, 98 U.S. 145, 164-66 (1878).

239. See, e.g., *Israel v. Allen*, 195 Colo. 263, 577 P.2d 762 (1968).

240. *Singer v. Hara*, 11 Wash. App. 247, 264, 522 P.2d 1187, 1188 (1974).

upstart notion; it has ancestry going back to Judaic and Christian law."²⁴¹ Senior Circuit Judge Bryan seems to sense the constitutional dilemma when he observes,

[I]f the State has the burden of proving it has a legitimate interest in the subject of the statute or that the statute is rationally supportable, Virginia has completely fulfilled this obligation. Fundamentally, the state action is simply directed to the suppression of crime, whether committed in public or in private.

Moreover, to sustain its action, the State is not required to show that moral delinquency actually results from homosexuality. It is enough for upholding the legislation to establish that the conduct is likely to end in a contribution to moral delinquency. *Plainly, it would indeed be impractical to prove the actuality of such a consequence, and the law is not so exacting.*²⁴²

If the circularity of Judge Bryan's proposition rings strangely in modern ears, one should recall that it has ample support in, for example, early gender discrimination cases. The contention, however, is not as circular as it seems. Properly analyzed, the support comes from tradition, moral custom and authority.²⁴³ Indeed, the Bryan argument is similar to the Court's mode of justification for obscenity laws. Thus, in *Paris Adult Theatre v. Slaton*²⁴⁴ the Chief Justice describes the state's interest in the moral tone of society, in "the quality of life" in a "decent society."²⁴⁵ When petitioners questioned the lack of scientific proof demonstrating adverse effects, the Court accurately proclaimed, "From the beginning of civilized societies legislators and judges have acted on various unprovable assumptions. Such assumptions underlie much lawful state regulation"²⁴⁶

Indeed, a little reflection reveals that it is often just such assumptions that not only underlie regulation, but also underlie notions of constitutional liberty and equality. What else does *Brown v. Board of Education*²⁴⁷ stand for but the recognition of a moral commitment? If

241. *Doe v. Commonwealth's Attorney*, 403 F. Supp. 1199, 1202 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901 (1976).

242. *Id.* at 1202 (emphasis added).

243. Insofar as the Court rejects arguments such as Judge Bryan's, it takes a stand on the "enforcement of morals" debate in favor of John Stuart Mill and against Sir Patrick Devlin. See P. DEVLIN, *THE ENFORCEMENT OF MORALS* (1965); J. MILL, *ON LIBERTY* (1859). Contemporary proponents of the Millian view confront Devlin with a demand for a showing of tangible harm—that societies whose social fabric is punctured begin to disintegrate. See, e.g., H. HART, *LAW, LIBERTY AND MORALITY* (1963). Threats to the social fabric are harms inherently incapable of empirical proof.

244. 413 U.S. 49 (1973).

245. *Id.* at 58-60.

246. *Id.* at 61.

247. 347 U.S. 483 (1954).

the plaintiffs had been charged with the burden of supplying empirical justification that separation of the races is bad for society, we might be living in a wholly different society today.

So we once again see that moral values and not logic determine the result in equal protection cases. The cases just discussed, however, illustrate an alternative vehicle for injecting moral presuppositions and making them operable. As an alternative to manipulating the purpose factor, the Court may achieve its desired ends by manipulating the nature of support demanded for the state policy. Since a party saddled with the demand for tangible evidence cannot rely on the moral bedrock form of justification, the burden is not likely to be satisfied.

V. The Search For Guidance

At this point, it is hoped that a convincing case has been made arguing that equal protection decisions cannot be illuminated by the simple mechanical scheme of rationality, but instead depend on moral values that are made operable through such devices as the manipulation of legislative purpose and the shift in differing perceptions of suitable justifications. Two questions must now be addressed: What guidelines, principles or standards exist for confining the Court within its proper bounds? What, indeed, are these bounds?

Considered first is whether either traditional rules of legislative interpretation or the Court's experience with equal protection cases provide rules that satisfactorily confine the judicial process. If our suspicion that no such rules exist is confirmed, we will have to throw a broader searchlight on the role of the Court in applying the open-ended clauses of the Constitution. This quest will reveal a rich literature leading one into political theory, particular and general history, and moral philosophy. We will also discover that others, from a variety of angles, have undertaken similar explorations. Necessarily, the results of our inquiry will be tentative and suggestive rather than exhaustive. I hope to make a convincing case for the importance of recognizing the moral values which underlie the equal protection decisions that deeply influence the shape of our national life.

A. Ascertaining Legislative Purpose and Evaluating Justification

Because the matter of legislative purpose is so crucial to equal protection analysis, one might suppose that the legal literature contains a fair amount of commentary on the problem of its ascertainment. We have already seen, however, the minimal and overly general attention that the Court itself has devoted to this problem. At most, we are as-

sured that as of late, some justices are sensitive to the complexity of purpose²⁴⁸ and that the Court will not always accept the state's avowals of purpose, but may resort to other sources of legislative context.²⁴⁹ More pointed discussions concerning the problem of legislative motive are considered below, but first, the literature on the general problem of legislative interpretation is examined.

There has been much commentary on the matter of legislative purpose and the complexity of ascertaining purpose has been appreciated. This confirms the supposition that the "concept of purpose is not simple."²⁵⁰ Justice Frankfurter has reminded us that legislative purpose is "not drawn, like nitrogen, out of the air,"²⁵¹ but may be evinced only from a multiplicity of sources requiring a "correlation of imponderables . . . which . . . cannot be made explicit."²⁵² Problems of levels of generality, tautology and context are not ignored.²⁵³ Nevertheless, the functional focus of most discussions of legislative interpretation is different inasmuch as it is part of the process of determining meaning and application of a statute; while insightful in identifying the concept of purpose, this focus provides few standards for ascertainment.²⁵⁴ Our inquiry is not concerned with the meaning of a statute—ordinarily that is clear enough—but whether or not, given the legislature's aims, the statute is rational.

248. See, e.g., *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166 (1980) (Stevens, J., concurring); note 108 *supra*.

249. See, e.g., *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463 n.7 (1981). See also note 252 *infra*.

250. See, e.g., H. HART & A. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF THE LAW* 1413 (1958) (tentative edition).

251. Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 539 (1947).

252. *Id.* at 532. See also R. DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 2, 86, 163 (1975); 2A C. SANDS, *SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION* § 45.09 (4th ed. 1972). Dickerson comments, "[T]he courts' currently widespread use of federal legislative materials is professionally shocking In general, the practice is attributable to the lack of a coherent philosophy of judicial 'interpretation,' broad naiveté about the general principles of communication, and a general ignorance of the realities of the legislative process." R. DICKERSON, *supra*, at 163.

253. See, e.g., *id.* at 87-88; H. HART & A. SACKS, *supra* note 250, at 1414. See also P. BREST, *supra* note 69, at 565-66.

254. See generally Horack, *The Disintegration of Statutory Construction*, 24 IND. L.J. 335 (1949); Landis, *A Note on "Statutory Interpretation,"* 43 HARV. L. REV. 886, 887 (1930); MacCallum, *Legislative Intent*, 75 YALE L.J. 754 (1966); Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930); Note, *A Re-evaluation of the Use of Legislative History in the Federal Courts*, 52 COLUM. L. REV. 125 (1952).

More on point is the discussion provoked by the Court's occasional disclaimer that it never inquires into legislative motivation.²⁵⁵ What is meant by this disclaimer? How can it be squared with the central burden of demonstrating intent to discriminate in equal protection cases²⁵⁶ or with the fact that "legislative purpose" is one of the keys to resolving equal protection cases in general?

Professor Ely has shown convincingly that motivation or purpose is not only an appropriate but a necessary consideration in certain types of constitutional adjudication.²⁵⁷ He contends that motive becomes crucial and is appropriate in only two types of cases despite the difficulty of the inquiry: First, where the choice made is acceptably a random one; for example, randomly selecting jurors. In such a case, a charge that racial factors are operating beneath the ostensibly neutral system necessarily requires inquiry into motive.²⁵⁸ Second, motive becomes critical in the area of what Professor Ely calls "discretionary choice"—a choice, for example, that is grounded on aesthetics or matters of taste that are ordinarily appropriate. For instance, a decision to require school children to wear red rather than blue uniforms cannot readily be tested under the rationality standard because such a decision carries its own goal. In order to invalidate such a scheme as being racially discriminatory, only an investigation of motive will do.²⁵⁹ Other cases, he contends, can be handled under the rationality model or the "disadvantageous distinction" model, because the challenged distinctions are patently discriminatory. In such cases, an examination of the motivation factor is unnecessary, and a court may look immediately to the question of rationality.²⁶⁰ In other words, an examination of motivation must sometimes precede or replace the examination of rationality.

255. See, e.g., *Palmer v. Thompson*, 403 U.S. 217, 224-25 (1971); *United States v. O'Brien*, 391 U.S. 367, 383-84 (1968); *United States v. Darby*, 312 U.S. 100, 115 (1941).

256. That the concept of legislative motive is an obscure and refined one is, of course, brought home by the fact that the Court has recently made clear that the central burden of an equal protection claimant is proof of intentional discrimination. See, e.g., *Mobile v. Bolden*, 446 U.S. 55 (1980); *Washington v. Davis*, 426 U.S. 229 (1976). Compare also the test the Court has fashioned for establishment clause cases, the first element of which is to determine whether the state action under review has a "secular legislative purpose." See, e.g., *Stone v. Graham*, 449 U.S. 39, 40 (1980).

257. Ely, *supra* note 201. See also J. ELY, *supra* note 2, at 136-45; Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Motivation*, 1971 SUP. CT. REV. 95.

258. Ely, *supra* note 201, at 1230-35.

259. *Id.* at 1235-49.

260. *Id.* at 1228-30.

While there is value in the distinctions Professor Ely draws,²⁶¹ his thesis is not above criticism. If he is using motivation in a special sense to mean, for example, a secret or hidden motive, then his thesis is correct, but confined. If he is using motivation in the broader sense, then he misapprehends the extent to which the purpose factor determines the outcome in all cases. In any case, he expresses hope that "in time the step of goal definition will come to be recognized as a crucial step in the review of any choice, and a process of reasoning will be undertaken and exposed to view."²⁶² With this observation and hope, I heartily agree.

In the area of equal protection some concept of purpose is crucial,²⁶³ and to some extent I intend to consider the process of discerning purpose. My thesis, however, is that this process is more dependent on value choice than on induction and is essentially akin to the process used in the area of that other open-ended constitutional clause, the due process clause. Our attention, therefore, must be on how the Court chooses values to be imposed under the equal protection clause. This necessarily raises the problem central to all constitutional litigation—what is the proper role of the Court, and where may it turn to give substance to constitutional clauses which implicate moral values? For if, as I contend, neither rules of statutory construction, nor time-honored practices suffice to control by procedural means the Court's determination of purpose, then no other method of control exists to serve this function. Furthermore, equal protection, if approached in all candor, is a matter of morality and justice. Purpose delineation is the end product of moral calculation, not its cause. The manipulation of purpose is, in other words, a technique—a vehicle for injecting moral premises. Although one can imagine a set of guidelines for the definition of purpose which places, for example, the level of generality somewhere between tautology and general welfare and which tries, as far as possible, to reconstruct the legislative process in all its complexity and contradictions, such rules themselves depend on a concept of the proper role of the Court and will inevitably bring one around again to facing value choices.²⁶⁴ Suppose that we can settle on a level of gener-

261. *But see* Brest, *supra* note 257, at 141-43.

262. Ely, *supra* note 201, at 1248.

263. I am, of course, speaking of legislative purpose in a sense other than individual ulterior motives to placate constituent *A* or to satisfy constituent *B*. *See* Note, *Legislative Purpose and Federal Constitutional Adjudication*, 83 HARV. L. REV. 1887 (1970).

264. It may well be that among the more useful tasks which scholars could undertake in the area of equal protection would be construction of a general theory of purpose ascertainment. Can we classify legislation according to purpose, or according to some other quality in order to construct a judicial guide directing the Court on matters of generality, timing, multiplicity, etc.? While beyond the scope of the present article, some such toward-a-gen-

ality and, further, that we can reconstruct the legislative process. Will we not have to face the question of the legitimacy of classification or of purpose when, as is inevitable, the classification will be found to be more or less rational? In any case, the latter standard is itself highly flexible in both formulation and application²⁶⁵

Suppose, for illustration, a statute exists that is similar to the one challenged in *Massachusetts Board of Retirement v. Murgia*,²⁶⁶ which compelled the retirement of police officers at age fifty. We will want our purpose to fall somewhere between that of "general welfare" and that of the level of tautology of compelling officers over age fifty to retire. At what level shall we set the purpose, and why? Suppose that the state articulates its purpose as assuring a physically vigorous police force and as "clearing the deck" for younger recruits. These are surely legitimate goals which, like all goals, are reached at the expense of another, in this case, a fit fifty-year-old officer who is forced to retire early. Moreover, although the line of delineation, fifty years of age, is surely rationally related to the avowed purposes, so would be many other cut-off points. Ordinarily, physical vigor begins to decline from age twenty-five on and that retirement, at any point, will open new jobs. What is rational enough, and why? The rationality formula, standing alone, simply will not tell.²⁶⁷ The real question is, does it seem fair, just, or, within broad bounds, wise? Suppose further that black officers were compelled to retire at age forty-five and that statis-

eral-theory-of-legislative-purpose article seems a useful undertaking. Might one contend the Court's power regarding its "purpose" to be different under the Fifth Amendment than under the Fourteenth Amendment?

265. Rationality is itself subject to variation or, at least, a variety of formulae. Compare Justice Brennan in *Western & S. Life Ins. Co. v. State Bd. of Equalization*, 101 S. Ct. 2070, 2085 (1981) ("[We ask whether the] legislature rationally could have believed . . .") with *Kassel v. Consolidated Freightways Corp.*, 101 S. Ct. 1309, 1321 (1981) (Brennan, J., concurring in result) ("[We ask whether the] lawmakers could rationally have believed . . .") and with *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 183 (1980) (Brennan, J., dissenting) ("[A] legislative classification may be upheld only if it bears a rational relationship to a legitimate state purpose"). Of course, the various tiers of review call for different levels of rationality, or so it is commonly supposed.

266. 427 U.S. 307 (1976). See also *McMahon v. Barclay*, 510 F. Supp. 114 (S.D.N.Y. 1981).

267. See *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32 (1928). "When a legal distinction is determined, as no one doubts that it may be, between night and day, childhood and maturity, or any other extremes, a point has to be fixed or a line has to be drawn, or gradually picked out by successive decisions, to mark where the change takes place. Looked at by itself without regard to the necessity behind it the line or point seems arbitrary. It might as well or nearly as well be a little more to one side or the other. But when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark." *Id.* at 41 (Holmes, J., dissenting). Apparently, the rationality test does tell some. See *McMahon v. Barclay*, 510 F. Supp. 1114 (S.D.N.Y. 1981).

tics showed that, with respect to longevity and health, white officers outlasted blacks. Surely, the scheme would fail, not because of the rationality test, although we might expect the Court's decision to be couched in these terms, but because of a moral proposition which operates to forbid presumptively the purpose or classification.

Another illustration of the flexible nature of the rationality formula is presented in *New Orleans v. Dukes*,²⁶⁸ which involved an ordinance that banned all pushcart vendors in the French Quarter, except for those who had been in business for eight or more years. Setting aside the problem of generality, the purpose proffered—to preserve the appearance valued by residents and tourists—creates an extraordinarily underinclusive classification,²⁶⁹ one which the Court nevertheless upheld. Of course, we could tighten the relationship between the classification and purpose by imagining other purposes; for example, to recognize the substantial reliance of those who had been in business a long while. Whether or not such a competing goal should be articulated or legitimated, however, does not depend on rationality but on a system of tenets.

Similarly, the validity of an all-male draft, when the problem was distilled, did not depend on rationality of purpose, although the result may have been expressed in such terms to preserve the aura of moral neutrality, but on whether it is acceptable to our nation to exclude women from combat.²⁷⁰

The previous examples make clear that not only the articulation of purpose, but also the judgment of rationality rest on factors that are deeper than those articulated. Purpose and rationality are simply means of organizing and displaying considerations relevant to a moral decision.

B. Bringing Control to the Review Process: Some Specific Proposals

By way of recapitulation, it will be useful to recount Professor Linde's somewhat parallel analysis of this rational-means-toward-legitimate-ends formula in the due process context.²⁷¹ As noted with respect to the equal protection rationality test: "The first problem in examining the formula is the identification of goals,"²⁷² i.e., purpose.

268. 427 U.S. 297 (1976).

269. Necessarily, the purpose could be rationally satisfied by selecting, randomly, any identifiable group of vendors for exclusion.

270. *Rostker v. Goldberg*, 101 S. Ct. 2646 (1981). The Court in *Rostker* assumes the validity of this distinction.

271. Linde, *supra* note 210.

272. *Id.* at 208.

The amorphous nature of goals, however, leads "court and counsel into a labyrinth of fictions."²⁷³ After noting the problem of multiple and competing goals,²⁷⁴ of actual and hypothetical goals,²⁷⁵ and of specific and broad goals,²⁷⁶ Linde despairs, "[T]he degree to which legislative purpose is scrutinized is easily manipulated even where legislative history exists. It is wide open when none exists."²⁷⁷ Far from satisfying the promise discerned by Professor Gunther,²⁷⁸ that means scrutiny would somehow allow the reviewing court to avoid value judgments, that scrutiny entangles the court in values even before its gears begin to turn.²⁷⁹ Linde reminds us of the utter complexity of the seemingly simple evaluation of rationality. His simple example is compelling.²⁸⁰ If your goal is to get to place *X*, any means of travel promotes your goal. Shall you go by foot or by car? Which is *more* rational? The almost infinite number of possible considerations is startling, and surely a legislature faces daily questions of comparable or greater complexity. At its lowest level of intensity, the means-ends test turns the reviewing court into no more than a "lunacy commission."²⁸¹ At greater levels of intensity, it allows the court to second guess values, since nonrational factors control the rational means test in equal protection and due process cases.

How, then, does one bring some control to the review process? This familiar question may be said to be the central problem of judicial review and has prompted volumes of commentary. Offered solutions pertinent to the present area under discussion may be divided into three rough categories: (1) those that seek to control the review process by eliminating any necessity to import moral values into it and by em-

273. *Id.*

274. *Id.* at 208-10, 212-13.

275. *Id.* at 215.

276. *Id.*

277. *Id.* at 213.

278. Gunther, *supra* note 30, at 21-22.

279. See, for example, *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974), in which Justice Stewart characterized the original purposes offered in support of the school board's mandatory pregnancy leave—to save "pregnant teachers embarrassment at the hands of giggling school children" and "to insulate school children from the sight of conspicuously pregnant women" as "outmoded taboos." *Id.* at 641 n.9. However outmoded these taboos may be, it is difficult to see any other basis for Justice Stewart's deprecating comment than an assessment of values.

Professor Linde also notes this characteristic and adds further to our understanding of the techniques of purpose manipulation by portraying the time variable. See text accompanying note 210 *supra*.

280. Linde, *supra* note 210, at 223.

281. See Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 819 (1935).

phasizing the peculiar attributes of the Court; (2) those that frankly recognize the role of values but seek to confine the Court with respect to the appropriate sources of values; and (3) those that seek limits by positing specific goals to be achieved by the clause under consideration. This third approach is prefabricated form of the second approach.

Professor Linde offers the first type of restriction, an essentially value free (or value certain) limit that emphasizes the lawmaking process. The virtues promised depend on the proposition that "due process in lawmaking in many, if not all, respects is a very concrete, well understood set of institutional procedures."²⁸²

A somewhat more elaborate but related argument is the thesis of Professor Ely's recent *Democracy and Distrust*,²⁸³ which is, in some respects, an extended explication of Alexander Bickel's somewhat enigmatic observation that "[n]o answer is what the wrong question begets"²⁸⁴ The question of where the Court should search for values to inform constitutional decisions engenders no satisfactory answer, because there "isn't any impersonal value source out there waiting to be tapped"²⁸⁵ "when we search for an external source of values . . . we search in vain."²⁸⁶ The solution to our problem lies in asking a different question: With what types of matters should the Court concern itself? Professor Ely's answer is "process-oriented" matters. What is comprehended by Ely's process, however, is considerably broader than by Linde's process. Included are all matters affecting the political

282. Linde, *supra* note 210, at 241.

283. J. ELY, *supra* note 2.

284. A. BICKEL, *THE LEAST DANGEROUS BRANCH* 103 (1962). "It is thus quite apparent that to seek in historical materials relevant to the framing of the Constitution, or in the language of the Constitution itself, specific answers to specific present problems is to ask the wrong questions. With adequate scholarship, the answer that must emerge in the vast majority of cases is no answer. In all the examples I have given, what we have is an assertion of an exact original intention, followed by its refutation. But the refutations disprove the assertion, they do not prove its opposite. It is not true that the Framers intended the First Amendment to guarantee all speech against all possible infringement by government regulation; but they did not foreclose such a policy and may indeed have invited something like it. It is not true that the Framers intended the Fourteenth Amendment to outlaw segregation or to make applicable to the states all restrictions on government that may be evolved under the Bill of Rights; but they did not foreclose such policies and may indeed have invited them. It is not true that the Framers intended to forbid the issuance of money as legal tender; but they did not foreclose such a policy and may indeed have invited it and hoped rather strongly that it would prove feasible. And it is not true that the Framers intended that trials by courts martial be conducted in most respects as if they were civilian trials, although, again, they far from foreclosed such a policy and quite possibly invited it.

"No answer is what the wrong question begets, for the excellent reason that the Constitution was not framed to be a catalogue of answers to such questions." *Id.* at 102-03.

285. J. ELY, *supra* note 2, at 72.

286. *Id.* at 73.

process—not only voting, speech, and apportionment, but also protection of minorities which are unfairly squeezed out of the democratic process; that is, “participation-oriented, representation-reinforcing” concerns.²⁸⁷ Substantive values are to be left almost wholly to the political branches. The Court, made up of process experts who stand outside the political process, is peculiarly well-suited to police democracy.

Professor Ely’s argument is strong and attractive and its acknowledged debt to the footnote in *United States v. Carolene Products Co.*²⁸⁸ is apparent.²⁸⁹ Although his argument rests, in part, on perceptions of the Court’s special virtues and weaknesses, does it really provide coherent and integral boundaries? In particular, when we approach problems of equality, what, aside from values, ever tells us which prejudice is acceptable and which is not? While the “process” tag may help us eliminate that anchorless quest for inexplicit fundamental rights,²⁹⁰ and while a narrow range of prejudices may be indisputably within the intended proscription of the equal protection clause, it does not help us, for example, to discover if women are constitutionally²⁹¹ different from men, if population or geography are the sole constitutional criteria for extending the franchise,²⁹² or if the poor are entitled to vote and seek office. The “process” tag, for all its virtues, may sharpen, but does not bury, the problem of bringing control into the review process.²⁹³

287. *Id.* at 87. See also *Griswold v. Connecticut*, 381 U.S. 479, 509 (1965) (Brennan, J., dissenting).

288. 304 U.S. 144, 152 n.4 (1938).

289. See note 7 *supra*.

290. Even here, the scope of process can become hazy. Are not privacy decisions in one sense process oriented insofar as they work out areas, matters and relationships concerning which the individual or group is sovereign? Are these not limits on what is susceptible to the political process?

291. The pun, unintended, nevertheless has a useful edge: To determine constitutional differences, to what extent shall we rely only on constitutional differences?

292. See A. BICKEL, *supra* note 11, at 151-72 (tracing the value implications of the Court’s series of apportionment decisions).

293. See L. LUSKY, *supra* note 7. See also A. BICKEL, *supra* note 11, at 164-65: “[T]his sort of fixation on a subjective state of mind makes hash of any and all classifications.” But see J. CHOPER, *supra* note 10. Although Choper, like Ely, postulates a confined scope for judicial review based on structure and the Court’s peculiar competencies and weaknesses, he comes to a somewhat different conclusion, *viz.*, that individual rights are properly the Court’s central concern, but that most issues concerning the reach of federal power and the separation of powers should be left to the political processes. He makes no distinction within the area of individual rights, however, between value-laden and process-oriented rights.

I am not, of course, the first to discover the necessarily moral bases of Ely’s theory. See, e.g., Alexander, *Modern Equal Protection Theories: A Metatheoretical Taxonomy and*

Could it be that this problem is ineradicable and thus, not a problem at all but a function of constitutional interpretation? Does not any process of expounding, especially a document such as the Constitution, which is located in the most generalized level of the legal hierarchy, necessarily invoke nonempirical principles of a moral nature? Is not the very essence of the Court's task in a given case to give legal focus to a broad moral principle, to particularize fairness? Ronald Dworkin has reminded us of the moral context of general law.²⁹⁴ Whatever its shape, equality is a concept of justice, and justice is a matter of fitness, of fairness—in a word, of morality. Nevertheless, as our system calls for constitutional, and not judicial, morality, we are still lacking a means of guidance.

A considerable body of literature devoted to the proper sources of constitutional values exists and has been appraised deftly by Professor Ely, who argues that it is inadequate as a whole²⁹⁵ because it is directed toward the wrong inquiry. Nevertheless, his distillation of proposed sources, from the "judge's own values" through natural law, reason, tradition and consensus, suggests the existence of a spectrum of sources ranging between the extremes of a hidebound literalism and the frankest, most solipsistic realism. Along the spectrum, there are both judicial and scholarly commentary. From Justice Roberts' modest conception of the Court's duty: "to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former"²⁹⁶—to Justice Douglas' bold admission: "In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality"²⁹⁷—and from Raoul Berger's careful plotting of the history of the

Critique, 42 OHIO ST. L.J. 3, 44 (1981); Brest, *The Substance of Process*, 42 OHIO ST. L.J. 131, 136 (1981); Richards, *Moral Philosophy and the Search for Fundamental Values in Constitutional Law*, 42 OHIO ST. L.J. 319, 330 (1981); Saphire, *The Search for Legitimacy in Constitutional Theory: What Price Purity?*, 42 OHIO ST. L.J. 335, 361 (1981); Tushnet, *Darkness on the Edge of Town: The Contribution of John Hart Ely to Constitutional Theory*, 42 OHIO ST. L.J. 1037 (1981); Wellington, *The Importance of Being Elegant*, 42 OHIO ST. L.J. 427, 432 (1981).

294. R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977).

295. Ely, *Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5 (1978). See also J. ELY, *supra* note 2, at 11-41.

296. *United States v. Butler*, 297 U.S. 1, 62 (1936) (Justice Roberts was testing the limits of the federal spending power).

297. *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 669 (1966). Justice Douglas continues, "any more than we have restricted due process to a fixed catalogue of what was at a given time seemed to be the limits of fundamental rights. Notions of what constitutes equal treatment for purposes of the Equal Protection Clause do change." *Id.* (emphasis in original & citation omitted).

Fourteenth Amendment²⁹⁸—to Thomas Grey's praise of our unwritten constitution,²⁹⁹—we have almost every imaginable post in the old battle manned. Although the debate has for the last century or so centered on the meaning of due process,³⁰⁰ resort to the equal protection clause offers no relief from the fundamental problem of constitutional interpretation: "the nature of appropriate constraints on judges."³⁰¹ While it is not my purpose to repeat this debate, it seems useful to sample some commentary as it exemplifies the second approach to constraining judges: by defining to what, in addition to text, they may turn.

Raoul Berger's meticulous study of the Fourteenth Amendment takes great pains to demonstrate, contrary to Chief Justice Warren's observation in *Brown v. Board of Education*,³⁰² that historical sources are inconclusive³⁰³ and that the intended scope of the Fourteenth Amendment in general, and the equal protection clause in particular, may be discerned with relative clarity. Berger is convinced that the Fourteenth Amendment in no way was intended to permit federal interference with matters of state suffrage or to forbid racial segregation.³⁰⁴ However solid his conclusions with respect to the originally intended scope, Berger realizes that whether or not it should be binding on the Court is a separate question.³⁰⁵ The Court's attention to history has always been uneven³⁰⁶ to begin with. Moreover, as Alexander Bickel observed, while "it is not true that the framers intended the Fourteenth Amendment to outlaw segregation . . . they did not foreclose such policies and may indeed have invited them."³⁰⁷

298. See R. BERGER, *supra* note 46.

299. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975).

300. See *Calder v. Bull*, 3 U.S. (3 Dall.) 385 (1798). See generally E. CORWIN, *LIBERTY AGAINST GOVERNMENT* (1948).

301. White, *Reflections on the Role of the Supreme Court: The Contemporary Debate and the "Lessons" of History*, 63 JUDICATURE 162, 164 (1979).

302. 347 U.S. 483 (1954).

303. *Id.* at 489.

304. R. BERGER, *supra* note 46, chs. 5 & 7. See also C. FAIRMAN, *THE HISTORY OF THE SUPREME COURT: RECONSTRUCTION AND REUNION, 1864-1888*, at ch. XX (1971); J. JAMES, *THE FRAMING OF THE FOURTEENTH AMENDMENT* (1956); Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955); Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949); Van Alstyn, *The Fourteenth Amendment, the "Right to Vote," and the Understanding of the Thirty-Ninth Congress*, 1965 S. CT. REV. 33. But see H. FLACK, *THE ADOPTION OF THE FOURTEENTH AMENDMENT* (1965); R. HARRIS, *THE QUEST FOR EQUALITY* (1960).

305. R. BERGER, *supra* note 46, at 8.

306. See, e.g., C. MILLER, *THE SUPREME COURT AND THE USES OF HISTORY* (1972).

307. A. BICKEL, *supra* note 284, at 103.

Furthermore, Professor Grey has reminded us of the profound implications of a strict interpretivism.³⁰⁸ Grey, in fact, is perfectly comfortable with judicial constitution making: "It seems to me that the courts do appropriately apply values not articulated in the constitutional text" ³⁰⁹ He sees the review process as similar to the traditionally accepted role of the common law judge³¹⁰ and as part of "a direct and traceable line of legitimate descent, of the natural-rights tradition that is so deeply embedded in our constitutional origins."³¹¹ In short, the "unwritten higher law principles [have] constitutional status."³¹²

Professor White also is far from troubled by Raoul Berger's concern over the broadening scope of the Fourteenth Amendment.³¹³ Once the Constitution is recognized as more than a legal document that is not wholly susceptible to lawyers' tools but does require normative, "supra-professional"³¹⁴ considerations, discomfort should pass. The Court, in fact, best fulfills the Framers' intent when it operates as an elite that meditates between individual rights and the darker sides of the majority will. The written text is only exemplary.³¹⁵

While confident about the Court's license to inject values into the Constitution, Professors Grey and White are less clear about sources of these values. Grey sees constitutional decisionmaking as an "explication of basic shared national values," which are "subject to growth and change."³¹⁶ These values may be drawn from "the Anglo-American tradition and basic American ideals."³¹⁷ For White, the Court must persuasively articulate "deeply felt and widely shared values."³¹⁸ In one sense, White's views are intensely pragmatic, for when he seeks constraints, he prescribes "the persistent equation, in American society,

308. Grey, *supra* note 299, at 710-14. Berger is not insensitive to these implications. "[I]t would be . . . utterly unrealistic and probably impossible to undo the past But to accept thus far accomplished ends is not to condone the continued employment of the unlawful means." R. BERGER, *supra* note 46, at 412-13.

309. Grey, *supra* note 299, at 705.

310. *Id.* at 715.

311. *Id.* at 717.

312. *Id.*

313. White, *supra* note 301, at 168.

314. White uses "supra-professional" to describe the theory that the constitutional interpretation should not be limited solely to strict legal interpretation, but should also encompass moral considerations and changing ethics and morals of contemporary society. *Id.* at 166-68.

315. *Id.* at 170.

316. Grey, *supra* note 299, at 709.

317. *Id.* at 717.

318. White, *supra* note 301, at 171.

of law with abstract beliefs about morality and justice."³¹⁹ These notions of shared values, which are inevitably intuitive in part, depend on the persuasive nature of the Court's moral reasoning, and ultimately thrive or die at the hands of the populace.³²⁰

Whether or not we enjoin the Court from seeking conventional morality,³²¹ the linkage "between law and moral norms,"³²² constitutional structure,³²³ the American tradition,³²⁴ the moral vanguard,³²⁵ or the "traditions and conscience of our people,"³²⁶ we come to the same foggy vista: How can we see what is out (or back) there, let alone assure ourselves that the justices are at least reporting in good faith? More to the point of our present discussion, what is the American tradition of equality?

Before attempting to answer the latter question, however, we should consider the third approach: finding guidance and limits in discrete goals under the equal protection clause.

In 1977, Kenneth Karst observed that the equal protection doctrine, in part because of the earlier noted preoccupation with methodology, had reached a point of "maximum incoherence."³²⁷ He offers as a central guide, the principle of "equal citizenship," the essence of which springs from a recognition that the Fourteenth Amendment's central purpose is to assure everyone "the dignity of full membership in the society."³²⁸ Everyone is to be treated fully as a person, bearing no trait of caste and no stigma, thus assuring the primary good of self-respect.³²⁹

319. *Id.* at 172.

320. *Id.* at 173.

321. See, e.g., Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221 (1973).

322. Levinson, *The Specious Morality of the Law*, HARPER'S, May 1977, at 99.

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

324. A. BICKEL, *THE MORALITY OF CONSENT* (1975).

325. Bickel, *supra* note 10.

326. *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) (Cardozo, J.). This phrase, or its variants, will be recognized as one rallying cry in the "incorporation debate" as well as in the modern version of substantive due process concerns. It is typically invoked on behalf of the interpretivist model of judicial review so recently championed by Justice Black. See H. BLACK, *A CONSTITUTIONAL FAITH* 45 (1968). See also *Griswold v. Connecticut*, 381 U.S. 479, 509 (1965) (Black, J., dissenting).

327. Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 3 (1977).

328. *Id.* at 5.

329. *Id.* at 6-7. Professor Karst draws the notion of "self-respect" from J. RAWLS, *A THEORY OF JUSTICE* (1971). Professor Rawls defines self-respect as having two aspects: (1) a sense of one's own value, and (2) a confidence in one's ability to fulfill one's intention. See *id.* at 534; Karst, *supra* note 327, at 6, 28.

For Professor Karst, an understanding of the Fourteenth Amendment begins with an appreciation of the central proposition of *Dred Scott v. Sandford*.³³⁰ Blacks are not citizens. The Fourteenth Amendment, retroactively undergirding the Civil Rights Act of 1866, is seen as a direct repudiation of that great judicial cloud. Its initial clause, assuring citizenship, signals the main thrust of the equality ordained in the last clause of section 1—full citizenship, the *sine qua non* of self-respect, underlain by the values of participation and responsibility.

Although the relationship between the 1866 Civil Rights Act and the Fourteenth Amendment is undoubted, Professor Karst stresses that the Framers chose normative language. In interpreting the Fourteenth Amendment, we should use the same intelligence and license that a sensitive reader applies to a poem; we are dealing with a compact piece of language carrying weight and richness necessarily capable of growth.³³¹ “The central concern of the equal citizenship principle is equality of personal status in the society. Each of us, says the principle, is presumptively entitled to be treated by the organized society as a person, a respected participant.”³³² Our ideas of what is involved in full participation necessarily evolve,³³³ yet Karst notes that in our society the “ethic of self-reliance is deeply ingrained.”³³⁴ Therefore, a full citizenship comprehends responsibility as well as participation: “[T]he principle of equal citizenship is not a charter for sweeping economic leveling.”³³⁵ It is eradication of caste, not class, that is promised.³³⁶

Professor Karst confesses that his proffered limiting principle in some sense only restates the problem, but he contends that it provides a substantive anchorage which ensures attention to the core value of citizenship, around which the decisional law, always dependent on sensitive judging, may coalesce.³³⁷ We ask, “Does the governmental action significantly impair a person’s claim to be treated by the organized society as a respected and responsible member?”³³⁸ To the extent that it does, we seek a “compelling” justification.

There is much value in Karst’s thesis and it seems responsive, at least tentatively, to American notions of equality. He does not claim to

330. 60 U.S. (19 How.) 393 (1856).

331. Karst, *supra* note 327, at 17.

332. *Id.* at 46.

333. *Id.* at 17.

334. *Id.* at 10.

335. *Id.* at 11.

336. *Id.*

337. *Id.* at 64-65.

338. *Id.* at 65.

formularize hard cases, but only to give bearings and perspective, "a way of looking at the constitutional problem of equality."³³⁹ This thesis should be kept in mind as we consider whether or not there is an identifiable "American notion of equality."

Professor Wilkinson has also undertaken to bring some order to the "formless concept" of equality,³⁴⁰ noting the undue emphasis on methodology, the state of confusion and the accumulation of *ad hoc* doctrines. His effort is premised on delineating three types of equality: political equality, equality of opportunity, and economic equality. The Court is strongly committed to the first type of equality, for it functions most effectively and unobtrusively when it undertakes to police the political process.³⁴¹ Wilkinson also characterizes the second type—equality of opportunity—as a strong strain of our national faith but would qualify the Court's role with the distinctive American devotion to the notion of individual merit and the virtue of individual striving and self-realization. This qualification calls for a careful balancing of the importance of the opportunity, the state interest, and the character of the injured group. The Court, in other words, must be mindful of the importance that is attached not only to equality of opportunity, but also to the rewards promised by that opportunity.³⁴² This caution leads Wilkinson, like Karst, to order a rather deferential judicial approach to the third type of equality—economic equality. Economic equality not only uncovers a national ambivalence over the causes and implications of poverty, but also involves that peculiarly legislative task of getting and spending, taxing and providing.³⁴³

While Professors Karst and Wilkinson counsel caution, Frank Michelman takes flight.³⁴⁴ For him, economic equality is not repugnant to constitutional values, but in fact should be seen as the goal of the "state's duty to protect against certain hazards which are endemic in an unequal society."³⁴⁵ By shifting our focus from the governmental act to the individual deprivation, we can identify certain "just wants," i.e.,

339. *Id.* at 67.

340. Wilkinson, *The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945, 946 (1975).

341. *Id.* at 956-76. Note the process emphasis so attractive to Ely and Karst.

342. *Id.* at 976-98.

343. *Id.* at 998-1017.

344. Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969). See also Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights* (pts. 1 & 2), 1973 DUKE L.J. 1153, 1974 DUKE L.J. 527; Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962 (1973).

345. Michelman, *supra* note 344, 83 HARV. L. REV. at 9 (emphasis in original).

entitlements "to have certain wants satisfied—certain existing needs filled—by government."³⁴⁶ This identification process proceeds somewhat in the manner that John Rawls prescribes:

Assume that a man has no idea what his social and economic station in a predominantly competitive society is to be and that he fully recognizes the role of income incentives and free markets in maximizing social productivity. Will he nevertheless wish to have each person insured against the risk that certain needs will remain unfulfilled . . . ?³⁴⁷

Insofar as this "original position" generates some consensus on just wants, Professor Michelman proposes that "minimum protection" be secured in "instances in which persons have important needs or interests which they are prevented from satisfying because of traits or predicaments not adopted by free and proximate choice."³⁴⁸

The trouble with Michelman's thesis and with other novel offerings under the equal protection clause³⁴⁹ is that they spring wholly from ideology without historical roots. They offer the Court a choice, to be sure, but depend wholly on detached normative principles. As such they are part of, not the solution to, the equal protection problem. Where should the Court turn? Philosophies of justice seek purity; history offers only blends. Insofar as we take the limited and specialized role of the Court seriously and deny it a roving license to choose one of several competing theories of justice, we find that theses like Michelman's appeal to no standard but their own.

C. Justice and Equality

This does not deny that philosophers of John Rawls' stature offer guidance, exert influence, or even provide tools of clarification and analysis. Indeed, philosophy of justice is a rich source of thought about equal protection. Whether or not it solves the problems facing the justices is another matter.

346. *Id.* at 13.

347. *Id.* at 15.

348. *Id.* at 35. See also Appleton, *Professor Michelman's Quest for a Constitutional Welfare Right*, 1979 WASH. U.L.Q. 715; Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U.L.Q. 695; Levin, *Education as a Constitutional Entitlement: A Proposed Judicial Standard for Determining How Much is Enough*, 1979 WASH. U.L.Q. 703; Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U.L.Q. 659; Winter, *Changing Concepts of Equality: From Equality Before the Law to the Welfare State*, 1979 WASH. U.L.Q. 741.

349. See, e.g., Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976); Nagel, *Commentary: The Meaning of Equality*, 1979 WASH. U.L.Q. 25; Winter, *Poverty, Economic Equality, and the Equal Protection Clause*, 1972 SUP. CT. REV. 41.

Although contemporary philosophers such as John Rawls and Robert Nozick help discern central features of our contemporary Court,³⁵⁰ we might wonder whether they best typify “the American way” or whether, as I suspect, each philosopher typifies the competing strains and inherent tensions in American thought. Few political systems have been molded with greater explicit attention to notions of higher law than has the American political system, yet it is the Constitution and its setting and evaluation in history that must point the proper direction.

Though justice has many facets, at its core and in all its manifestations it is concerned with fitness, the ascription of a proper place in a morally ordered and inevitably hierarchical universe. This notion informs the modern day search for “relevant criteria” in equal protection cases, although we no longer are so keen about hierarchy. While justice has many manifestations, we are ordinarily concerned, under the equal protection clause, with distributive justice—who gets and suffers what? As we have seen, however, the mere Aristotelian equation only sets up the problem and portrays what might be called only the formalities of justice, but does not answer “the central problems of a philosophy of equality, the problems of relevant groupings.”³⁵¹ Formal justice is a necessary, but hardly sufficient, condition of justice. We need also material, moral principles. To that end, William Frankena provides a useful outline of theories of distributive justice in his effort to discover which theory most powerfully calls for the assent of his reader’s intellect.³⁵² His panorama considers the varieties of inegalitarian theories—the oligarchic, the aristocratic, and those that he labels equalitarian or democratic—settling finally on what he terms “procedural equalitarian Justice”: All should be treated equally unless and until a good reason for doing otherwise appears, often in the form of competing interests.³⁵³ Frankena does not deny that the crucial factors determining our preference are more normative than factual³⁵⁴ and while he may make a

350. See, e.g., Nowak, *Foreword: Evaluating the Work of the New Libertarian Supreme Court*, 7 HASTINGS CONST. L.Q. 263, 275, 285 (1980). Nowak’s thesis is most useful as a means of identifying strains in individual cases or justices. As applied, it becomes a bit Procrustean. I do not read Nowak to claim that the Burger Court has been schooled in Nozick (or the Warren Court in Rawls), only that the tendencies of each Court point roughly in those respective directions.

351. Freund, *The Philosophy of Equality*, 1979 WASH. U.L.Q. 11, 12.

352. Frankena, *Some Beliefs About Justice*, in JUSTICE: SELECTED READINGS 46 (J. Feinberg & H. Gross eds. 1977).

353. See text accompanying notes 408-25 *infra* on the extent to which justice is always compatible with competing interests in, for example, liberty or order. See also, e.g., Ake, *Justice as Equality*, 5 PHIL. & PUB. AFF. 69 (1975).

354. Frankena, *supra* note 352, at 47: “[O]ur choice cannot have any rational basis

strong play for the assent of his readers' intellect, he hardly attempts to make the case for the assent of the justices' intellect. What Supreme Court justices should do is a specialized question of metaethics to which few philosophers consciously address themselves. These same limitations inhere in the predominant contemporary perspectives on justice, whether such perspectives are utilitarian,³⁵⁵ contractarian,³⁵⁶ historical,³⁵⁷ or psychological.³⁵⁸

As long as we subscribe to some theory of institutional limitations on the Supreme Court, we must realize that the choice between theories of justice is one of those matters for the political arena, whether it is the legislative or constitutional setting. No one seriously has supposed that the justices should prowl too far from the first Justice White's "fundamental conception of a judicial body . . . that of one hedged about by precedents which are binding on the Court without regard to the personality of its members."³⁵⁹ We have no "bevy of platonic guardians,"³⁶⁰ but judges over our Constitution. Judges want restricted tasks.

VI. Is There an American Notion of Equality?

Anyone with even a fleeting sense of American history knows that equality has been a constantly rung theme. deTocqueville saw the "general equality of condition" as America's most striking aspect, its most "fundamental fact,"³⁶¹ the American idol,³⁶² and its ruling passion.³⁶³ Indeed, deTocqueville was but expanding on an identification of equality with democracy that has classical roots.³⁶⁴ Surely, then, it is

. . . ." "Justice," however, is necessarily empirically based, as well. See R. SOKOL, *JUSTICE AFTER DARWIN* (1975).

355. See, e.g., N. RESCHER, *DISTRIBUTIVE JUSTICE: A CONSTRUCTIVE CRITIQUE OF THE UTILITARIAN THEORY OF DISTRIBUTION* (1966).

356. J. RAWLS, *supra* note 329. This is not to overlook the signal contribution to metaethical questions that John Rawls' concept of the "original position" represents. Whether it is quite moral bedrock or rather psychological nonsense, it hardly suggests itself as a guide for justices.

357. R. NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974).

358. R. SOKOL, *supra* note 354.

359. *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 652 (1895) (White, J., dissenting).

360. L. HAND, *THE BILL OF RIGHTS* 73 (1958).

361. A. DETOCQUEVILLE, *DEMOCRACY IN AMERICA* 1 (Reeves trans. 1858).

362. *Id.* at 55.

363. "I think the democratic communities have a natural taste for freedom; left to themselves, they will seek it, cherish it, and view any privation of it with regret. But for equality their passion is ardent, insatiable, incessant, invincible: they call for equality in freedom; and if they cannot obtain that, they still call for equality in slavery. They will endure poverty, servitude, barbarism—but they will not endure aristocracy." *Id.* at 102-03.

364. See, e.g., T. SMITH, *THE AMERICAN PHILOSOPHY OF EQUALITY* 133 (1927).

incorrect to contend that "the idea of equality is no part of the authentic 'American Ideology.'"³⁶⁵ After all, it depends on what one has in mind when one speaks of the "idea of equality." We have seen enough of this puzzle to realize that equality has many meanings—it is always a matter of the "repudiation of certain differences instead of others."³⁶⁶ What have been its distinctive American features?

Whether or not it is useful to describe modern Western history as but a progressive tendency toward leveling of condition, various notions of equality certainly have been significant in the development of Western culture even before the colonization of North America. Hence, the equality that Jefferson invoked in the Declaration of Independence was hardly, in its general sense, a new concept. Others have noted at least these strains: The Stoic philosophers perceived the natural equality of all men, endowed with the capacity to reason and hence to achieve virtue.³⁶⁷ Another familiar concept is the premise of Christianity that all persons have souls and therefore, are equal before God's eyes. For a full perspective, we also should take note of the Reformation as it emphasized the priesthood of all believers. Without overlooking the harsh hierarchies of some protestant covenant theology, we should not forget the occasions on which radical protestantism was manifested in flat egalitarian ideas and communities, both in continental Europe and in mid-seventeenth century England. Social contract theory, whether espoused by Hooker, Hobbes, or Locke, begins in a natural state of equality.³⁶⁸ Although these ideas arise in a firmly hierarchical culture and are thus heretical, the idea of equality, as Archibald Cox has recently reminded us, once unleashed, is not readily cabbined.³⁶⁹

Surely colonial America provided fertile ground for a theretofore unknown equality of conditions to flourish. The magnet of the New World drew, if not a monolithic immigration, a middling group with but a smattering of the highest or most destitute classes of Europe.

365. Tussman & tenBroek, *supra* note 1, at 380, quoting Johnson, *Party and Ideology in America*, 38 YALE REV. 11 (Sept. 1948).

366. J. POLE, *THE PURSUIT OF EQUALITY IN AMERICAN HISTORY* 356 (1978) (citation omitted). This work presents perhaps the most comprehensive study of the shifting nature of the American notion of equality.

367. *Id.* at 7.

368. See, e.g., J. LOCKE, *THE SECOND TREATISE OF GOVERNMENT* § 4 (London 1690). Already noted is the predominant place equality has in the work of the contemporary social contract theorist, John Rawls. See note 356 *supra*.

369. Cox, *The Supreme Court, 1965 Term—Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966).

Thus, the spectrum of society in colonial America was substantially compressed. In a time when land was still a crucial determinant of wealth, its very abundance helped moderate class distinction. Innumerable other factors, from labor scarcity to general ownership of guns, contributed to a novel compression of social classes.³⁷⁰

Edmund Morgan has described the persistent hymning of equality in colonial Virginia side by side with the institutionalization of slavery.³⁷¹ His thesis that the rough achievement of the former specifically depended on the latter, by solving the problem of the poor and laboring classes,³⁷² suggests why the southern colonies appeared to have less social stratification than did the northern and middle colonies.³⁷³

There surely was substance, therefore, in the eighteenth century egalitarian boasts that this was truly the first post feudal society.³⁷⁴ Moreover, it seems clear that the colonists were conscious of their special role as the embodiment of enlightened European thought, and that equality of condition, except for the slave race, was among colonial society's most shining attributes.³⁷⁵ This is not to suggest that the Revolution was primarily a proletarian or even a social revolution, but only to recognize that it arose in a setting which, at least in contrast to the European nations, was distinctly egalitarian. The Constitution itself is seeded with egalitarian notions,³⁷⁶ and its very content may be seen as, in some measure, a substitute for hierarchical British dispersion of power between the crown, the aristocracy and the commons, categories by then alien to Americans.³⁷⁷

Besides the Fourteenth Amendment, the document that is probably most cited as the embodiment of America's egalitarian strain is the Declaration of Independence, where first among the self-evident truths is the proposition "that all men are created equal." Carl Becker has noted the commonplace nature of Jefferson's proposition and its echoes

370. See generally C. VER STEEG, *THE FORMATIVE YEARS: 1607-1763* (1964).

371. E. MORGAN, *AMERICAN SLAVERY, AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA 378-80* (1975).

372. *Id.* at 380-81.

373. See, e.g., J. BLUM, *THE BURDEN OF AMERICAN INEQUALITY* (1978).

374. See, e.g., R. HOFSTADTER, *AMERICA AT 1750: A SOCIAL PORTRAIT* xii (1971).

375. See, e.g., H. COMMAGER, *THE EMPIRE OF REASON* (1977). See also B. BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967).

376. E.g., U.S. CONST. art. I, § 9, cl. 8: "No Title of Nobility shall be granted"; U.S. CONST. art. I, § 10: "No state shall . . . grant any Title of Nobility"; U.S. CONST. art. IV, § 2 (interstate privileges and immunities).

377. See, e.g., B. BAILYN, *supra* note 375, at 299.

in so many state constitutions.³⁷⁸ Whether the words of that great brief in support of independence should be dismissed as so much glittering rhetoric, should serve as "a blank check for idealists,"³⁷⁹ or, as Garry Wills cogently has contended, should serve as a scientific document expressing the quite literal truth that all people are indeed equal in their moral sense,³⁸⁰ surely it represents a vital strain in the American thought.

There are, to be sure, American notions of equality and, in the eyes of Jefferson's contemporaries, tangible evidence thereof. This is not, of course, to blink away the then-existing distinctions in wealth, the property based franchise, the subordinate status of women, and, of course, the state of the black and Native American races. Nevertheless, the engine of equality was a powerful one throughout the nineteenth century, fueled especially by the west-moving frontier.³⁸¹ It was manifest in the growth of public education, the feminist struggle, the abolitionist movement, and the organization of workers; yet, in its ideological sense, "[t]he concept of equality in the first half-century of the Republic was . . . limited and circumscribed,"³⁸² as it was until modern times.³⁸³ The abiding ideology was premised upon political equality, equality before the law, and the absence of legal privilege. Indeed, if Raoul Berger is correct, even the Fourteenth Amendment went no farther than this circumscribed concept.³⁸⁴ Authors who take opposing viewpoints hardly venture far from these central premises, differing mainly in the implications that the premises have for the present.³⁸⁵

Indeed, one who is tempted to find in the Fourteenth Amendment a great leveling force must wonder at the parallel development of and attraction to Social Darwinism, so warmly received and embraced by substantial segments of the late nineteenth century American public.³⁸⁶

378. See C. BECKER, *THE DECLARATION OF INDEPENDENCE; A STUDY IN THE HISTORY OF POLITICAL IDEAS* 24, 93 (1970).

379. G. WILLS, *INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE* xxiv (1978).

380. See generally *id.* at 199-212.

381. See J. Pole, *supra* note 366, at 255.

382. Handlin, *The Quest for Equality*, 1979 WASH. U.L.Q. 35, 38.

383. See, e.g., R. HARRIS, *THE QUEST FOR EQUALITY* (1960).

384. R. BERGER, *supra* note 46.

385. See, e.g., C. FAIRMAN, *THE HISTORY OF THE SUPREME COURT: RECONSTRUCTION AND REUNION, 1865-1888*, at pt. 1 (1971); H. FLACK, *THE ADOPTION OF THE FOURTEENTH AMENDMENT* (1965); R. HARRIS, *supra* note 383; J. JAMES, *THE FRAMING OF THE FOURTEENTH AMENDMENT* (1956); L. WARSOFF, *EQUALITY AND THE LAW* (1938).

386. See generally R. HOFSTADTER, *SOCIAL DARWINISM IN AMERICAN THOUGHT* (1944).

There is greater congruity when we identify the second great strain of the American notion of equality: equality of opportunity. One hardly needs the confirmation of historians, though it is there,³⁸⁷ to discern the fundamental place of this precept of American ideology. If the contemporary version of equality seems at times to have shifted to a demand for equal results, this shift stems more from our changed perception of the role of government in assuring equality of opportunity than from any clearly defined change of goals. Our contemporary faith in the capacity of the social sciences to discern reasons and provide remedies for unequal opportunities supports this desire for an active government. Equal results, though useful to measure progress toward the goal of opportunity, have a way of becoming mistaken for the goal itself. Whether the insights and prescriptions of the social sciences are real or are but examples of our overweening pride remains to be seen. Nevertheless, it is doubtful that the mainstream American notion of equality seeks equal results.

This brief survey has made evident that some notion of equality is central to American thought. More particularly, it has been suggested that the major strands of this notion have to do with equality before the law and equality of opportunity,³⁸⁸ i.e., equality of chance. Have we thereby brought to the surface the guides that the justices need? In the abstract, perhaps—at least these notions may circumscribe and orient their attention properly—but there are some sticking points: a) We are addressing the Court and not the legislature that surely shares the responsibility of achieving the nation's promise, whatever it is; b) as American knowledge grows, what constitutes truly equal opportunity changes; and c) there are other interests that compete with equality and which the Court as a lawmaker must take into account.

VII. A Concluding Note on Costs, Consequences and Prescriptions

A. A Brief Recap

I have argued that equal protection decisions, despite the mechanistic aspect of the discussions they contain and the formulae upon which they are based, are as wide open as problems arising under the

387. See, e.g., J. BLUM, *THE BURDEN OF AMERICAN EQUALITY* (1978); R. HOFSTADTER, *THE AMERICAN POLITICAL TRADITION* viii (1948); J. POLE, *supra* note 366, at 117; Handlin, *supra* note 382.

388. The reader will have noted that, having gone a long way around, we return to the same rough locus that Professors Karst and Wilkinson have mapped. See notes 327-43 and accompanying text *supra*.

due process clause and are therefore fraught with the same uncertainties and value potential. While the fundamental standard is that of reasonableness, itself a supple term, that reasonableness necessarily turns on the characterization of the first factor in equal protection analysis—purpose. Since no ready guide to determination of purpose presents itself, the definition of purpose is susceptible to manipulation or approval to such an extent that it itself is apt to reflect the values that the Court chooses as its premises. The Court's formulation seems to be more a before the fact molding of the mechanical scheme than an ascertainment of level of review. The Court injects moral premises in the superficially neutral guise of purpose characterization and in the demanded level of rationality.

A similar process of choosing values is made operative by the Court's apparently morally neutral steps of analysis. This process frequently shapes the Court's notions of what constitutes acceptable proof to justify a challenged distinction. We are not concerned here with the selection of a level of review as much as with the Court's unspoken premises. Normative judgments operate in the guise of objective quests for or reliance on knowledge. This feature is not unique to equal protection cases. Indeed, it may be most apparent in substantive due process cases concerning "privacy," in which, for example, the Court notes the want of proof respecting the impact of contraceptive availability on teenage sexual conduct.³⁸⁹ Beneath this supposed want lies a crucial premise: Satisfactory proof must be empirical, or more precisely, statistical in nature. The state's appeal to the importance of its own moral posture, which Justice Stevens demeans as a mere propaganda interest,³⁹⁰ meets hardly concealed derision. Similarly, in the series of cases challenging Louisiana statutory treatment of illegitimacy, any appeal to the notion that each provision is but a subtle part of a broader social fabric is hardly accorded serious consideration.³⁹¹ The problem of proving empirically that any single statutory warning has a measurable impact on the frequency of the birth of children out of wedlock is nearly insurmountable.

The evidentiary demand with which we are concerned is of a piece with that leveled at Sir Patrick Devlin's contention that the enforcement of morals is a proper concern of the state in protecting the social fabric.³⁹² When H.L.A. Hart challenged Devlin to provide proof of an

389. *See, e.g.,* *Carey v. Population Serv. Int'l*, 431 U.S. 678, 696, 701 (1977).

390. *Id.* at 715 (Stevens, J., concurring).

391. *See* text accompanying notes 186-99 *supra*.

392. *See* P. DEVLIN, *supra* note 243.

empirical nature,³⁹³ of course, the game was over. Such proof, within the context of a strict scrutiny model of review, will simply not be forthcoming. Moral suppositions of such a nature are not susceptible to such proof. This difficulty may account for the Court's current unwillingness to explicate fully the state's interest in sodomy laws,³⁹⁴ laws preventing homosexual marriage,³⁹⁵ or child custody laws.³⁹⁶ Unless moral axioms³⁹⁷ can carry the day, it is difficult to conceive of the state meeting its burden of empirical proof.

The Court, of course, is not unfamiliar with giving weight to moral bedrock; at one time it was commonplace. In 1878, in *Reynolds v. United States*,³⁹⁸ the Chief Justice and a unanimous Court were content to rest on historical truisms: "Polygamy has always been odious among the northern and western nations of Europe From the earliest history of England polygamy has been treated as an offense against society."³⁹⁹ Indeed, "polygamy leads to the patriarchal principles, and . . . fetters the people in stationary despotism."⁴⁰⁰ What justifications would serve today to rebuff a challenge to laws proscribing polygamy?

Resting on moral axioms, even though at times a screen of empirical support is thrown up, is not beyond the modern Court's repertoire. Often, however, the axioms are invoked on behalf of the party challenging the governmental action and therefore are made to appear to rest on constitutional principles. This occurred, for example, in the line of privacy rights stretching from *Griswold v. Connecticut*⁴⁰¹ to the pres-

393. H. HART, *supra* note 243, at 50-51.

394. *Doe v. Commonwealth's Attorney*, 403 F. Supp. 1199, 1200 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901 (1976).

395. *See, e.g.*, *Baker v. Nelson*, 291 Minn. 310, 312, 191 N.W.2d 185, 186 (1971), *appeal dismissed*, 409 U.S. 810 (1972); *Singer v. Hara*, 11 Wash. App. 247, 249, 260, 522 P.2d 1187, 1189, 1195 (1974).

396. *S. v. S.*, 608 S.W.2d 64, 66 (Ky. 1980).

397. For example, Judge Bryan writes, "Although a questionable law is not removed from question by the lapse of any prescriptive period, the longevity of the Virginia [sodomy] statute does testify to the State's interest and its legitimacy. It is not an upstart notion; it has ancestry going back to Judaic and Christian law." *Doe v. Commonwealth's Attorney*, 403 F. Supp. 1199, 1202 (E.D. Va. 1975) (citing *Leviticus* 18:22, 20:13), *aff'd mem.*, 425 U.S. 901 (1976). Somewhat comparable is the reasoning of the Washington court in rejecting the efforts of a homosexual couple to obtain a marriage license. *See Singer v. Hara*, 11 Wash. App. 247, 262, 522 P.2d 1187, 1197 (1974) (court relied on definitional bedrock: "[M]arriage as now defined [a union between one man and one woman] is deeply rooted in our society").

398. 98 U.S. 145 (1878).

399. *Id.* at 164.

400. *Id.* at 166.

401. 381 U.S. 479 (1965).

ent.⁴⁰² Witness also the moral shift from *Bradwell v. Illinois*⁴⁰³ to *Reed v. Reed*.⁴⁰⁴ Even that monument to justice, *Brown v. Board of Education*,⁴⁰⁵ is at bottom rested on moral axioms and historical wisdom. We simply know that the separation of the races is a vertical, not horizontal, distinction.⁴⁰⁶ No statistical proof is needed.⁴⁰⁷

We see, then, that the Court's values are made operative not only through manipulation of the purpose factor, selection of a level of review, and placement of the burden of proving moral truisms, but also through the nature of justifications that the Court will accept. We might almost formulate a law that the party granted the waiver from marshaling empirical proof will win. Can any of our morally based law, built on so many admittedly tentative pieces of wisdom, survive against such demands?

B. Does It All Matter?

I have perceived the central mode of this article to be descriptive: To note problems, inconsistencies and techniques in the equal protection process. Necessarily, however, a variety of guidelines have been considered and been found more or less wanting. Aside from offering

402. For example, in the latest and currently definitive treatment of obscenity, Chief Justice Burger recognized the public interest in "the quality of life and the total community environment" despite an admitted lack of "scientific data which conclusively demonstrate that exposure to obscene material adversely affects men and women or their society." *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 58-60 (1973). The Court recognized that "from the beginning of civilized societies, legislators and judges have acted on various unprovable assumptions. . . ." *Id.* at 61. Indeed, as seen in *Miller v. California*, 413 U.S. 15 (1973), the empirical burden in this context, is dragged across the challenger's brief. "There is no evidence, empirical or historical, that the stern 19th century American censorship of public distribution and display of material relating to sex . . . in any way limited or affected expression of serious literary, artistic, political, or scientific ideas." *Id.* at 35.

403. 83 U.S. (16 Wall.) 130 (1873).

404. 404 U.S. 71 (1971). See notes 54-60 & 191-92 and accompanying text *supra*. *But cf.* *Rostker v. Goldberg*, 101 S. Ct. 2646 (1981) (upholding all-male draft registration).

405. 347 U.S. 483 (1954).

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

407. Nevertheless, Chief Justice Warren cited sociological data to support his conclusions. See, e.g., *Brown v. Board of Educ.*, 347 U.S. at 494 n.11. The Court's frequent requirement that justifications be empirically based often reflected simply the contemporary faith in America's ability to reduce all problems to quantitative solutions. There is irony here because the faith cuts both ways. Take, for example, the late repudiation of presumptions in child custody cases. Insofar as the traditional presumptions such as the "tender years doctrine" authority or the presumptive preference for natural parents, see, e.g., *Painter v. Bannister*, 258 Iowa 1390, 140 N.W.2d 152, cert. denied, 385 U.S. 949 (1966), are undercut, the court necessarily must deal with the more sensitive matters of lifestyle, belief, and moral uprightness. Even assuming that our confidence in making such judgments is well founded, surely we have created a more intrusive model, although under the banner of equality.

some general cautions and pleas for greater candor, I do not intend to offer solutions here; instead, I will sketch the importance, beyond doctrinal aesthetics, of the problems involved and will offer some suggestions that provide a step toward a prescriptive solution.

There is, in the equal protection clause, the potential for more thoroughgoing social changes than in any of the other great protective clauses of the Constitution. This is so because the clause is concerned with rights in gross and with the relationship of groups to one another and to the government in general. A vigorous resort to the equal protection clause therefore promises to set the nation on distinct and deep-running courses, dependent on the particular values which the Court brings to bear in the manner described herein. Different premises point to profoundly different costs and consequences.

In speaking of costs and consequences, I am not concerned with "impact analysis," although that mode of sociology has revealed much of real interest for lawyers and judges.⁴⁰⁸ My present concern is with consequences and implications of a more distant sort: The ideological impact and cost in theory, doctrine, and values. The one-person one-vote doctrine necessarily pervades the entire political system and locks it into a particular democratic model. The military draft of women would shatter centuries of inbred distinctions and would mandate a profound shift in social structure.⁴⁰⁹ The demand that the poor be compensated for their poverty crowds many mainstream beliefs about what life in this nation promises. Nor is my concern with the several bizarre episodes in which the egalitarian drive demonstrates what single-sighted fools ideas can make of us.⁴¹⁰ Such is the effluence of any trend or movement.

The trouble with the equal protection clause, once we step beyond its central historical aim, is that it contains no articulate goal beyond the redundant notion of justice. By comparison, the general recogni-

408. See, e.g., T. BECKER & M. FEELEY, *THE IMPACT OF SUPREME COURT DECISIONS* (2nd ed. 1973); J. CHOPER, *supra* note 10; R. JOHNSON, *THE DYNAMICS OF COMPLIANCE* (1967).

409. The upholding of male-only registration in *Rostker v. Goldberg*, 101 S. Ct. 2646 (1981), confirms that the Court, at least, is not ready to recognize such a profound shift in sound structure.

410. For example, such items come to mind as the U.S. Army's foredoomed experiment with "unisex latrines" for troops stationed in Germany, the order of a court appointed desegregation administrator for Cleveland schools that high school athletic teams reflect the racial composition of the student body, and the closing down of magnet educational programs because the racial ratio of applicants deviated from the general student ratio. See Kilpatrick, *The Costs of Perfecting Racial Balance*, *Indianapolis Star*, Jan. 6, 1981, at 8, col. 2.

tion of the "central meaning"⁴¹¹ of the First Amendment has contributed to the development of a doctrine in a fairly consistent manner. At least with the First Amendment, there is some consensus about what is wanted, though how to get there and how to accommodate competing interests are questions still provoking sharp debate.

The equal protection doctrine does have a certain appealing coherence with respect to decisional techniques but has only the vaguest notion of ultimate goals. It is, of course, an infinitely more complex matter, and even reducing it to a formula analogous to our free speech guidepost—the greatest degree of expression commensurate with good order—we find that the greatest degree of justice commensurate with a sound, stable society is hardly more than a pleasing mist of words. Equal protection, by its very imprecision, packs revolutionary potential. Free speech promises only to expose possibilities; equal protection pushes us toward them.

We now, for example, have sufficient perspective to appreciate the extent to which "a broadly-conceived egalitarianism was the main theme in the music to which the Warren Court marched."⁴¹² Its guiding star was an "Egalitarian Society." While the drive has been trimmed by the change in Court personnel and what seems to be at least a momentary shift in the national mood, the leveling push and implications of many recent equal protection decisions cannot be gainsaid. Equal protection raises the question most fundamental to a society: Who gets what? Of course, that problem, approached from a different angle may be reformulated: Who gives up what? What are the costs of a thoroughgoing equality of condition?

Recall the variety of notions that the phrase "equality of condition" conjures. We have seen a gross historical shift from a notion of inherent equality of moral perception as a statement of fact to a notion of equality before the law, to a growing faith in equality of opportunity, and to the recent notion of equality with equal results. Each grows from the former. If we rally around equal opportunity, then our growing sophistication about what makes for success and power inexorably pushes us toward more than a formal legal equality, and causes profound implications for other ideals.

Almost all would affirm the goal of equal education, or at least equal educational opportunity. But what is necessary for achievement of that goal? Not everyone can go to Harvard. If one measures the reality of equality by results, one learns from Christopher Jencks' study

411. *New York Times Co. v. Sullivan*, 376 U.S. 254, 273 (1964).

412. A. BICKEL, *supra* note 11, at 103.

that the most crucial variable in academic prowess seems to be the socioeconomic status of the individual's family.⁴¹³ As other commentators have acknowledged, the implications of these findings are broad and deep. For Miller and Roby, "[c]utting the link between the parent's position and that of the child is one of the core goals of a fluid society."⁴¹⁴ John Rawls is more explicit:

The consistent application of the principle of fair opportunity requires us to view persons independently from the influences of their social position. But how far should this tendency be carried? It seems that even when fair opportunity . . . is satisfied, the family will lead to unequal chances between individuals Is the family to be abolished then? Taken by itself and given a certain primacy, the idea of equal opportunity inclines in this direction.⁴¹⁵

In facing up to this implication we run into one of the less distinct, but generally acknowledged, fundamental liberties—that of parents to direct the rearing of their children.⁴¹⁶ That is, we have recognized a hazy liberty, but liberty points right (or left), while equality points left (or right). Indeed, we have already seen efforts to resolve the tension, first in favor of equality,⁴¹⁷ and then in favor of liberty.⁴¹⁸

The point of this article, however, is not to resolve the tension, but only to display it. This display seems especially necessary because our political faith sounds, time and again, the inherent compatibility of equality and liberty.

Indeed, the first of John Rawls' principles of justice secures an equal right to the most extensive liberty compatible with a like liberty

413. C. JENCKS, *INEQUALITY: A REASSESSMENT OF THE EFFECT OF FAMILY AND SCHOOLING IN AMERICA* (1972).

414. S. MILLER & P. ROBY, *THE FUTURE OF INEQUALITY* 135 (1970).

415. J. RAWLS, *supra* note 329, at 511. "We should however note that although the internal life and culture of the family influence, perhaps as much as anything else, a child's motivation and his capacity to gain from education, and so in turn his life prospects, these effects are not necessarily inconsistent with fair equality of opportunity. Even in a well-ordered society that satisfied the two principles of justice, the family may be a barrier to equal chances between individuals. For as I have defined it, the second principle only requires equal life prospects in all sectors of society for those similarly endowed and motivated. If there are variations among families in the same sector in how they shape the child's aspirations, then while fair equality of opportunity may obtain between sectors, equal chances between individuals will not. This possibility raises the question as to how far the notion of equality of opportunity can be carried; but I defer comment on this until later I shall only remark here that following the difference principle and the priority rules it suggests reduces the urgency to achieve perfect equality of opportunity." *Id.* at 301.

416. *See, e.g.*, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

417. A. BICKEL, *supra* note 11, at 142-81 (1970) (with regard to the reaction to Southern evasion of *Brown v. Board of Educ.*).

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

for others.⁴¹⁹ Ronald Dworkin argues that the whole notion of liberty is premised on equality.⁴²⁰ In a certain sense, of course, the interdependence of liberty and equality is psychically real, always depending on what is meant by equality. Dworkin's thesis seems, in fact, to be a very traditional one—equality before the law. Everyone ought to be equally free before the law to speak, to practice religion, and to be relieved of burdens that are imposed for the wrong reasons. While Rawls argues that equality is the prevailing principle of justice, Robert Nozick shows that ahistorical theories of social justice, such as those of Rawls, require the increasing government regulation to which we are all becoming accustomed.⁴²¹ Whatever value one places on economic liberty, clearly it is compromised by the drive toward equality of condition. As clearly, family ties and other ties of affection disrupt equality of economic condition.

I do not pretend to have revealed some horrid truth, only the obvious fact that in all reaches, liberty and equality are not compatible.⁴²² That this fact is as true in practice as in theory is evidenced by the greater number of Marxist nations, where the primacy of social justice has precisely the effect of crowding out liberty.⁴²³ As deTocqueville noted, the appetite for equality is apt to be the more voracious.⁴²⁴

The extreme flexibility of the equal protection clause makes it a more ready instrument for a broad spectrum of political ideology than any other constitutional clause. Once the Court moved beyond its historical purpose, it became a vehicle, taking us beyond that skeptical equality which demands only that the government be blind to differences to that equality of faith which requires government to erase differences.⁴²⁵ Without a goal or guide, it is difficult to evaluate the

419. J. RAWLS, *supra* note 329, at 60.

420. R. DWORKIN, *supra* note 294, at 150-83. *See also* B. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980).

421. R. NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974). *See also* Winter, *Poverty, Economic Equality, and the Equal Protection Clause*, 1972 SUP. CT. REV. 41.

422. *See, e.g.*, Lieberman & Morganbesser, *The Choices of Isaiah Berlin*, N.Y. REV. OF BOOKS, Mar. 20, 1980, at 31; Lieberman & Morganbesser, *The Question of Isaiah Berlin*, N.Y. REV. OF BOOKS, Mar. 6, 1980, at 38.

423. *See* Singer, *Dictator Marx*, N.Y. REV. OF BOOKS, Sept. 25, 1980, at 62.

424. A. DETOCQUEVILLE, *supra* note 361, at 1. *See also* *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973); *Reitman v. Mulkey*, 387 U.S. 369 (1967). Both *Pittsburgh Press* and *Reitman* may be seen as involving a preference for equality over liberty interests.

425. It may be contended that one's values with respect to justice reflect just one more element on the political grid, so that with the "equality of faith" go nurture, luck, determination, control and perfectability, and that with "skeptical equality" go nature, virtue, free will, laissez-faire and doubt.

correctness of any given decision. At a minimum, however, we can ask for greater candor with respect to values, moral premises and ideological costs. Can we expect more?

Conclusion:

“No Single Answer Is What the Question Begets”

We are left with a question of goals and sources: For what shall the Court aim? Where shall it look? Necessarily, we are concerned with hard cases—cases in which, for the most part, it has been assumed that judges have discretion. Professor Dworkin contends, however, that there are answers, and that rights exist in every case, even though no general map can be drawn to demonstrate what legal rights parties have in hard cases.⁴²⁶ He believes that it is improper for judges to exercise discretion, but that they must develop, through a consideration of “political philosophy and institutional detail,” a constitutional theory which is the most “satisfactory elaboration of the general idea of” equal protection.⁴²⁷ The American theory of government and the proper role of judges necessarily shares this faith in the ability of judges to develop constitutional theory in a nondiscretionary manner. As a prescription for the proper psychological attitude of judges, and even as a description of the way some judges operate, Dworkin’s thesis has much to recommend it. If this faith is a fiction, then it is a fiction of the highest order, for which there is no satisfactory substitute. As Edmund Morgan has stated,

All government of course, rests on fictions, whether we call them that or self-evident truths; and political fictions, like other fictions, require a willing suspension of disbelief on the part of those who live under them. The suspension is seldom total, and when it is the results are disastrous. For the individual, total suspension of disbelief in any fiction spells insanity, an inability to distinguish the real world from make-believe; and in politics total suspension of disbelief can lead to 1984, with autocratic governments ruling over autistic subjects. A fiction should not be mistaken for a fact, and the mistake is sometimes easy to make, since ideally the one should be seen to approach the other. For a political fiction to be acceptable to sane men and women it must, while remaining a fiction, bear some resemblance to fact. There has to be at least a kernel of truth in it, which government must nourish by trying to make facts resemble it; and both governors

426. R. DWORKIN, *supra* note 294, at 1-13, 131-49.

427. *Id.* at 107.

and governed must join in a benign conspiracy to suspend disbelief without mistaking fiction for fact.⁴²⁸

There is, of course, an aspect of the tragic in this advice, and we may, if we wish, pay homage to judges who must operate as tragic surrogates in seeking to reconcile the world with our faith in constitutional justice.

The fact remains, despite the liberal faith in perfect accommodation of our hopes, that no legal system can resolve everything without resort to outside sources. Inevitably, there are controversies in which the scales of justice break or oscillate madly, in which the weights of legal principles are equal and contradict one another,⁴²⁹ and in which liberty and equality pull in opposing directions. There is also the inevitable comeuppance, which Alexander Bickel described in his assessment of the Warren Court: "They used reason to put in question old values, and they came to realize that their own were not to be found in reasons alone."⁴³⁰ Their effort to fill every legal vacuum with principle inevitably bred paradox. Equal education, where it does not yoke the poorest, must restrict choice.

What, then, can be asked of the justices? How can they tread that nice line between the fact and fiction? Too often, the Court treats equal protection as a closed and complete system. But the rules that do exist, however, are only theorems. Lacking too often are the axioms or the means by which they are derived. Legal systems are not immune from the characteristic that an infinite number of "Why's?" forces an infinite search for foundations—a search which can come to rest only upon axioms, themselves not of a legal nature. Is this not as it should be? Intelligent human systems are, like human language, necessarily open, generating new considerations, new meanings, and new rules.

Others have noted that when the Supreme Court justices come to write an opinion, they open up a colloquy with the nation; they posit, through resolution of particular disputes, general postulates for the nation to accept or reject, if only in the long run. This is only to recognize that "the basis of all law—judicial, legislative, or administrative—is consensual,"⁴³¹ that in a rough way the justices reflect political climate,

428. Morgan, *The Great Political Fiction*, N.Y. REV. OF BOOKS, Mar. 9, 1980, at 13. See also Farago, *Intractable Cases: The Role of Uncertainty in the Concept of Law*, 55 N.Y.U. L. REV. 195 (1980). "[T]here are sound practical reasons why we will nevertheless want to make believe judges never exercise discretion. We may, that is, have good reason in practice to close our eyes, ears, and minds to the existence of the intractable cases, even though those are precisely the cases that are of greatest interest to us in theory." *Id.* at 199.

429. See generally Farago, *supra* note 428.

430. A. BICKEL, *supra* note 11, at 82.

431. A. BICKEL, *supra* note 324, at 110 (1975).

and that the test of a legal order, and especially of constitutional doctrine, is its self-executing capacity and its moral authority. Thus, the source outside the legal order to which the Court must resort is the moral sensibilities of the polity. The Court's *moral* as well as legal reasoning must be satisfactory.

Much of the criticism brought to bear upon the modern Court has focused on its legal and doctrinal deficiencies. I would submit that the greater lapse lies in the Court's refusal to clarify the moral dimensions of its reasoning. The elaborate system of shifting levels of review, of vacillating presumptions, and of reasonableness reified in underinclusive and overinclusive relationships seems to move the decisionmaker logically along. As we have seen, however, equal protection is about moral theory, and the fusion between the two ought to be made plain.⁴³² If the Court's decisions are often unconvincing, it is because the Court is not always straight with us.

The Court has a dual role. On one hand, it produces essays on America's notions of equality. In that role, its task is to portray the moral discourse and dilemmas and to clarify the choices, seeking thereby to persuade the nation to assent to its position. On the other hand, the Court must accommodate the tensions in the case before it in a manner optimal to order and expectations.

Alexander Bickel has described this dual role as involving a resort to Edmund Burke's "computing principle": Balancing different goods, goods and evils, and evils and evils—"adding, subtracting, multiplying, and dividing, morally and not metaphysically, or mathematically, true moral denominations."⁴³³ Bickel states,

There are no absolutes that a complex society can live with in its law. There is only the computing principle that Burke spoke of—adding, subtracting, multiplying, dividing It is the most enduring instinct of our legal order, which is more Burkean than some care to acknowledge, to resist the assertion of absolute claims and, therefore, a waste of breath to make them. Even absolute rights that the legal order seems, absentmindedly, to create, if very rarely, do not endure. Circumstances erode them.

432. See R. DWORKIN, *supra* note 294, at 149.

433. A. BICKEL, *supra* note 431, at 23-24. See E. BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE (1890). Preceding the quoted statement, Burke writes, "The pretended rights of these theorists are all extremes: and in proportion as they are metaphysically true, they are morally and politically false. The rights of men are in a sort of muddle, incapable of definition, but not impossible to be discerned. The rights of men in governments are their advantages; and these are often in balances between differences of good; in compromises sometimes between good and evil, and sometimes between evil and evil. Political reason is a computing principle; adding, subtracting, multiplying, and dividing, morally and not metaphysically, or mathematically, true moral denominations." *Id.* at 210.

Better to recognize from the first that the computing principle is all there is, ought to be, or can be.⁴³⁴

The plea must be for candor with respect to the elements and the computation. For myself, there is no better answer than this procedural prescription. The limits and guides are nothing less than the sum of all factors—text, history, philosophy, conscience—tempered by the evolving, internal ethic of the law, the adjustments of the political process, and the limits of popular acceptance.

Although boundaries are never absolute in an evolutionary process, specific cases do provide at least temporary boundaries in the constitutional evolution. Since the Court's principal function is not dispute resolution, but official articulation of the boundaries, we must at least demand that the Court provide clarification, in moral terms, of what it is doing.

434. A. BICKEL, *supra* note 431, at 88.

