Perceptions of Judicial Responsibility: The Views of the Nine United States Supreme Court Justices as They Consider Claims in Fourteenth Amendment Noncriminal Cases: A Post-Bakke Evaluation

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Original Citation

Perceptions of Judicial Responsibility: The Views of the Nine United States Supreme Court Justices as They Consider Claims in Fourteenth Amendment Noncriminal Cases: A Post-Bakke Evaluation, 14 Wake Forest Law Review 1097 (1978)
PERCEPTIONS OF JUDICIAL RESPONSIBILITY—THE VIEWS OF THE NINE UNITED STATES SUPREME COURT JUSTICES AS THEY CONSIDER CLAIMS IN FOURTEENTH AMENDMENT NONCRIMINAL CASES: A POST-BAKKE EVALUATION

Arthur Landever*

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INTRODUCTION

Each Justice of the United States Supreme Court has a particular conception about his function. His notion of judicial responsibility is really a composite of overlapping commitments; yet in any given case, a single value is likely to predominate. One Justice may see his responsibility as primarily to assure broad redress for the politically weak or insular, or indeed, even for John Q. Public. Another may identify some operating principle that determines his response to the actions of political institutions. A third may reject any movement to establish constitutional guarantees unknown to the framers, and may voice criticism of broad judicial remedies that are almost legislative in form or effect. Still another may emphasize the importance of the states in our federal republic.

Some of the Justice’s actions may be ad hoc; in the main, however, his view of his task—and the attendant constitutional values at stake—is significant in his own decision-making process. His perception takes on increased importance in fourteenth amendment situations. The amendment’s assurances of due process and equal protection are deemed by most observers to speak in general terms1 that are “as comprehensive as possible.”2 Furthermore, at least the latter clause is thought to possess no constitutional principle to direct the Justices.3 Accordingly, a Justice may find little guidance in the

1. See, e.g., F. Frankfurter, Mr. Justice Holmes and the Supreme Court 7 (1938) in R. Berger, Government by Judiciary—The Transformation of the Fourteenth Amendment 193 n.2 (1977); P. Freund, On Law and Justice 35 (1968); L. Hand, Spirit of Liberty 172-73 (I. Dillard ed. 1952) in Berger, supra at 166 n.4; L. Levy, Against the Law: The Nixon Court and Criminal Justice 27 (1974) in Berger, supra at 194 n.3; W. Mendelson, Justices Black and Frankfurter: Conflict in the Court viii (1961) in Berger, supra at 194 n.3. But Raoul Berger, supra disagrees contending that the framers clearly envisioned the amendment to have a definite and quite limited scope—essentially to assure that blacks would have the same rights as whites in contract and property transactions, and freedom from physical violence. Berger, supra at 35-36.


amendment's language and history; consequently, his discretion and thus his hierarchy of personal values may assume primacy.

In this article, the author sketches each Justice by examining his expressed attitudes and silent concurrences in fourteenth amendment noncriminal cases, as well as his remarks in other, non-court settings. While judicial behaviorists have employed quantitative techniques focusing upon analysis of voting records, the author believes that use of the lawyer's traditional method—case and opinion examination—is more appropriate here. Each Justice's composite should tell us not only something about the individual Justice's views, but also something about the views of key blocs on the Court. By such an effort, we learn more about the range of the possible in urging doctrinal changes and about the nature of the Supreme Court as an institution.

The plan is first to consider those Justices who stake out positions on the polar "extremes" and then to discuss the remaining members. Therefore, Justices Brennan and Marshall at one end, and Justices...
tice Rehnquist at the other, are dealt with in that order. The first two Justices interpret their roles broadly to justify intervention in support of aggrieved claimants—and perhaps most particularly racial minorities and the politically insular. Justice Rehnquist, by contrast, defers to the other national branches, and to the states. Next considered is Justice Powell, a major figure. He cautions at times against undue interference with the other governmental institutions; yet on other occasions, he fashions new interventionist approaches. A picture of the Chief Justice follows. Ideologically closest to Rehnquist, Chief Justice Burger plays a dual role in the life of the court. His function as titular head of both the Court and the federal judiciary undoubtedly has an impact upon his perceptions as a Court member. Justice White is treated next. Closer to the Brennan-Marshall end of the spectrum, especially in certain equal protection contexts, he is nonetheless a “swing” member. He brings to his task a frank, pragmatic aspect. Justice Stewart, dealt with after White, probably is closer philosophically to the views of Rehnquist and Burger. Yet an effort to accommodate himself to the majority, and in particular, the employing of narrow bases for decision in troublesome cases are important components of Stewart’s approach. Justice Blackmun, treated next, emphasizes the Court’s responsibility to assure the right to abortion; and, most recently, he has expressed support for affirmative racial admissions programs in universities. Newcomer John Paul Stevens completes the list. He is ordinarily close to the Brennan-Marshall wing in equal protection cases, but his opinions evidence an independent posture in that area as well as in due process contexts.

After providing individual assessments, the author concludes that three Justices in particular—Powell, White, and Stevens—are a key central force, although by no means a cohesive bloc. Propositions indicating the present collective portrait of the Court are then listed and critically evaluated by the author.

9. See notes 20-106 infra and accompanying text.
10. See notes 107-39 infra and accompanying text.
11. See notes 139-201 infra and accompanying text.
12. See notes 202-38 infra and accompanying text.
13. See notes 239-81 infra and accompanying text.
14. See notes 282-314 infra and accompanying text.
15. See notes 315-58 infra and accompanying text.
16. See notes 359-89 infra and accompanying text.
17. See notes 395-410 infra and accompanying text.
18. See notes 411-35 infra and accompanying text.
19. See notes 436-51 infra and accompanying text.
I. The Justices

Justice Brennan

William J. Brennan best typifies the predecessor Warren Court and its commitment to substantive liberalism; he confidently sees the Court as a defender of the individual against government, not brooking overly technical access rules or other procedural obstacles to achieving that goal. He is sharply critical of his colleagues for what he sees as their too-narrow conception of judicial responsibility and their watering down of constitutional guarantees. He is unwilling to construe the fourteenth amendment in any narrow, historically confining way, especially since the framers of that provision had "papered over" their differences. He has urged the strictest scrutiny of classifications impinging upon insular minorities or upon fundamental rights.

Justice Brennan is a judge who does not enjoy the role of "passionate dissenter," but notwithstanding his "instinct for accommodation," he has become one. In an important article written in 1977, Brennan made clear his reasons for his frequent dissents and at the same time expressed his judicial philosophy. He has endorsed the principle established earlier in Boyd v. United States that "constitutional provisions for the security of person and property should be liberally construed." As Brennan contended, "[i]t is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." The genius of our Constitution, he said, "resides not in any static meaning that it had in a world that is dead and gone, but in the adaptability of its great principles to cope with the problems of a developing America." He added "that there exists . . . the necessity for protecting [the citizen]
from arbitrary actions by [state] governments more powerful and more pervasive than any in our ancestors' time."^{31}

Brennan sees in recent decisions by the Court a trend "at least [to] suspend for the time being, the enforcement of the Boyd principle [in due process and equal protection cases]."^{32} The Court's new jurisdiction and standing rules, to him, evidence that regrettable development. He charges that "[u]nder the banner of the vague, undefined notions of equity, comity, and federalism, the Court has con
doned both isolated and systematic violations of civil liberties."^{33} The Court's actions, he has said, hurt the very groups "most in need of judicial protection of their rights—the poor, the underprivileged, the deprived minorities;"^{34} standing has been denied absent showings probably impossible to make. Indeed, he went further in *Warth v. Seldin*,^{35} a leading exclusionary zoning case, accusing his brethren of an "indefensible determination by the Court to close the doors of the federal courts to claims of this kind."^{36} Given that trend, Justice Brennan issued a clarion call to the state courts. It is their right—free from his Court's review—and indeed, it is their duty to read their own state constitutions expansively.^{37} The Supreme Court's recent prudential decisions, in effect, have placed that trust in the states' hands.

The present Court majority finds unsatisfactory the Warren Court's approach to equal protection cases, and Justice Brennan has had to accommodate himself to the Tribunal's new directions. He had played an important part in developing the more stringent test, strict scrutiny, to be applied to an open-ended list of classifications deemed suspect or adversely affecting fundamental rights. Thus he had spoken for the Court in the landmark case of *Shapiro v. Thompson*,^{38} announcing that the government could not infringe upon a fundamental right of interstate travel without demonstrating a compelling government interest and no narrower alternative means. The traditional rational basis standard, applied to all other social and economic legisla-
tion challenged as violative of the clause, is much more deferential; it requires only that there be some conceivable rational state interest to pass constitutional muster. The experience has been that categories determined to be subject to strict scrutiny invariably have been struck down; those tested by a rational basis standard almost always have been sustained.

Finding the two-tier equal protection standard (the use of both a strict scrutiny test and rational basis approach depending on the category protected) unsound and result-oriented, the Court has sought to put limits on the categories subject to the strict scrutiny test. It has also sought to employ closer scrutiny than that employed under the rational basis approach, at least in certain settings. Thus it has invoked an intermediate standard in cases testing classifications based upon gender, based upon illegitimacy, or intruding upon family relations.

Brennan's pattern of accommodation to that trend is seen most vividly in gender cases. Initially, in a plurality opinion, he had taken the position that gender classifications, however "rationalized by an attitude of 'romantic paternalism'" should be deemed suspect and thus tested by the more stringent standard. He emphasized that special disabilities by reason of an immutable characteristic violate "the basic concept of our system that legal burdens should bear some relationship to individual responsibility." Most recently, in the gender case of Craig v. Boren, Justice Brennan spoke for the Court and

39. Thus poverty is not considered a suspect category. See San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1 (1973) (Texas funding scheme upheld despite wide per pupil spending disparity from district to district—education also not found to be a fundamental right). Nor is gender. See Craig v. Boren, 429 U.S. 190 (1976) (state law found void which permitted 18 to 20-year-old females but not males to purchase 3.2 beer). Housing has not been found to be a fundamental right. See Lindsey v. Normet, 405 U.S., 56, 74, (1972) (state law requiring tenants to post double bond in order to appeal from landlord-tenant action violative of equal protection clause). But the Court has held that prisoners have a fundamental right to have some access to the courts. See Bounds v. Smith, 430 U.S. 817 (1977) (right at least to adequate library materials).


41. Trimble v. Gordon, 430 U.S. 762 (1977) (law forbidding illegitimates to inherit from their natural fathers while allowing inheritance from natural mothers found to violate equal protection clause).

42. Moore v. City of East Cleveland, 431 U.S. 494 (1977) (ordinance preventing grandmother from having her two sons' children live with her found to violate due process clause).

43. Frontiero v. Richardson, 411 U.S. 677, 684-86 (1973) (federal statute requiring only females to demonstrate that spouse is dependent in order to get increased armed service benefits found to violate fifth amendment due process).


45. 429 U.S. 190 (1976).
invoked a new middle-range standard. He noted that previous cases had established that "[t]o withstand constitutional challenge [gender classifications] must serve important governmental objectives and must be substantially related to achievement of those objectives."\(^{46}\) Hence, gender classifications which were based on an important governmental need were subject to constitutional attack.

Court members still endorse the view that distinctions based upon race are suspect, but they increasingly disagree about the scope of their protective role. Justice Brennan earlier wrote the Court opinions in two significant busing cases. *Green v. County School Board*\(^{47}\) marked the turning point. In that case, the Court imposed affirmative obligations upon local school officials, holding that thereafter, they had a "duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."\(^{48}\) Five years later in *Keyes v. School District*,\(^{49}\) the Court held that once there was a showing of segregative intent for a substantial part of a school district, a rebuttable presumption arose that such an intent existed for the entire district.

Justice Brennan now finds himself in the minority, objecting to what he deems a retreat by his colleagues. He has objected to Court decisions which appear to signal a withdrawal from endorsement of busing as a remedy for racial segregation.\(^{50}\) Indeed, he challenges the

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\(^{46}\) *Id.* at 197. See Justice Brennan's *Bakke* dissent where he called for employment of that intermediate test, rather than the more stringent standard, when, as in the California university admissions program, the racial classifications were to further remedial purposes, and did not have the effect of stigmatizing students. Regents of the Univ. of Calif. v. Bakke, 98 S. Ct. 2733, 2782-85 (1978) (Brennan, J., concurring in part and dissenting in part).

\(^{47}\) 391 U.S. 430 (1968) (board plan authorizing busing only where local authorities so choose, given the obligation to end dual racial school systems in rural county, found to be realistic).

\(^{48}\) *Id.* at 437-38.

\(^{49}\) 413 U.S. 189 (1973).

\(^{50}\) See School Dist. of Omaha v. United States, 433 U.S. 677, 669 (1977) (Brennan, J., dissenting) (vacate Eighth Circuit Court of Appeals busing order and remand to ascertain extent of purposive discrimination); Austin Ind. School Dist. v. United States, 429 U.S. 990 (1976) (mem.) (Brennan, J., dissenting) (vacate Fifth Circuit Court of Appeals busing order for same reason); Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 441 (1976) (Court struck out that part of judge's order mandating permanent racial balance in a system found to have been a dual one. The district judge had imposed in an earlier case the rule that there be no majority of a minority within a school; and that objective had been achieved during the first year, but not thereafter as a result of residential pattern changes. The precedent may be read narrowly as denying district judge's authority to impose racial balance for his lifetime in a school system once found to be segregated; or broadly, as Justices Marshall and Brennan fear, to limit the district judge's authority, although the majority concedes that perhaps total desegregation had not yet been accomplished) (Brennan, J., joining in the dissenting opinion of Marshall, J).
effort to minimize the constitutional significance of a showing that particular governmental action has had a disproportionately adverse effect upon a racial minority.\textsuperscript{51} Not only does he read the federal judiciary’s responsibilities here expansively, but he believes that wide authority is vested in national political institutions as well.\textsuperscript{52}

Brennan’s conception of a broad judicial role to protect deprived minorities is evident in his dissent in \textit{Regents of University of California v. Bakke}.\textsuperscript{53} At issue was whether the special admissions program used by the state medical school that set aside a fixed percentage of openings for racial minorities was legal. The Justice, speaking for himself and three colleagues, maintained that it was, and found that the program violated neither Title VI\textsuperscript{54} nor the fourteenth amendment.

Justice Brennan cautioned the other five members of the Court to understand the central reality within which constitutional interpretation should take place: Substantial, chronic underrepresentation of racial minorities in the professions, caused by societal discrimination, can be addressed successfully only by race-conscious affirmative action by government.\textsuperscript{55} Hence he argued that the ideal of “color

\textsuperscript{51} See Washington v. Davis, 426 U.S. 229, 256 (1976) (federal civil service examination upheld although black applicants for the District of Columbia police department had a disproportionately higher failure rate, especially given circumstances that precluded any inference of purposive discrimination) (Brennan, J., dissenting upon statutory grounds).

\textsuperscript{52} See United Jewish Orgs. v. Carey, 430 U.S. 144, 168 (1977) (Brennan, J., concurring) (Brennan emphasizes authority of United States Attorney General under Federal Voting Rights Act, where Justices voted to uphold a state redistricting plan passed pursuant to that official’s guidelines. The plan employed racial percentages in order to assure that blacks, deemed the victims of prior discrimination, would have majorities in several legislative districts); Katzenbach v. Morgan, 384 U.S. 641 (1966) (Court per Brennan, J., upholds congressional authority under the fourteenth amendment to ban English literacy tests, essentially for Puerto Ricans. It is sufficient that the Court perceives “a basis” upon which Congress could have viewed the state requirement as an invidious discrimination).

\textsuperscript{53} 98 S. Ct. 2733, 2766 (1978) (Brennan, J., concurring in part and dissenting in part).

\textsuperscript{54} 42 U.S.C. § 2000d (1970) [hereinafter cited as Title VI] (“No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”). Justice Brennan stated that the intent of the special program was to give considerable flexibility despite the cryptic nature of the language used. He cited the 1977 federal public works statute providing a 10 percent setoff of contracts to be let to minority employers as evidencing a continuing congressional commitment to minority race preference. 98 S. Ct. at 2778; see 42 U.S.C. § 6705f(2) (1970).

\textsuperscript{55} 98 S. Ct. at 2787. Justice Brennan noted that the University of California Regents were an authoritative policy-making body under the state constitution. Accordingly, he argued the cases cited by Justice Powell could not be distinguished.
blindness [by government must not] become myopia which masks the reality.” Accordingly, in view of the mandate of equality in the fourteenth amendment, Brennan argued that such voluntary state minority admissions programs must not be foreclosed, nor does Supreme Court case law call for a different result.

Examining the record in the case, Brennan concluded that the Davis program being challenged did not sweep too broadly. “Only [those] minority applicants likely to have been isolated from the mainstream of American life” were to be considered. Furthermore, no meaningful distinction could be drawn between the Davis approach and programs followed in other universities which awarded an additional set number of points because of the minority status of an applicant.

Justice Brennan’s opinion gave little weight to any injury suffered by Bakke. Admittedly, Bakke had been denied admission while possessing higher objective credentials than the minority candidates accepted into the medical school under the program. Nonetheless, Brennan found that the university, in denying Bakke admission, had not intended to stigmatize him nor was there such an effect. Moreover, as a white, Bakke was not a member of an insular or historically oppressed racial minority. Therefore, Brennan concluded that strict scrutiny of the remedial program was not appropriate; instead, invoking an intermediate test, Justice Brennan satisfied himself that the remedial goal was an important one and that the program was substantially related to its achievement.

Justice Brennan further suggested that it was not actually the special admissions program that caused injury to Bakke; rather the university’s policy only served to remedy the pattern of racial discrimination. Had there been no such societal discrimination in the first place—and thus no need for a special program—Bakke likely still would have been refused admission. He thus declared that “there is a reasonable likelihood that, but for pervasive racial discrimination, respondent would have failed to qualify for admission even in the ab-

56. Id. at 2768.
57. Id. at 2788.
58. Id. at 2793.
59. Id. at 2794.
60. See Justice Powell’s discussion of Bakke’s credentials. Id. at 2740-42. Interestingly, Bakke, in applying for admission in the class entering in the fall of 1974 had higher credentials than the average of those Caucasians admitted but did poorly on the interview score. Id.
61. Id. at 2792.
62. Id. at 2782-83. He also referred to the intermediate test as “strict and searching.” Id. at 2785.
sence of Davis' special admissions program." That would be the case, according to Brennan, because there then would have been enough minority candidates with higher credentials admitted before him.

Justice Brennan noted that given Powell's swing position, a five-member majority had expressed support for affirmative action programs in general. But he expressed concern that a majority could not be mustered to uphold the particular program being challenged. As we have seen, Brennan has objected to other recent trends in equal protection cases. Moreover, he has voiced similar misgivings in a range of due process contexts. Hence Brennan posits that the Court's narrow construction of the concepts of liberty and property—deemed protected unless due process is afforded—vitiates constitutional guarantees.

Of course, when the setting shifts to economic policy outside a fourteenth amendment context, pitting Congress against the states, Brennan has taken the opposite tack. In National League of Cities v. Usery, for example, the Court struck down a federal minimum wage law as applied to state government employees. Here, Brennan was critical of the Court's activism in support of state power, seeing the Tribunal's approach as a "patent usurpation of the role reserved for the political process."

In confronting fourteenth amendment challenges, however, Justice Brennan believes that the Supreme Court must act with vigor. In his mind, court members must take special care to grasp the essential nature of the problems that confront not only the Tribunal but the nation. Justice Brennan sees a need for meaningful access rules and liberal constitutional construction to assure protection and redress to

63. Id. at 2787.
64. In Moore v. City of East Cleveland, 431 U.S. 494, 506 (1977) (Brennan, J., concurring), Brennan cautioned his colleagues not to endorse legislation which embodied "white suburbia's preference for family living"; he deemed the Connecticut law denying medical benefits for abortion while granting expenses for childbirth "coer-[cive]." Id. at 508. In Maher v. Roe, 432 U.S. 464, 482 (1977) (Brennan, J., dissenting), Brennan dissented from the Court's decision to deny federal relief to an individual defamed by a police circular. Such misgivings are further indicated in Paul v. Davis, 424 U.S. 693, 714 (1976) (Brennan, J., dissenting), where he states, "[B]y mere fiat, [the Court] wholly excludes personal interest in reputation from the ambit of 'life, liberty, or property' protected by due process. Id. at 721. See also Ingraham v. Wright, 430 U.S. 651, 683 (1977) (Brennan, J., joining in dissent of White, J.); Weinberger v. Salfi, 422 U.S. 749, 786 (1975) (Brennan, J., dissenting).
65. 426 U.S. 833 (1976) (no congressional power, even plenary commerce power, to apply federal minimum wage law to state and local government employee salaries in traditional governmental areas in order to protect states).
66. Id. at 853 (Brennan, J., dissenting).
the injured; he believes that such an approach will enhance judicial integrity and benefit the citizenry.

JUSTICE MARSHALL

Thurgood Marshall fully shares the concerns of Brennan, and he charts an equally expansive judicial role to safeguard certain individual rights. He is determined that the Supreme Court, along with the other federal tribunals, must protect insular minorities as well as the ordinary citizen against arbitrary government action.67 To that end, he calls upon his colleagues to employ a deliberative range of standards by which to evaluate legislative classifications, and not simply a deferential rational basis test.68 Justice Marshall thus sees the common endeavor of judge and lawyer as "nothing less than doing justice,"69 and he argues that the "Courts have a special responsibility to preserve and enforce the moral pillars on which society is built."70

The other members of the Court have joined with Marshall in recognizing a fundamental right of prisoners to have access to the courts;71 however, those members generally have resisted Marshall's expansive view of suspect categories72 and fundamental rights.73 Troubled by his colleagues' limited reading, Marshall rejects the use of any single standard to measure the rationality of legislation not deemed to involve the two areas. He believes that such an approach, which he considers rudderless, undercuts the judicial function; it provides little guidance either to the judge or to the government official. Instead, Marshall argues that the Court should invoke a "spectrum of standards."74 Consistent application of that approach would furnish the best opportunity for open and fruitful debate among the Court members, focusing upon such relevant factors as the

67. See notes 76-106 infra and accompanying text.
68. See notes 71-106 infra and accompanying text.
73. See, e.g., San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1 (1973). Justice Marshall would have found a fundamental right to public education since such "[e]ducation directly affects the ability of [the] child to exercise his First Amendment rights." Id. at 112 (Marshall, J., dissenting).
74. Id. at 98.
character of the classification, the relative importance of the govern-
ment benefit being denied, and the alleged state interest;75 as a re-
result, Marshall believes a sliding scale of standards offers the fullest
measure of constitutionally mandated protection to the individual.

Consistent with his analysis of fourteenth amendment case law is
Marshall’s empathy with the poor, racial minorities, and other politi-
cally disadvantaged groups. He perceives them not as faceless
“masks”76 of the law from whom the judge should keep his intellec-
tual distance, but as flesh and blood people, entitled to doctrinal
frameworks which assure that justice will be meted out to them.

Marshall’s opinions provide ample evidence of that dual as-
pect—an intellectual vigor in urging a spectrum of standards as well
as an extreme sensitivity for persons injured by arbitrary govern-
mental action. Consider his expressed views in five important cases. In
the abortion funding case, *Maher v. Roe*,77 Marshall could find no
constitutional basis for upholding a state’s denial of abortion benefits
to an indigent in the face of a fundamental procreative right of pri-
vacy.78 That such legislation should be sustained “points up once
again the need for this Court to repudiate its outdated and intellectu-
ally disingenuous ‘two-tier’ equal protection analysis.”79 He declared
that the government action “brutally coerce[d] poor women to bear
children whom society will scorn for every day of their lives . . . .”80
Marshall argued that not only would the effect “fall with great dispar-
ity upon women of minority races,”81 but the decision would invite
legislatures, under lobbying pressures, to approve “more such restric-
tions.”82 Earlier, in *Milliken v. Bradley*,83 the Court declined to sup-
port a district judge’s inter-district school consolidation remedy. Jus-
tice Marshall, in dissent, found sufficient evidence in the record to
uphold the district judge’s remedy and cautioned his brethren not to
abdicate their responsibilities by simply reflecting a “perceived public
mood that we have gone far enough in enforcing the Constitution’s
guarantee of equal justice.”84 In *Dandridge v. Williams*,85 the Court

75. Id. at 98-99.
78. See also Roe v. Wade, 410 U.S. 113 (1973) (state laws prohibiting abortion
deny fundamental right of procreative privacy, at least during the first two trimesters, in
violation of fourteenth amendment due process).
80. Id. at 456.
81. Id. at 459.
82. Id. at 462.
84. Id. at 814.
sustained a state law imposing an upper limit on the amount that a family could receive on an Aid to Families with Dependent Children grant. Marshall noted the "extremes to which the Court has gone in dreaming up rational bases" for business regulations. But he also noted that the classification at issue was far different, involving the "literally vital interests of a powerless minority—poor families without bread-winners." To Marshall, the legislation could not withstand close examination because it did not assure protection to all needy dependent children. Moreover, it was clear that the actual reasons for the regulation were budgetary, that is, "to limit the total cost of the program along the path of least resistance." In Jackson v. Metropolitan Edison Co., the Court found no state action requiring a due process hearing in the decision of an electrical utility to shut off an individual's electricity. According to Justice Marshall in his dissent, this was not an instance in which a public utility should be permitted to be free of constitutional restrictions out of a concern to have a flourishing private sector; such values in "pluralism and diversity are simply not relevant when the private company is the only electric company in town." Finally, in Wyman v. James, the Court sustained the right of a caseworker to make home visitations upon several days' notice as a reasonable condition for continued welfare payments. Marshall bristled at the analogy that his colleagues drew between such an entry and the obligation of the taxpayer to document his right to a tax deduction. As he argued, if an IRS agent actually "invade[d] the home for the purpose of questioning the occupants and looking for evidence . . . the cries of constitutional outrage would be unanimous."

Justice Marshall's recent dissent in Bakke is further evidence of his extreme sensitivity for individuals injured by arbitrary government action. In Bakke, he expressed deep personal concerns about the "tragic" lot of blacks today. "[D]ragged to this country in chains," blacks suffer the "inevitable consequence of centuries of

86. Id. at 520 (Marshall, J., dissenting).
87. Id.
88. Id. at 529.
89. 419 U.S. 345 (1974).
90. Id. at 372-73.
92. Id. at 343 (Marshall, J., dissenting).
94. Id. at 2802. Marshall expressed the same sentiments in open court the day the decision was announced. "'The position of the Negro today in America is tragic . . . . I am talking about today.'" TIME, July 10, 1978, at 11.
95. 98 S. Ct. at 2798.
unequal treatment.”

Justice Marshall felt that the obligation of the Supreme Court in Bakke was clear—to uphold affirmative action programs such as the program instituted at Davis. In his view, such a university admissions policy was fully consistent with the fourteenth amendment; indeed, the central purpose of the framers of that provision was to protect the new freedman, and the need for that protection has not diminished. As for race-conscious preferences in favor of minorities, they were constitutionally mandated. The “experience of Negroses,” he said, “has been different in kind [and therefore they require] greater protection to remedy the effects of past discrimination.”

Justice Marshall despaired that a majority of his colleagues could not understand the nature of the constitutional commitment owing to blacks. It was “more than a little ironic,” he declared, “that after several hundred years of class-based discrimination against Negroses, the Court is unwilling to hold that a class-based remedy is permissible.” He was apprehensive that the decision might help to topple countless federal, state, and local affirmative action programs. As the Court in an earlier day had “destroyed the movement toward complete equality,” he feared that “we have come full circle. . . . [N]ow we have the Court again stepping in . . . .”

Justice Marshall sees the Court as the guardian not only of racial minorities, but also of the disadvantaged and the poor. He views the Court as the protector of everyman against the arbitrary actions of an all-powerful government. He has sounded that theme in a number of public employment cases. In Board of Regents v. Roth, Marshall

96. Id. at 2802.
97. Id. at 2803.
98. Id.
99. Id. at 2804. Marshall also noted that [while in] Un[nited] J[ewish] O[rganizations] and Webster the use of the disfa[vored] classification was predicated on legislative or administrative action, . . . in neither case [did] those bodies [make] findings that there had been constitutional violations or that the specific individuals to be benefited had actually been the victims of discrimination. . . . There is . . . ample support for the conclusion that a university can employ race-conscious measures to remedy past societal discrimination, without the need for a finding that those benefited were actual victims of that discrimination.

100. Id. at 2805.
101. Id. at 2806.
102. 408 U.S. 574 (1972) (nontenured teacher whose contract was not renewed, without any aspersions upon his character or fitness, held to have no entitlement to
would have afforded a due process hearing to a state college teacher whose contract was not renewed. "[E]very citizen who applies for a government job," he said, "is entitled to it unless the government can establish some reason for denying the employment. This is the 'property' right . . . protected by the Fourteenth Amendment."\textsuperscript{103}

Finally in other cases, he has displayed concern about the dire consequences facing a fired employee,\textsuperscript{104} has emphasized the important "liberty" interest implicated by police hair style regulations,\textsuperscript{105} and has subjected employment classifications grounded upon age to close scrutiny.\textsuperscript{106} In sum, Justice Marshall searches for the key ingredients of a challenged government regulation, with a deeply felt commitment to his fellow man as a driving force.

\textbf{JUSTICE REHNQUIST}

William Rehnquist sees his judicial responsibilities quite differently. Justices Brennan and Marshall have sought to extend the Court's scrutiny of official action alleged to have impinged upon civil liberties, and have thus endorsed generous access rules.\textsuperscript{107} Justice Rehnquist, on the other hand, almost without exception has voted to uphold challenged government regulations and to limit federal court jurisdiction. He calls for constitutional construction in which judicial interpretations are clearly grounded in the language of the document. Thus, he takes the position that it is for the political branches, not for the Supreme Court, to decide issues of major national policy.\textsuperscript{108} Fur-
thermore, the states must remain independent units of government in order to perform their constitutional functions.

In 1974, he observed that there had been a "dramatic shift of power . . . to the judicial branch . . . . The federal courts . . . are no longer simply dispute settlers . . . performing constitutional adjudication primarily as a bi-product . . . ."\(^{109}\) While he has claimed neither "to lament nor applaud" that approach,\(^{110}\) his pattern of expression makes clear that it is a lament. In a recent study of his votes, his actions were deemed to be motivated by three attitudes: "(1) Conflicts between an individual and the government should, whenever possible, be resolved against the individual; (2) Conflicts between state and federal authority . . . should, whenever possible, be resolved in favor of the states; and (3) Questions of the exercise of federal jurisdiction . . . should, whenever possible, be resolved against such exercise."\(^{111}\) Justice Rehnquist is critical of what he deems to be judicial lawmaking. As did Holmes,\(^{112}\) he sees our Constitution as a living instrument,\(^{113}\) which must adapt to changing social and technological conditions; but he warns against accepting a version of the living Constitution concept that finds an affirmative judicial obligation to act because "other branches of government have failed [to act]."\(^{114}\) or that sees the Court as "the voice and conscience of contemporary society."\(^{115}\) To Rehnquist, the idea of the Tribunal as akin to a "roving commission to second-guess"\(^{116}\) the political institutions is contrary to the framers' intent and in violation of the principle of democratic governance. He contrasts the broader role\(^{117}\) of Congress, as contemplated by the framers of the fourteenth amendment, with the role intended for the judiciary, and argues that unless values are traceable to constitutional language and history, Court opinions are merely exercises in subjectivism.\(^{118}\)

Justice Rehnquist recognizes that the equal protection clause is ambiguous; indeed, he views it as a paradox\(^{119}\) which lacks any direct-

\(^{110}\) Id.
\(^{111}\) Shapiro, Mr. Justice Rehnquist: A Preliminary View, 90 Harv. L. Rev. 293, 294 (1976).
\(^{114}\) Id. at 695.
\(^{115}\) Id.
\(^{116}\) Id. at 698.
\(^{117}\) Id. at 699-700.
\(^{118}\) Id. at 704.
But he believes that the Justices should not compound such difficulties by choosing only those societal groups that a majority deem insular and thus deserving of "ward of the Court" protection against the legislature. Nor in Rehnquist's mind should the Court employ intermediate approaches which require the most subjective assessments regarding the importance of legislative goals or the substantiality of the classifications chosen to achieve them. To him, the test which takes appropriate account of the Court's limited role is the traditional rational basis test. Consequently, in other than race relations contexts, he would ask whether a challenged classification has a conceivable rational basis.

In the area of race, Justice Rehnquist feels that the Court's mandate is to apply strict scrutiny. At the same time, Rehnquist denies that sweeping busing orders in school desegregation cases are part of that judicial responsibility. His opposition to such orders is thus consistent with both his concept of the federal judiciary's limited role and his confidence that state officials are carrying out their tasks in good faith. Furthermore, Rehnquist believes that desegregation calls for neutral assignment, not coerced "racial mixing."

Justice Rehnquist's Court opinion in Pasadena City Board of Education v. Spangler signaled a new willingness by the majority to restrict both the busing remedy and the authority of the federal district judge, regardless whether total achievement of a unitary system actually had yet taken place.

Justice Rehnquist joined Justice Stevens' opinion in Bakke, finding that the university's special admissions policy for minorities violated Title VI of the Civil Rights Act of 1964. Justice Rehn...
quist's concurrence in *Bakke* probably should not be viewed as an instance of his support of an individual's claim against government; rather, it is best understood as his deference toward a federal legislative policy deemed valid and controlling as against an inconsistent policy of a single state university campus.

So understood, his concurrence in *Bakke* is consistent with his general deferential approach. He has followed that approach not only in equal protection cases but also in due process contexts. Thus he spoke for the Court in finding that reputation, absent "some more tangible interests such as employment," was neither liberty nor property within the purview of the due process clause. Accordingly, the Court held that an individual defamed by the police had no federal remedy for damages under the civil rights statute.

Even where there is a property interest under state law, Justice Rehnquist believes it may be restricted by procedures prescribed in the granting statute. Moreover, his opinion for the Court in *Weinberger v. Salfi* may have sounded the death knell of the irrebuttable presumption doctrine. Invoking that doctrine, the Court previously had struck down legislation that the members believed improperly had foreclosed litigation on issues when application of the law to the plaintiff in question clearly was arbitrary. Justice Rehnquist argued that all classifications necessarily involve such presumptions. Consequently he argued that to strike down such laws because in some instances application is unreasonable is to challenge the idea of lawmaking itself; so long as such legislation had a conceivable rational basis, it should pass constitutional muster. Rehnquist would apply that deferential standard to abortion situations, but his views in that area have not carried a majority.

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131. *Id. at* 713-14.
133. *422 U.S. 749* (1975) (Court per Justice Rehnquist upholds nine-month marriage duration requirement for spouse to receive social security benefits as not violating due process; the Court found no constitutionally protected status in a noncontractual claim on public treasury). *But see* *Turner v. Department of Employment Security*, 423 U.S. 44 (1975) (per curiam).
134. *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974) (board requirement that pregnant teacher four or five months pregnant take an unpaid leave found to create a conclusive presumption of incompetency during pregnancy and thus to violate due process); *Vlandis v. Klein*, 412 U.S. 441 (1973) (state imposition of higher tuition on individual, given nonresidence status which under law was not capable of change, is violation of due process).
136. *Id.*
137. *Id. at* 774.
Consistently then, Justice Rehnquist has supported governmental authority when challenged upon a fourteenth amendment basis, applying almost the equivalent of a heavy presumption in its favor.139

JUSTICE POWELL

Lewis Powell is a major figure between the polar extremes of the Court. Justice Powell's pattern of perceptions is more complex than that of the Justices previously discussed. That pattern has five components: (1) Standing rules serve fundamental judicial process concerns and therefore should not be viewed as obstacles to carrying out the Court's mandate;140 (2) Prudential considerations sometimes will require the Tribunal to decline jurisdiction although a case or controversy is present;141 (3) A Justice has the responsibility to analyze the articulated justifications for legislation and should weigh the importance of the governmental goal and the substantiality of the individual interest with respect to it;142 (4) The Court should strive to assure that political officials have ample leeway in establishing and implementing social policy; (5) Public officials, including state judges, should be assumed to be competent and to be acting in good faith unless cause is shown to reject that assumption.143

According to a former law clerk, Justice Powell operates in the tradition of a burkean judge, recognizing the limits within which judicial institutions must operate.144 Thus, Powell has taken the lead in approves of the compelling state interest approach which he believes entails passing upon the "wisdom of [legislative] policies." Id. at 174.

139. His support of state redistricting legislation intentionally assuring black majorities in some districts to redress former discrimination is part of that pattern. See United Jewish Orgs. v. Carey, 430 U.S. 144 (1977). He did vote to strike down the gender classification in Weinberger v. Wiesenfeld, 420 U.S. 636, 655 (1975) (Rehnquist, J., concurring), deeming the classification to be not in furtherance of the law's demonstrable purpose, to permit a surviving parent to remain at home with a child. In Weinberger, the Court held that a social security payment of benefits to a surviving female spouse but no such payments to a surviving widower of covered wage earner violated due process. Notwithstanding Justice Rehnquist's restraintism in the fourteenth amendment cases, he is an activist in protecting state power when it collides with federal authority. In National League of Cities v. Usery, 426 U.S. 833 (1976), the Court per Justice Rehnquist found an implied state immunity, insulating the state from application of federal minimum wage legislation to state and local governmental employees in traditional areas to protect a state's "attributes of sovereignty." Id. at 845.

140. See note 145 infra and accompanying text.
141. See notes 146-50 infra and accompanying text.
142. See notes 151-56 infra and accompanying text.
143. See notes 157-61, 165-75 infra and accompanying text.
urging restricted access of citizens to the federal courts. He believes that a showing of personal injury in fact, not some vague stake in the outcome or generalized grievance, ordinarily should be required to meet article III standing requirements. Powell has urged additional prudential considerations to justify denying access: the interest claimed by the aggrieved party must not be insubstantial; a constitutional challenge on behalf of another should not be allowed unless litigation by the party more immediately aggrieved is in “all practical terms impossible”; pronouncement of a precedent that will be “difficult to cabin” should be avoided by evaluating the effect of a decision upon the doctrinal development of the Court; the causal connection between plaintiff’s alleged grievance and defendant’s conduct must be clear; and the federal judiciary’s remedial powers must appear likely to redress the injury.

Once these procedural tests are met, Justice Powell urges a closer examination of the challenged governmental action than would be endorsed by his more restraintist colleagues. Thus, in cases involving legislative distinctions which appear to “approach sensitive and fundamental personal rights,” he argues for a careful assessment of ends and means. He asks “[W]hat legitimate state interests does the classification promote? What fundamental personal rights might the classification endanger?” Powell expresses dissatisfaction with the

145. [A]llowing unrestricted . . . citizen standing would significantly alter the allocation of power . . . with a shift away from a democratic form of government . . . [Moreover] the allowance of public actions would produce uneven and sporadic review, the quality of which would be influenced by the resources and skill of the particular plaintiff . . . . United States v. Richardson, 418 U.S. 166, 188, 191 (1973) (federal taxpayers held to lack standing to challenge CIA statute providing secrecy for CIA appropriations) (Powell, J., concurring).

146. Singleton v. Wulff, 428 U.S. 106, 129 (1976) (Court held that physician has standing in abortion case) (Powell, J., dissenting). Powell disagreed finding “nothing more is at stake than remuneration for professional services.” Id.

147. Id. at 126. Thus Powell did not believe it appropriate to have the physician in Singleton assert the interests of the pregnant women.

148. Id. at 129.

149. Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 38-39 (1976) (Court per Justice Powell holds that individuals on welfare lacked standing to challenge new IRS ruling granting favorable treatment to hospitals despite refusal to give service to indigents). “[I]t does not follow . . . that the denial of access to hospital services in fact results from [the Secretary of the Treasury’s] new Ruling.” Id. at 42.

150. Id. at 38; Austin Ind. School Dist. v. United States, 429 U.S. 990 (1976) (mem.) (Powell, J., concurring).


152. Id. at 173.
two-tier equal protection standard, “viewed by many as a result-oriented substitute for more critical analysis.” Therefore, while not comfortable with the thought of yet another intermediate tier, he endorses efforts to employ close scrutiny to classifications grounded upon gender, those grounded upon illegitimacy, and those which intrude upon the sanctity of the family. Justice Powell thus believes that such classifications should neither be subject merely to the deferential rational basis test, nor be subject to the stringent demands of the strict scrutiny test.

Justice Powell also believes that legislators’ motivations are not beyond the ken of a sitting Justice. For example, when claimants allege that racial discrimination is a real purpose behind government action which appears neutral on its face, he encourages the Tribunal to engage in a “sensitive inquiry into such circumstantial and direct evidence of intent as may be available.” Significantly, however, Justice Powell has been unwilling to take the position that disproportionate racial impact—whether in public schools, housing, or employment contexts—should give rise to a presumption of invidious intent. Thus he recognizes that minority plaintiffs have a difficult evidentiary task, since the burden of going forward is not shifted to the defendant.

Powell’s opinions in race relations cases reflect confidence that he can develop judicial approaches that speak more meaningfully to the needs of the present society. The opinions also suggest his caution in seeking to narrow the busing remedy. Calling for Court doctrine that is workable for both North and South, Powell has urged abandonment of the long-time distinction between de jure and de facto segregation. Using his approach, plaintiffs would not have to establish purposive discrimination in the public school context. Simply upon a

154. Id. at 211.
showing of racial imbalance, courts would require school officials to engage in a range of integrative steps; those steps, however, would be short of busing.\textsuperscript{163} He has contended that at least in urban settings in the North only rarely is busing proper since the crucial factor is changing residential patterns, not school board conduct.\textsuperscript{164}

Powell's opposition to compelling state officials to bus school children is consistent with another strain in his pattern—a hesitance to intrude upon general policy making by the political institutions. Thus, he criticized those Justices who would place gender into the category of suspect classification “at the very time when State legislatures . . . are debating the proposed [Equal Rights] Amendment . . . [P]re-empt[ion] [would] . . . not reflect appropriate respect for duly prescribed legislative processes.”\textsuperscript{165} Powell evidenced similar judicial restraint in declining to find a constitutional requirement to fund abortions.\textsuperscript{166} He emphasized that “[a]n indigent woman who desires an abortion suffers no disadvantage as a consequence of [the state’s] decision [not to provide the monies].”\textsuperscript{167} He explained that “[t]he indigency [itself] . . . is neither created nor . . . affected by the . . . regulation.”\textsuperscript{168} Admittedly, an indigent woman might find it difficult to get an abortion, absent such funding, and the Court was “not un-

163. “Public schools are creatures of the State, and whether the segregation is state-created or state-assisted or merely state-perpetuated should be irrelevant to constitutional principle.” \textit{Id.} at 227. He continued:

\begin{quote}
I would hold . . . that where segregated schools exist within a school district to a substantial degree, there is a prima facie case that the duly constituted public authorities . . . are sufficiently responsible to warrant imposing upon them a nationally applicable burden to demonstrate they nevertheless are operating a genuinely integrated school system.
\end{quote}

\textit{Id.} at 224.

A system would be integrated in accord with constitutional standards if the responsible authorities had taken appropriate steps to (i) integrate faculties and administration; (ii) scrupulously assure equality of facilities, instruction, and curriculum opportunities throughout the district; (iii) utilize their authority to draw attendance zones to promote integration; and (iv) locate new schools, close old ones, and determine the size and grade categories with this same objective in mind. . . . An integrated school system does not mean—and indeed could not mean . . . that every school must in fact be an integrated unit. A school which happens to be all or predominately white or all or predominately black is not a “segregated” school in an unconstitutional sense if the system itself is a genuinely integrated one.

\textit{Id.} at 226-27. “[T]he ambiguities of \textit{Swann} construed to date almost uniformly in favor of extensive transportation, should be redefined to restore a more viable balance among the various interests which are involved.” \textit{Id.} at 252.

167. \textit{Id.} at 474 (emphasis added).
168. \textit{Id.}
sympathetic to [her] plight.”169 Yet he underscored the Tribunal's limited function, declaring that such sensitive policy choices should be made by the legislature.170 He displayed similar restraint in San Antonio Independent School District v. Rodriguez171 in sustaining the Texas school property tax as a basis for educational funding although it had resulted in widely disparate per-pupil spending from one educational district to another. The Court, he declared, lacked “both the expertise and familiarity with local problems so necessary to the making of wise decisions.”172 He also cautioned against abrogating “systems of financing public education presently in existence in virtually every State”173 absent a showing that the education provided to a child clearly fell below an acceptable minimum. Significantly, he sought to encourage state legislatures to reduce inequities, noting that the Court was not “placing its judicial imprimatur on the status quo. The need is apparent for reform.”174

Justice Powell would extend his posture of judicial deference to elected officials striving to develop major social policy to state judges on the basis that they, no less than their federal counterparts, should be presumed to be committed to enforcement of constitutional norms.175 This judicial deference, although present, is not as clearly stated in his Bakke176 opinion. The lack of clarity results from the nature of the case: Conflicting governmental policies were before the Court—one policy in Title VI of the Civil Rights Act of 1964, framed by Congress, and a second developed by a state university medical school.

Nonetheless, Powell's important opinion in Bakke provides a useful case study of his judicial approach. In that case, his colleagues split evenly. Four members deemed Title VI clear in proscribing the university's race-conscious exclusion policy.177 Four others found no obstacle to the affirmative action program either in Title VI or in the

169. Id. at 479.
170. Id.
172. Id. at 41.
173. Id. at 44.
174. Id. at 58.
175. Ingraham v. Wright, 430 U.S. 651 (1977) (Court per Justice Powell holds that while corporal punishment in the public schools requires due process, that guarantee can be afforded through a subsequent state court common law relief for aberrational abuse); Stone v. Powell, 428 U.S. 465 (1976) (Court per Justice Powell forecloses federal habeas corpus to test a claim of unconstitutional search “where the State has provided an opportunity for full and fair litigation.” Id. at 482.).
177. Id. at 2809-15 (Stevens, Burger, Rehnquist, Stewart, JJ., concurring in part and dissenting in part).
fourteenth amendment's equal protection clause. They endorsed the university's policy as necessary to remedy societal discrimination and not materially different from more subtle affirmative action programs which take race into account.

Justice Powell walked a middle path. He agreed with one group that Title VI was not intended to forbid race-conscious programs in federally assisted facilities. He then concurred in the perception of the other group that the program in question worked a racial exclusion. To him, any such affirmative action program, voluntarily instituted without authoritative mandate, violated both the federal statute and the fourteenth amendment. His opinion seemed to mark off boundaries within which the judiciary is competent. It may be read as stating several propositions respecting constitutional interpretation and judicial role.

First, the Court should interpret the fourteenth amendment to state a principle of universal application. The Tribunal should focus upon the provision's "universal terms," the "broader princi-
ple” intended by the framers, and Court case law in the twentieth century endorsing that broader aspect. The Court thus should not stress unduly the framers’ immediate concern to protect the freedom of former slaves. Second, the strict scrutiny test, rather than a more deferential standard, should be invoked notwithstanding any alleged benign purpose. Both principle and good sense call for rejection of a more deferential test, Powell argued. The language of the amendment admits of no “special wards.” Nor is there any reasoned basis for deciding which groups merit “heightened judicial solicitude.” The Court not only lacks competence to rank groups’ constitutional protection depending upon their degree of societal injury, but such constitutional preference might prove not so benign to the groups themselves. Preferential programs may reinforce common stereotypes and there may be inequity in forcing the innocent to bear the burden.

Third, Justice Powell believed that the focus must be on protecting the individual; hence a fatal flaw of the university admissions program in Bakke was its disregard of individual rights. “The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal.”

Fourth, the white candidate’s injury was caused by the unconstitutional action of the university. Justice Powell felt that it was highly questionable to operate on the assumption that the university’s program was not the cause of injury to Allan Bakke. Justice Powell accused the dissenters of engaging in a “speculative leap” in their assumption that “but for [societal discrimination] Bakke ‘would have failed to qualify for admission’ because Negro applicants . . . would have made better scores.”

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185. Id.
186. Id.
187. Id. at 2751.
188. Id. The intermediate standard employed for gender-based distinctions is not appropriate because such distinctions “are less likely to create the analytical and practical problems present in preferential programs premised on racial or ethnic criteria. With respect to gender there are only two possible classifications. The incidence of the burdens imposed by preferential classifications is clear.” Id. at 2755. “The Fourteenth Amendment is not directed solely against discrimination due to a ‘two-class [black-white] theory.’” Id. at 2751.
189. Id. at 2751.
190. Id. at 2753.
191. Id. at 2764.
192. Id. at 2748.
193. Id. at 2751 n.36.
Fifth, racial preferences of the exclusionary type employed by the medical school are legitimate in Justice Powell's view only where there has been a finding of prior violation of law. The Court should not approve "a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations." Absent such findings from an authoritative government body race properly may remain a factor in considering the application of a candidate for admission, but may not be used to justify a total "exclusion" from a specific percentage of the seats in an entering class.

Sixth, the strict scrutiny test, the proper standard to be applied here, requires that the government establish that its "purpose or intent is both . . . permissible and substantial, [and its chosen classification] 'necessary.'" Of the four purposes urged by the uni-

194. Id. at 2757-58. Justice Powell notes that the case does not call into question authoritative administrative actions such as consent decrees under Title VII or approval of reapportionment plans under section 5 of the Voting Rights Act. He says that in such cases "there has been detailed legislative consideration of the various indicia of previous constitutional or statutory violations . . . ." Id. at 2755 n.41.

195. Id. at 2758-59.

[1] Isolated segments of our vast governmental structures are not competent to make those decisions, at least in the absence of legislative mandates and legislatively determined criteria . . . . Before relying upon these sorts of findings [by an educational institution] in establishing a racial classification, a governmental body must have the authority and capability to establish, in the record, that the classification is responsive to identified discrimination.

Id. at 2758-59. The "broad mission [of the University of California at Davis] is education, not the formulation of any legislative policy or the adjudication of particular claims of illegality." Id. at 2758.

196. Id. at 2764.

197. Id. at 2757.

198. Four were offered by the university:

(i) "[R]educing the historic deficit of traditionally disfavored minorities in medical schools and the medical profession . . . ." Id. (quoting Petitioner's Brief at 32). Justice Powell views this goal of "[p]referring members of any one group for no reason other than race or ethnic origin [as] discrimination for its own sake [and] as facially invalid." Id.

(ii) "[C]ountering the effects of societal discrimination . . . ." Id. Justice Powell concludes that "[w]ithout . . . findings of constitutional or statutory violations, it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another." Id. at 2758.

(iii) "[I]ncreasing the number of physicians who will practice in communities currently underserved . . . ." Id. at 2757. Justice Powell concludes that "[p]etitioner simply has not carried its burden of demonstrating that it must prefer members of particular ethnic groups over all other individuals in order to promote better health care delivery to deprived citizens." Id. at 2759.

(iv) "[O]btaining the educational benefits that flow from an ethnically diverse student body." Id. at 2757. Justice Powell suggests a fifth possible purpose—fair appraisal
versity for the program, only one goal was seen by Powell as permissible and substantial: the “attainment of a diverse student body.”

The university, however, had failed to show that the exclusionary means selected were necessary to the achievement of diversity. Indeed, the means chosen would tend to hinder achievement of the goal.

Seventh, once the university eliminates such a racial percentage system, the Court should refrain from intruding upon the admissions process even though race is being used as one factor in the evaluation of applicants. Absent evidence to the contrary, the Court should assume that a university which acts in good faith will be taking race into account in evaluating applications on an individual basis. The Court should not presume that “a university, professing to employ a facially nondiscriminatory admissions policy, would operate it as a cover for the functional equivalent of a quota system.”

It is likely that Justice Powell, notwithstanding his opposition to the Davis program, will defer in the future to universities in their efforts to employ affirmative action without strict racial quotas.

What, in sum, may be concluded about Justice Powell’s approach in fourteenth amendment cases? Judicial process rules play a fundamental part in confining a Justice’s discretion. Unlike Justice Rehnquist, he calls for close scrutiny of governmental ends and means, at times leading him to vote to strike legislation and state policy deemed violative of the fourteenth amendment. In contrast to Justice Marshall, an extreme sensitivity to the claims of racial minorities and the politically insular is not part of his pattern. In his analysis he strives to be dispassionate, keeping himself at some distance from the fray.

CHIEF JUSTICE BURGER

Warren Burger bears a heavier responsibility than his colleagues on the Court; in addition to being Chief Justice, and therefore spokesman for the Court, he is also head of the federal judiciary. His perceptions about the Court, especially as expressed before lay and governmental audiences with regard to the “crisis” in the federal courts, inevitably are affected by his dual role. He seeks a more

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199. Id. at 2760.
200. Id. at 2761.
201. Id. at 2763.
202. E.g., Burger, How to Break the Log-Jam in the Courts, U.S. News & World Reports, Dec. 19, 1977, at 21. The Chief Justice supports a substantial increase in the number of federal judges, expansion of the powers of federal magistrates, elimination of
deliberative environment for the federal judge and some way to manage the growing docket avalanche. At the same time, Chief Justice Burger contends that the Court has enlarged significantly constitutional guarantees for all individuals.\textsuperscript{203} Undoubtedly, as he confronts the issues that come before the Supreme Court, he occasionally weighs how he should vote in order to maintain a leadership position on the Tribunal. As a sitting member, he has tended to vote with Justice Rehnquist. His record reveals two major shifts: one in his expressed attitude toward busing\textsuperscript{204} and the other in his view on abortion.\textsuperscript{205}

The Chief Justice contends that the federal courts should play only a limited role in policy making. He is therefore critical of lawyer-activists who misperceive the courts as channels for broad social reform. Indeed, those who look to tenured federal judges to “reshape our society” should “ponder what remedy is available if the world shaped by the judicial process is not to their liking.”\textsuperscript{206} Moreover, he is convinced that it is not within the judges’ mandate to impose their own notions of what is good for the country.\textsuperscript{207} Despite Chief Justice Burger’s philosophical predisposition toward judicial restraint, he accepts the need at times for a more activist posture.\textsuperscript{208}


\textsuperscript{203} “[T]o say that the Court has denied access to deprived or disadvantaged people is refuted by the public record on claims of women, minority groups, prisoners, aliens, illegitimate children, minors, students, mental patients and welfare recipients.” \textit{U.S. NEWS & WORLD REPORTS, supra} note 202, at 21.

\textsuperscript{204} \textit{See} notes 215-24 infra and accompanying text.

\textsuperscript{205} \textit{See} notes 225-30 infra and accompanying text.

\textsuperscript{206} \textit{Burger: Don’t Look For Courts to Reshape Society, U.S. NEWS & WORLD REPORTS, Oct. 4, 1971, at 19; see Graham, Burger Asserts Reform is Not Role of Courts, N.Y. Times, July 4, 1971, at 1, col. 5, at 20, col. 1.}

\textsuperscript{207} \textit{See} Farrell, \textit{Burger, Honoring Holmes, Outlines Role of Judges, N.Y. Times, May 11, 1970, at 9, 29, 3.}

\textsuperscript{208} \textit{U.S. NEWS & WORLD REPORTS, supra} note 202, at 21:

\textit{[I]f a State is running its prisons or its mental hospitals in a way that violates . . . civil rights . . . it is a judge’s duty to act . . . The trend toward what is called judicial activism . . . is partly brought on by a host of new problems . . . and they are becoming more acute . . . [There are] problems. . . . [As a result,] poor draftsmanship [and] gaps [in legislative schemes occur]. . . . [J]udges have to fill those gaps. . . . [A]ll of us should be constantly on guard against going beyond proper limits on the judicial function, but this is easier said than applied.
In the main, Chief Justice Burger has sought to keep the Tribunal's role a narrow one; consequently his opinions reflect an effort to apply standing rules narrowly.\textsuperscript{209} He has resisted access rules that, in his judgment, would have the federal courts play the role of "continuing monitors of the wisdom and soundness of Executive action."\textsuperscript{210} Moreover, he has dissented when he has felt that his colleagues were not demonstrating due regard for the judgments of state courts.\textsuperscript{211}

In equal protection and due process litigation, he takes positions similar to those of Justice Rehnquist. He endorses application of the rational basis test, rather than the much more subjective intermediate approach, in assessing classifications arising from social and economic legislation.\textsuperscript{212} He views the irrebuttable presumption doctrine as an unsuccessful attempt to narrow the Court's intrusion into government action. As he explains, the doctrine merely "transfer[red] . . . the elusive and arbitrary 'compelling state interest' concept\textsuperscript{213} into due process, thereby potentially calling into question the "thousands of state statutes [which] create classifications permanent in duration which are less than perfect . . . ."\textsuperscript{214}

\textsuperscript{209} See, e.g., Craig v. Boren, 429 U.S. 190, 215-17 (1976) (Burger, C.J., dissenting) (sole member of Court taking the position that the liquor seller lacked standing to assert the equal protection argument of males, 18-20 years old, who could not purchase 3.2 beer); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 217 (1974) (Burger, C.J., commented that it was mere "speculation whether the claimed nonobservance of . . . [the incompatibility clause (art. I, § 6, cl. 2)] deprives citizens of the faithful discharge of legislative duties" of reservist members of Congress); United States v. Richardson, 418 U.S. 166 (1974) (federal taxpayer held not to have standing to challenge federal statute providing that CIA appropriations not be made public); Laird v. Tatum, 408 U.S. 1 (1972) (citizen members of political organizations bringing class action denied standing to challenge army monitoring of legitimate political activity of civilians on rationale that because injuries were too speculative, there was no showing of injuries to plaintiffs themselves).

\textsuperscript{210} Laird v. Tatum, 408 U.S. 1, 15 (1972).

\textsuperscript{211} E.g., Eisenstadt v. Baird, 405 U.S. 438 (1972) (person convicted of violating law prohibiting distribution of contraceptives held to have standing to assert constitutional claim of unmarried individuals). In his dissent, Chief Justice Burger contended that "[t]he Court today blithely hurdles th[e] authoritative state pronouncement" that the anti-distribution provision "served the legitimate interest of the State in protecting the health of its citizens [by permitting dispensing only through medical channels]." Id. at 467. Wisconsin v. Constantineau, 400 U.S. 433 (1971) (Court holds violative of due process a state law permitting spouse or official without a hearing to forbid for a year the sale of liquor to person who has been declared by a court to be an excessive drinker). The state courts should have been given an opportunity to rule on the patently unconstitutional state statute "[s]ince no one could reasonably think that the judges of Wisconsin have less fidelity to due process requirements of the Federal Constitution than we do." Id. at 440 (Burger, C.J., dissenting).


\textsuperscript{213} Vlandis v. Kline, 412 U.S. 441, 460 (1973) (Burger, C.J., dissenting).

\textsuperscript{214} Id. at 462.
Justices Powell and Rehnquist have made clear their opposition to massive busing.215 The Chief Justice’s attitude appears to have shifted dramatically toward that view. In 1971, he spoke for the Court in Swann v. Charlotte-Mecklenburg Board of Education,216 endorsing extensive district court remedial authority to order cross-town busing, though noting that factors of health or adverse effect upon the educational process might serve to restrict that remedy.217 The following year, he expressed growing uneasiness over interference with school board discretion and he would have sustained the attempt of a board, then under a desegregation order, to carve out a new district.218 In 1974, his Court opinion in Milliken v. Bradley219 opposed interdistrict consolidation absent a showing “that there has been a constitutional violation within one district that produces a significant segregative effect in another district.”220 Two years later, he concurred in Austin Independent School District v. United States,221 identifying residential patterns as the principal cause of urban racial imbalance. Accordingly, he agreed that in such situations only “rarely” would it be proper for a court order to “result in the widespread busing of elementary age children.”222 Most recently, the Chief Justice has supported Court action vacating some busing orders either as not being based on a sufficient showing of segregative intent or as being beyond district court authority.223 Despite his apparent shift in attitude on the busing issue, the Chief Justice did write the 1977 opinion that upheld judicial authority to compel a state, implicated in the constitutional violation, to finance a range of educational components to remedy the plaintiffs’ injuries.224

The Chief Justice’s views apparently have undergone marked change on the abortion question as well. He concurred in the landmark Roe v. Wade225 decision which voided state prohibitory legislation; however, he subsequently joined with a new majority in deny-
ing any constitutional right to federal financial assistance in obtaining an abortion.\textsuperscript{226} Even more revealing, in \textit{Planned Parenthood v. Danforth},\textsuperscript{227} he concurred in Justice White's dissent which would have upheld substantial restrictions, and not only financial ones, on the freedom of a pregnant woman to have an abortion. Such conditions included spousal veto,\textsuperscript{228} parental veto in the case of an unmarried minor,\textsuperscript{229} and prohibition against use of a basic—perhaps indispensable—technique of abortion after the twelfth week.\textsuperscript{230}

In a legislative apportionment case, \textit{United Jewish Organizations v. Carey},\textsuperscript{231} which challenged a district gerrymandered to guarantee a majority position for blacks, deemed to have been the subject of prior discrimination, Chief Justice Burger alone labeled the plan a "strict [racial] quota approach."\textsuperscript{232} Thus, he dissented from the views of his colleagues who sustained the legislation based upon either broad national authority,\textsuperscript{233} state reserved power,\textsuperscript{234} or both.\textsuperscript{235}

In \textit{Bakke},\textsuperscript{236} the Chief Justice joined in Justice Stevens' opinion which found that the special admissions program employed by the University of California at Davis violated a federal statute.\textsuperscript{237} The opinion did not reach the constitutional issue. Judging, however, from Burger's dissent in the legislative districting case,\textsuperscript{238} in the absence of the statute, he probably would have found the classification at issue a quota violative of the fourteenth amendment.

Undoubtedly, Chief Justice Burger's role as titular leader exerts pressure upon him at times to take positions that he otherwise would not take as a sitting Justice. In his recent opinions, however, especially in race relations and abortion contexts, he appears to be exhibiting his basic philosophy of judicial restraint.

\textbf{JUSTICE WHITE}

The Chief Justice and the other Court members naturally reflect upon the practical implications of their decisions. Byron White, in

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\item \textsuperscript{226} Maher v. Roe, 432 U.S. 464 (1977).
\item \textsuperscript{227} 428 U.S. 52 (1976).
\item \textsuperscript{228} \textit{Id.} at 92-94.
\item \textsuperscript{229} \textit{Id.} at 94-95.
\item \textsuperscript{230} \textit{Id.} at 95-99.
\item \textsuperscript{231} 430 U.S. 144, 180 (1977).
\item \textsuperscript{232} \textit{Id.} at 182 (Burger, C.J., dissenting).
\item \textsuperscript{233} \textit{Id.} at 155-65.
\item \textsuperscript{234} \textit{Id.} at 179-80 (Powell, J., joining in concurring opinion of Stewart, J.).
\item \textsuperscript{235} \textit{Id.} at 147-68 (White, J., wrote the plurality opinion, in which Stevens, J., joined upholding the districting on both grounds).
\item \textsuperscript{236} Regents of the Univ. of Calif. v. Bakke, 98 S. Ct. 2733 (1978).
\item \textsuperscript{237} \textit{Id.} at 2809-15.
\item \textsuperscript{238} \textit{See} note 231 \textit{supra} and accompanying text.
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particular, stresses that pragmatic aspect. According to a former law clerk, Lance Liebman, he sees his role as “challenging him to choose the [reasoning] that will serve the nation over time,” freely acknowledging that the Court makes new law and that it should be ever mindful of the impact of its decisions. He is an important middle-of-the-roader in fourteenth amendment litigation. At times, especially in equal protection cases, he has aligned himself with Brennan and Marshall. Yet, in other cases, his views set him apart from those two Justices. Thus, he has de-emphasized the significance of a showing of disproportionate racial impact, indicated his hesitance over extensive busing, and demonstrated a marked restraint in substantive due process contexts.

Justice White’s candid remarks in *Miranda v. Arizona*, a fifth amendment case, reveal his pragmatic approach quite vividly. In *Miranda*, the majority held that absent warnings to the suspect about his right to remain silent and the availability of counsel, admissions obtained during in-custody interrogation violated the constitutional privilege against self-incrimination. In White’s mind, the majority was wrong in its analysis; however, they were not in error merely because the holding was “neither compelled nor even strongly suggested by the language [of the amendment], [was] at odds with American and English legal history, and involve[d] a departure from a long line of precedent.” Rather, according to White, the majority was wrong because of its misjudgment regarding the consequences of the decision. Justice White agreed that the Supreme Court in interpreting “great clauses of the Constitution” necessarily must “make new law and new public policy.” Nevertheless while the “Court’s text and reasoning should withstand analysis and be a fair exposition of the . . . provision [,] [e]qually relevant is an assessment of the rule’s consequences measured against community values.”

Such practical considerations played a dominant part, according

239. See notes 246-56 infra and accompanying text.
240. The Court is in Two Factions Now, and Justice White is in the Middle, N.Y. Times, Oct. 8, 1972, § 6, at 16.
241. See notes 270-74 infra and accompanying text.
242. See notes 246-51 infra and accompanying text.
243. See note 275 infra and accompanying text.
244. See note 276 infra and accompanying text.
245. See notes 278-80 infra and accompanying text.
247. Id. at 531 (White, J., dissenting).
248. Id.
249. Id.
250. Id.
251. Id. at 537 (emphasis added).
to Liebman, in White's contrasting positions in two open-housing cases. In the first, *Reitman v. Mulkey*, Californians, through referendum, had incorporated a provision into their state constitution permitting racial discrimination in housing soon after the state legislature had passed an open-housing law. Justice White found state action present in the individual homeowner's racial discrimination, construing the concept liberally. Had White not concluded as he did, Liebman explained, the "movement for open-housing laws," then underway, "might [have been] dealt a major setback." By contrast, in the second case, *Jones v. Alfred H. Mayer Co.*, White declined to interpret a post-civil war statute as containing an open-housing component, especially in light of recent passage of federal legislation on the subject. According to Liebman, White believed that the majority's action sacrificed "consistent legal reasoning and accurate statutory interpretation . . . for no important purpose," and a "gratuitous insult" was handed to Congress. That body was told in effect "that its long and courageous struggle to secure new legislation had been unnecessary."

Justice White's pragmatism is revealed in several fourteenth amendment cases. In *San Antonio Independent School District v. Rodriguez* he felt that "[school] districts with a low per-pupil real estate tax base" "utterly failed to extend a realistic choice to parents . . . ." He viewed the interdistrict consolidation remedy in *Milliken v. Bradley* as both appropriate and practical. The majority, he said, had suggested "that judges should not attempt to grapple with the administrative problems attendant on a reorganization of school attendance patterns." To White, it was "precisely this sort of task which the district courts [had] been . . . exercising" since *Brown v. Board of Education*. He dissented in a school corporal discipline case, in which the Court declined to require any prior due process hearing. As White reasoned, any supposed tort rem-

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253. See *Court is in Two Factions*, supra note 240, at 98, § 6.
255. See *Court is in Two Factions*, supra note 240, at 98, § 6.
256. *Id.*
258. *Id.* at 64 (White, J., dissenting).
259. *Id.* at 65.
261. *Id.* at 778 (White, J., dissenting).
262. *Id.*
edy—as a substitute for the prior due process hearing—was “utterly inadequate to protect against erroneous infliction of punishment.” Moreover, he added, the fear of the majority that requiring such a due process hearing would result in “a ‘significant intrusion’ into the discipline process [was] exaggerated.”

Finally in *Bakke*, Justice White reflected, in part, upon the practical implications of a private cause of action under Title VI in concluding that Congress had not intended to incorporate that remedy in the statute.

In some equal protection contexts, Justice White has voted along with the Brennan-Marshall wing. He joined in the Brennan dissent which would have upheld the University of California at Davis special admissions program setting aside places for minority students. He had earlier endorsed their view that classifications grounded upon gender should be deemed suspect, and he agreed with Marshall that a spectrum of standards would best serve Court analysis. Like Brennan and Marshall, he believes that there is substantial national authority, political as well as judicial, to remedy past racial discrimination. He also feels that there is extensive state reserved power to redress such injuries.

Nonetheless, Justice White’s middle stance is clear. In a leading public employment case, he spoke for the Court in declining to

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265. Id. at 693.
266. Id. at 700.
269. As Justice White reasoned:

Nor do any of these statements [in the legislative history] make nice distinctions between a private cause of action to enjoin discrimination and one to cut off funds, as Mr. Justice Stevens and three justices who join his opinion apparently would. . . . [I]t would be odd if they did, since the practical effect of either type of private cause of action would be identical. . . . [In either case] recipients of federal funds would be presented with the choice of either ending what the court, rather than the agency, determined to be a discriminatory practice within the meaning of Title VI or refusing [to accept] federal funds. . . . Both types of action would equally jeopardize the administrative processes so carefully structured into the law.

270. Id. at 2737.
273. See Katzenbach v. Morgan, 384 U.S. 641 (1966) (White, J., joins opinion by Brennan, J., upholding congressional authority under the fourteenth amendment to ban English literacy tests for certain Puerto Rican voters).
274. See United Jewish Orgs. v. Carey, 430 U.S. 144, 162-68 (1977) (White, J., concurring) (White maintained that the Constitution permits a state to redraw legislative districting lines to favor blacks victimized by prior discrimination).
find constitutionally determinative the disproportionate failure rate of blacks on a police entrance examination. Recently, he has endorsed the Court's opinion in a school case which appeared to narrow the concept of "desegregation." 276

In procedural due process cases, once White is satisfied that a liberty or property interest is present, he takes the lead in urging a due process hearing requirement; 277 however, in a number of instances involving substantive challenges to legislation concerned with abortion, 278 exclusionary zoning, 279 and housing 280 he has been disinclined to find such a constitutionally protected interest. In other contexts as well 281 Justice White's votes suggest his swing position.

Somewhat more activist in equal protection cases and more restraintist in substantive due process situations, Justice White's pragmatism is a central component of his approach.

277. See Ingraham v. Wright, 430 U.S. 651, 683 (1977) (White, J., dissenting); Bishop v. Wood, 426 U.S. 341, 355 (1976) (Court finds no entitlement under state law sufficient to guarantee a terminated local policeman a right to due process hearing) (White, J., dissenting); Goss v. Lopes, 419 U.S. 565 (1975) (Court per Justice White finds entitlement to public education under state law requiring due process hearing prior to suspension of student even for a few days).
278. Roe v. Wade, 410 U.S. 113, 221-22 (1973) (Court fashioned "a new constitutional right . . . with scarcely any reason or authority . . . [interfering with] the people and the legislatures of the 50 states") (White, J., dissenting). Eight years earlier, however, he had voted to strike down a state birth control counseling restriction as intruding upon the "intimacies of the marriage relationship." Griswold v. Connecticut, 381 U.S. 479, 502-03 (1965) (White, J., concurring).
280. Lindsey v. Normet, 405 U.S. 56 (1972) (Court per Justice White sustains state law limiting tenant defenses for the purpose of eviction hearing). As Justice White declared, "We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill." Id. at 74.
JUSTICE STEWART

Potter Stewart, another swing member on the Court, is philosophically closer to Rehnquist and Burger. He agrees with the two in rejecting any intermediate approach in equal protection cases although his threshold for finding irrationality in legislation may be lower. His effort to side with the majority, however, is evident in several ways: his liberal construction of post-civil war legislation; his employment of the irrebuttable presumption doctrine; and perhaps of greatest significance in understanding his approach, his attempt to rely upon narrow grounds in particularly troublesome cases.

Justice Stewart would place the label of judicial moderate or restraintist upon himself. His opinions and votes reveal a general willingness to defer to political decision making. Indeed, those opinions suggest a disposition to be supportive of state institutions even, in certain contexts, when they are in conflict with the Congress.

282. See notes 297-98 infra and accompanying text.
283. See notes 299-303 infra and accompanying text.
284. See notes 299-314 infra and accompanying text.
285. Voicing opposition to the adoption of the “one-man, one-vote” standard, for example, he declared: “What the Court has done is to convert a particular political philosophy into a constitutional rule . . . . [I cannot] join in the fabrication of a constitutional mandate which imports and . . . forever denies to every State any opportunity for enlightened and progressive innovation in the design of its democratic institutions . . . .” Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713, 748 (1964) (Court held that seats in state legislature were malapportioned even though those in the lower house were based upon population and the apportionment in the upper house had been endorsed by a majority of voters; Court holds that apportionment in both houses had to be based upon a strict population basis in order not to violate equal protection) (Stewart, J., dissenting). See also Moore v. City of East Cleveland, 431 U.S. 494, 537 (1977) (Stewart, J., dissenting) (“To equate [the desire of a grandmother to have her sons’ children live with her] with the fundamental decisions to marry and to bear and raise children [would] extend the limited substantive contours of [due process] beyond recognition.”); Griswold v. Connecticut, 381 U.S. 479, 530-31 (1965) (Stewart, J., dissenting) (would uphold the “uncommonly silly” anti-birth control counseling law since he could find no “right of privacy” applicable to it).

In two other cases he appeared disinclined to find “state action” present so as to impose federal constitutional requirements. Hudgens v. NLRB, 424 U.S. 507 (1976) (Court per Justice Stewart holds that there was no first amendment right to enter a shopping center to picket in a labor dispute); Reitman v. Mulkey, 387 U.S. 369 (1967) (Court holds that state constitutional provision legitimating racial discrimination in housing is “state action”) (Stewart, J., joining in dissenting opinion of Harlan, J.).

286. In Oregon v. Mitchell, 400 U.S. 112 (1970), he viewed the federal statute seeking to create voting rights for 18-year-olds in federal and state elections as an unconstitutional intrusion upon the states’ mandate to determine voter qualifications. He joined in a dissent with Justice Harlan in Katzenbach v. Morgan, 384 U.S. 641, 659 (1966), challenging the majority’s view that Congress had the authority under the fourteenth amendment to determine for itself whether a state had violated equal protection; rather, argued the dissenters, the issue was for the judiciary to decide. He concurred in
Stewart's recent position in Bakke\textsuperscript{287} is not inconsistent with that tendency. In Bakke, he joined in Stevens' opinion which invoked Title VI as clearly dispositive. He was convinced that the federal statutory policy obviously was superior to an inconsistent single state university program.

To Justice Stewart, the traditional rational basis standard is the appropriate test by which to assess ordinary social and economic legislation not involving suspect classifications.\textsuperscript{288} Even "chaotic" and "unjust"\textsuperscript{289} legislation might pass constitutional muster if based upon some rational grounds. Nor should the government be required to demonstrate a compelling state interest where such laws are challenged.\textsuperscript{290}

No matter how philosophically out of step he may be with some members, Justice Stewart has sought to find bases upon which to join the majority. For example, in Craig v. Boren,\textsuperscript{291} a recent gender case, he relied upon the traditional rational basis approach to reach the result achieved by the majority through its intermediate standard.\textsuperscript{292} Thus, unlike Rehnquist and Burger, he found the state law prohibiting males but not females eighteen to twenty years old from purchasing beer "totally irrational."\textsuperscript{293} While earlier he had rejected the idea that there was any privacy right infringed by an "uncommonly silly"\textsuperscript{294} birth control counseling prohibition, he later joined in the Court's pattern of abortion decisions.\textsuperscript{295}

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\item Justice Rehnquist's Court opinion in National League of Cities v. Usery, 426 U.S. 833 (1976). In United Jewish Orgs. v. Carey, 430 U.S. 144, 180 (1977), he seemed to minimize the significance of the Federal Voting Rights Act, instead finding broad state authority to employ "racial awareness," absent a showing of invidiousness.
\item 429 U.S. 190 (1976) (state law permitting females from 18-20, but not males of the same age, to purchase beer invalidated by Court as violative of equal protection clause).
\item Id. at 215 (Stewart, J., concurring).
\item Id.
\item In Roe v. Wade, 410 U.S. 113 (1973), he considered himself bound by the Griswold precedent. Id. at 168-70 (Stewart, J., concurring). He also took the position that the "right [to beget a child] necessarily includes the right of a woman to decide whether or not to terminate her pregnancy." Id. at 170. Justice Stewart joined in the
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In race relations cases, Stewart consistently has supported majority positions.\textsuperscript{296} Indeed, he spoke for the Court in its quite liberal construction of two 100-year-old federal statutes, finding within them prohibitions against racial discrimination in private housing transactions\textsuperscript{297} and private schools.\textsuperscript{298}

Undoubtedly, the most distinctive aspect of Justice Stewart's role is his effort to invoke narrow positions as dispositive, rather than to reach the broader, more difficult constitutional issues. At times, of course, his colleagues choose that course as well. But Stewart's effort seems a more persistent one. His use of the irrebuttable presumption doctrine was interpreted by dissenters as such an attempt,\textsuperscript{299} and while commendable, it was unsuccessful in their view.\textsuperscript{300} It was seen as the Justice's struggle to set limits upon use of the subjective compelling interest approach in the equal protection area.\textsuperscript{301} Instead, Justice Stewart sought to bring the problems within a more manageable due process context. Thus, the Court would not have to determine whether a compelling interest was established, but would ascertain whether the legislation in issue contained a conclusive presumption that foreclosed a claimant from challenging its arbitrary application. The approach has been called into question, not only by dissenters, but also by Justices concurring in the judgments.\textsuperscript{302} Its present status is in doubt.\textsuperscript{303}

\textsuperscript{296} See, e.g., Hills v. Gautreau, 425 U.S. 284 (1976) (Court per Justice Stewart upheld metropolitan-wide remedy given the involvement of a federal administrative agency in the housing violations); Wright v. Council of Emporia, 407 U.S. 451 (1972) (Stewart, J.).


\textsuperscript{300} Id. at 460.

\textsuperscript{301} Id.


\textsuperscript{303} See Weinberger v. Salfi, 422 U.S. 749 (1975) (Court per Justice Rehnquist held nine-month marriage duration requirement for spouse to receive social security benefits not violative of due process). But see Turner v. Department of Employment Sec., 423 U.S. 44 (1975) (per curiam) (state law making pregnant women ineligible for unemployment compensation during late pregnancy and immediately after childbirth held void as creating "conclusive presumption").
Justice Stewart's hesitance to reach the broader constitutional questions has been apparent in various types of cases. In *Frontiero v. Richardson*, the four-member plurality had rested on a finding that gender was a suspect classification. Concurring in the judgment, Justice Stewart briefly noted that the "statutes before us work an invidious discrimination in violation of the Constitution." In *Geduldig v. Aiello*, he hardly took cognizance of the dissenters' argument that excluding pregnancy disability from a state insurance coverage constituted sex discrimination. He was satisfied that sufficient legitimate justifications existed for that exclusion; consequently any resulting discrimination was not invidious. In *Burton v. Wilmington Parking Authority*, the majority had examined the totality of circumstances to arrive at the conclusion that the state had so entangled itself with the actions of the restaurant owner engaged in racial discrimination that the owner's acts had constituted state action. Stewart found it unnecessary to broaden the state action concept. As he saw it, a particular state law as construed by the state court had purported in effect to authorize the discrimination. Similarly, in *United States v. Guest*, he declined to reach the question whether Congress had authority under the fourteenth amendment to punish private conspiracies. He found analysis of the question unnecessary by interpreting the indictment in *Guest* as containing "an express allegation of state involvement . . . ." It is interesting to note that while Justice Stewart announced the judgment of the Court, six members in two concurring opinions thought it appropriate to reach that broader fourteenth amendment question. The Justice's approach is evident in other areas as well.

305. *Id.* at 682.
306. *Id.* at 691. See also *Reed v. Reed*, 404 U.S. 71 (1971) (Court struck down as violative of equal protection state law providing preference to male when both male and female are equally qualified to serve as estate administrator; administrative convenience deemed insufficient justification).
308. *Id.* at 494.
310. *Id.* at 726-27 (Stewart, J., concurring).
312. *Id.* at 756.
313. *Id.* at 762 (Clark, J., concurring, joined by Black & Fortas, JJ); *Id.* at 777 (Brennan, J., concurring, joined by Warren, C.J. & Douglas, J.).
314. See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (discussing in his concurrence the Tribunal's prolonged and convoluted attempts to define hard-core pornography and commenting: "I know it when I see it . . ."); *Mapp v. Ohio*, 367 U.S. 643, 672 (1961) (concurrency did not reach the question whether unconstitu-
In sum, while hesitant about reaching or discussing broader constitutional issues, Justice Stewart seems motivated to join the majority.

**JUSTICE BLACKMUN**

Justice Stewart’s concurrence in the landmark abortion decision may have been a reluctant one. By contrast, Harry Blackmun sees a fundamental judicial responsibility to safeguard a woman’s procreative privacy and thus has opposed efforts to diminish the availability of abortion. Outside that area, his pattern is a mixed one, but he has taken an activist stance in some contexts. He has authored opinions endorsing strict scrutiny of state legislation impinging upon aliens. His dissent in *Bakke* revealed his support for a broad Court role in assuring meaningful affirmative action programs and he has called for expansive standing rules in environmental contexts.

Justice Blackmun’s opinion in *Roe v. Wade* announced a fundamental right of privacy which “encompass[ed] a woman’s decision” to have an abortion. He rejected as insufficient the state’s three supposed justifications for its prohibition: the effort to discourage illicit sexual activity, the danger involved to the pregnant woman, and the interest in protecting prenatal life. The first justification, Blackmun argued, was conceded by the state to be a weak rationale. As for the second, Blackmun asserted that abortion “in early pregnancy . . . is now relatively safe.” As to the third, he declared that “the judiciary . . . is not in a position to speculate [about when life begins].” Blackmun concluded, however, that an unborn fetus is not a “person” within the meaning of the fourteenth amendment due process clause.

The intensity of Justice Blackmun’s endorsement of the abortion right is seen in his opinions in several subsequent cases. He angrily protested the majority’s sustaining of laws denying financial aid to the

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Footnotes:

315. See notes 320-32 infra and accompanying text.
316. See notes 333-34 infra and accompanying text.
318. See notes 343-53 infra and accompanying text.
319. See notes 357-58 infra and accompanying text.
321. Id. at 153.
322. Id. at 148.
323. Id. at 140.
324. Id. at 159.
325. Id. at 158.
indigent woman seeking an abortion when the same laws granted such assistance to a woman carrying the fetus to full term. To him, this was "almost reminiscent of 'Let them eat cake.'" The result of such laws was that a "presumed majority . . . punitively impresses upon a needy minority its own concepts of the socially desirable." In another context, he had no difficulty in finding that physicians seeking to perform abortions possessed standing to assert the constitutional rights of their clients. Blackmun spoke for the Court in rejecting legislation which would have imposed three additional restrictions upon the abortion right: spousal veto, "absolute" parental veto in the situation of an unmarried minor, and prohibition of a particular aborting technique after a given period of pregnancy.

In other fourteenth amendment cases, Blackmun has spoken for the Court in striking down state laws infringing upon the rights of aliens. They are deemed a "prime example of a 'discrete and insular' minority . . . for whom heightened judicial solicitude is appropriate." In other contexts, he has been less disposed to invalidate government action. He had been disinclined to view classifications based upon gender as suspect, but now concurs in the recently

327. Id.
328. Id. at 462-63.
329. Singleton v. Wulff, 428 U.S. 106, 117 (1976) (physicians have standing to assert the constitutional rights of their clients because of the risk that a patient might be reluctant to participate in a public court suit and the danger of "imminent mootness").
331. Id. at 72-75. Justice Blackmun emphasized that not every minor, "regardless of age or maturity, may give effective consent for termination of her pregnancy." Id. at 75.
332. Id. at 75-79. Justice Blackmun, writing for the Court, sustained the legislative requirement that a woman signify in writing her willingness to have an abortion. Id. at 67.
333. See Nyquist v. Mauclet, 432 U.S. 1 (1977) (state law denying college financial assistance to aliens who choose not to declare intent to apply for citizenship was held to violate equal protection); Sugarman v. Dougall, 413 U.S. 634 (1973) (Court held that prohibition of alien employment in civil service violates equal protection); Graham v. Richardson, 403 U.S. 365 (1971) (state law denying welfare to resident alien held to violate equal protection). Justice Blackmun, however, has favored a more restraintist judicial attitude towards federal statutes affecting aliens. See, e.g., Hampton v. Mow Sun Wong, 426 U.S. 88, 117 (1976) (Court held that statutory exclusion of resident aliens from the Federal Civil Service violates due process because the exclusion was not related to the Civil Service Commission's delegated concern with efficiency) (Rehnquist, J., joined by Blackmun, J., dissenting).
335. See Stanton v. Stanton, 421 U.S. 7 (1975) (Court per Justice Blackmun found no rational basis for state law extending male minority to 21, but terminating female minority at 18, for purposes of child support).
framed intermediate test. Yet, even in the gender classification setting, he continues to exercise judicial restraint. Thus he joined in a dissent by Rehnquist which urged that the Court give more weight to the government’s “administrative convenience” argument in the federal social insurance context. Rehnquist argued that the Social Security Administration must deal with millions of applications; and accordingly, important values of accuracy and promptness are placed in jeopardy by excessive judicial scrutiny.

Justice Blackmun is reluctant to vote to overturn classifications based upon illegitimacy. He emphasizes that while the appropriate scrutiny is “not a toothless one . . . the burden remains upon [those challenging the classification] to demonstrate the insubstantiality of [the means chosen].” Earlier, the Justice had concurred in a dissent which deemed poverty a suspect classification, but in later cases he appears to have moved away from that position.

In the race relations context, Blackmun almost always has voted with the majority. He did not do so, however, in Bakke. His support of the Brennan dissent and his own brief dissenting remarks displayed a substantial commitment toward preferential admissions programs for minorities. As did Brennan and Marshall, he emphasized that the Court must come to grips with the reality of race relations in America. He declared that “to get beyond racism, we must first take account of race . . . . [T]o treat some persons equally, we must first treat them differently.” He “suspect[ed] that it would be impossible to arrange an affirmative action program in a racially neut-

337. Califano v. Goldfarb, 430 U.S. 199, 224 (1977) (Court held that denial of social security benefits to widowers who are unable to show dependency upon deceased wage earners violated Constitution) (Rehnquist, J., joined by Blackmun, J., dissenting).
338. Id. at 225.
341. See United States v. Kras, 409 U.S. 434, 446 (1973) (Court per Justice Blackmun upholds state requirement that individual pay $50 fee as a prerequisite to bankruptcy relief; the Court found no “fundamental right” to that relief, especially since the legislation fell within the area of “economic and social welfare”). Justice Blackmun also joined in San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1 (1973), finding no equal protection violation, notwithstanding the widely disparate per-pupil expenditures.
344. Id. at 2808.
eral way and have it successful.” While Allan Bakke, the disappointed white candidate to the medical school, might have been a victim of the program, Blackmun wondered “who is to say” that others excluded by other valid governmental remedial efforts, sustained by the Court, have not also been victimized equally. Furthermore, he argued that a preference being given to a class of applicants should not be determinative since university and governmental preference systems are commonplace.

Nor was it advisable for the Supreme Court to intrude upon a university’s admissions process. The Tribunal simply is “ill equipped” to resolve that all-too-complex problem: “Among the qualified, how does one choose?” Nor was there any clear, constitutionally meaningful line between the Davis fixed-number-of-places approach and the Harvard rating system. In both, “subjective application is at work.”

The need, therefore, was to interpret the equal protection clause with “breadth and flexibility and ever-present modernity” to make certain that it did not “perpetrate racial supremacy.” While the clause may have grown in its mandate, Justice Blackmun contended that it has not “broken away from its moorings and its original intended purposes” of protecting the ex-slave and his descendents.

Justice Blackmun has been hesitant to read the liberty or property concepts broadly; however, once he has been satisfied that a constitutional right has been created by state law, he asserts that “the federal Constitution, not state law [should determine] the process to be applied in connection with any State decision to deprive [anyone] of it.” Constitutional due process must be accorded to the individual with such an interest.

345. Id.
346. Id. at 2807.
347. Id. at 2808.
348. Id. at 2807.
349. Id. at 2808.
350. Id. at 2807.
351. Id. at 2809.
352. Id. at 2808.
353. Id. at 2807.
355. Bishop v. Wood, 426 U.S. 341, 361 (1976) (Blackmun, J., joins White, J., dissenting). But see Ingraham v. Wright, 430 U.S. 651 (1977) (Blackmun, J., joins majority in finding that corporal punishment engages a due process interest, but that no prior hearing is thereby required; the Court was satisfied that subsequent state court common law relief for “aberrational” abuse would be adequate to protect students).
In fourteenth amendment cases outside the area of abortion decisions, Justice Blackmun is most well-known for his activist stance in the area of environmental law. He has called for an "imaginative expansion of our traditional concepts of standing . . . to enable an organization such as the Sierra Club . . . to litigate environmental issues." More recently, he contrasted improper federal interference with state public employee salary scales, on the one hand, with broad national authority to compel state compliance with federal environmental standards, on the other.

While perhaps labeled as a moderate or restraintist, Justice Blackmun has voiced a strong judicial commitment to several kinds of claimants: the pregnant woman seeking an abortion, the alien challenging restrictive state laws, the black applicant benefiting from minority-preference admissions programs, and the environmental group seeking standing.

JUSTICE STEVENS

John Paul Stevens is closer than Blackmun to the Brennan-Marshall wing of the Court. Yet, in a number of respects, his opinions evidence an independent stance. He argues that the Court has used a single equal protection standard all along; hence, he believes that close examination must be made in a particular context, and the members must be "especially vigilant" in applying that standard to classifications appearing to incorporate outmoded and inaccurate stereotypes. In race relations cases, he supports the Tribunal's new emphasis on the need for establishing purposive discrimination; nevertheless, he does not downgrade the importance of disproportionate impact in determining intent. Unlike Brennan and Marshall, he construes Title VI to forbid university admissions policies grounded upon race. Outside the race context, he is more willing than his two associates to read state legislative authority broadly. He has disagreed with them on some abortion issues, stressing state power over minors. Finally, in several due process contexts, his expressions attest to his independent posture and show a disposition to be supportive of state courts.

Critical of the multi-tiered approach in equal protection cases, Stevens maintains that in actuality the Supreme Court has "employed

He believes that it is more fruitful to assess carefully the “reasons motivating particular decisions” than to try to “articulate [the standard] in all-encompassing terms.” Such an examination reveals that, in Justice Stevens’ mind at least, the Court properly pays close attention to classifications which seem the product of habit. “Habit, rather than analysis, makes it seem acceptable and natural to distinguish between male and female, alien and citizen, legitimate and illegitimate.”

Justice Stevens feels that in the past there was much “the same inertia in distinguishing between black and white.” Therefore, he contends that such a “stereotyped reaction may have no rational relationship—other than pure prejudicial discrimination—to the stated purpose for which the classification is made.”

In race relations cases, he has taken a position somewhat at variance with that of Brennan and Marshall. Unlike those Justices, he endorses the majority’s new focus upon the claimant’s burden to establish purposive discrimination, not merely disproportionate impact of government action upon a racial minority. His concurrence in Washington v. Davis sought to emphasize the evidentiary weight of such impact. In United Jewish Organizations v. Carey, he endorsed Justice White’s reading of state reserved power as affording a sufficient basis for framing legislative districting plans that took race into account in redressing past discrimination. Finally, he expressed uneasiness over the statutory construction by which post-civil war legislation was interpreted loosely to achieve present national goals.

Justice Stevens, in his concurring opinion in Bakke, also

361. Id.
363. Id.
364. Id. at 520-21 (citation omitted).
366. Justice Stevens stated that “the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds.” Id. at 253. His point was that “the line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps not quite as critical, as the reader of the Court’s opinion might assume . . . .” Id. at 253-54.
367. 430 U.S. 144 (1977) (Stevens, J., joins White, J., in the majority opinion). Only Justice Stevens joined Justice White’s view that there were two independent bases—federal and state—for sustaining the apportionment plan.
parted company with his two senior colleagues. He did so not only on the statutory question involved, but also on the appropriateness of addressing the more troublesome constitutional issue.

To him, the meaning of Title VI was "crystal clear." The provision was intended to forbid the kind of government action which had taken place—exclusion of a candidate from a federally supported program on the basis of race.

Furthermore Stevens maintained that resolution of the statutory issue was dispositive. No broader constitutional question regarding the general matter of affirmative action programs had to be considered. Indeed, it was not proper for members to address that question because no class action was involved in the case before the Court. The litigation simply involved one individual's challenge to the process being applied to his candidacy. Accordingly, the question whether "race can ever be used as a factor in an admissions decision is not an issue in this case, and . . . discussion of that issue is inappropriate." By focusing narrowly, he avoided examination of the much more volatile subject: the constitutionality of affirmative action programs to redress injuries caused by societal discrimination.

In the abortion setting, Justice Stevens' views differ from those of Brennan and Marshall as well. Justice Stevens found valid a distinction between state prohibitory legislation and the failure of a state to provide financial assistance to indigents to get abortions, and he concurred in the Court's decision to sustain the right of a state to

370. Id. at 2812. "[N]othing in the legislative history justifies the conclusion that the broad language of [the statute] should not be given its natural meaning." Id. at 2814.

371. Id. at 2814.

372. Justice Stevens had no difficulty in assuming that Title VI permits a private cause of action. He argued that the question, whether a private cause of action existed, was "not properly before us" since the question was not raised below by the university. Id. He strongly intimated, however, that if he were to reach the question, he would find that such a cause did exist. Id.

373. Id. at 2811. Justice Stevens added, however, that if the university prevailed on the statutory issue, then the Court would have to confront the constitutional question. Id.

374. Id. at 2809.

375. Id. at 2810. For a contrary view, see Justice Powell's opinion. Id. at 2747.

376. Justice Stevens stated, "It is always important at the outset to focus precisely on the controversy before the Court." Id. at 2809. He noted that "[f]our members of the Court have undertaken to announce the legal and constitutional effect of this Court's judgment . . . . It is hardly necessary to state that only a majority can speak for the Court or determine what is the 'central meaning' of any judgment of the Court." Id. n.1. He continued, "It is particularly important to do so in this case because correct identification of the issues will determine whether it is necessary or appropriate to express any opinion about the legal status of any admissions program other than petitioner's." Id. at 2809.

deny such aid. Furthermore, he would have upheld state legislation requiring parental consent before an unmarried minor could undergo an abortion.\textsuperscript{378} In a related case, he deemed "frivolous" the argument that a minor had a "constitutional right [to use] contraceptives" notwithstanding the wishes of parent or state.\textsuperscript{379}

Justice Stevens has acknowledged that "[national] power over aliens is of a political character . . . subject only to narrow judicial review."\textsuperscript{380} Nevertheless, he voted to strike down a federal civil service regulation excluding nonresident aliens as beyond the Commission's mandated concern for an efficient service.\textsuperscript{381}

In cases involving due process challenges, Justice Stevens again reveals his distinctive approach. In Bishop v. Wood,\textsuperscript{382} for example, he wrote for the Court in finding that a fired policeman had no constitutional right to continued employment; therefore, the policeman had no due process hearing right. Justice Stevens emphasized that a federal court was not the appropriate forum to review public agency personnel decisions, even though "numerous individual mistakes are inevitable."\textsuperscript{383} In another case,\textsuperscript{384} he suggested that he agreed with Justice Brennan that injury to reputation implicated a liberty interest.\textsuperscript{385} He went on, however, to offer the possibility that an adequate state court remedy might satisfy due process requirements even absent federal statutory relief.\textsuperscript{386} In a third opinion, this time a concurrence in Moore v. East Cleveland,\textsuperscript{387} Stevens employed a more deferential standard than did Powell in his plurality opinion. The case involved an ordinance which sought to put limits on the freedom of extended families to live together. The Powell opinion had employed

\textsuperscript{378}. Planned Parenthood v. Danforth, 428 U.S. 52, 101 (1976) (Stevens, J., dissenting). Such a view stems, in part, from Justice Stevens' belief that a legislature may properly assume that "most parents will be primarily interested in the welfare of their children . . . ." \textit{Id.} at 104.


\textsuperscript{381}. \textit{Id. But see} Fiallo v. Bell, 430 U.S. 787 (1977) (Stevens, J., joining majority in sustaining federal statute denying certain immigration preferences to illegitimates); Mathews v. Diaz, 426 U.S. 67 (1976) (Court per Justice Stevens upheld federal law denying medicare to aliens not resident for at least five years).

\textsuperscript{382}. 426 U.S. 341 (1976).

\textsuperscript{383}. \textit{Id.} at 349-50.


\textsuperscript{385}. \textit{Id.} at 702.

\textsuperscript{386}. \textit{Id.}

\textsuperscript{387}. 431 U.S. 494 (1977) (ordinance preventing grandmother from having her two sons' children live with her violated due process).
an intermediate standard in testing legislation when "the government intrudes on choices concerning family living arrangements." Justice Stevens invoked the limited standard of review applicable in zoning cases and stressed traditional property rights.

The new Justice, then, appears to establish a number of bridges to the center from his independent base.

II. Who Speaks for the Court?

Having considered the role of each of the nine current Supreme Court Justices, one must shift focus and ask which judge or grouping appears to speak for the Tribunal. Clearly, none of the members is so far out of step that he does not at times write the Court opinion in a fourteenth amendment case. For example, Justice Brennan, portrayed along with Justice Marshall as positioned on one end of the spectrum framed the recent Court intermediate standard to be used in gender classification cases. Justice Marshall wrote for the Court in announcing the right of prisoner access to adequate law library materials. The two Justices, however, with their commitment to a liberal district court access policy and a more substantial judicial role in protecting racial minorities and the politically weak, are not in the mainstream of the Court. Nor for that matter is Justice Rehnquist, especially in equal protection cases in which he readily finds bases upon which to sustain the actions of political institutions.

To the extent that the Chief Justice aligns himself with Justice Rehnquist in such instances, he also does not represent majority thinking; however, his opinions in standing cases generally achieve majority support. More important, he is the official leader of the Supreme Court. He represents his colleagues before the other branches of government and in public addresses. Undoubtedly as his predecessors did, he occasionally restrains his impulse to dissent in order to present the image of a unified Tribunal and to maintain his influence upon doctrinal development.

Of the five remaining Justices, three appear to be the major central force of the Court, though by no means a cohesive voting

388. Id. at 499.
389. Id. at 520.
392. See notes 121-23 supra and accompanying text.
393. See note 209 supra and accompanying text.
394. It is probable that his initial positions in Roe v. Wade, 410 U.S. 113 (1973) and Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971), reflected that effort rather than his true attitude, given his later shifts. See notes 216-27 supra and accompanying text.
bloc. They are Justices Powell, White, and Stevens. Each has a somewhat different perspective concerning Court responsibility; yet together their approaches generally attract a stable majority. Justice Powell is the most important in that regard. His views on access limits, his substantial deference to other institutions, and his employment of intermediate levels of scrutiny in certain kinds of cases have won support. But Court members may not be ready to accept his thinking in school desegregation settings. For example, no other Justice in the swing group endorsed the non-exclusionary voluntary affirmative action programs endorsed by Justice Powell in Bakke. As a practical matter, given the even Court split, the Court majority is committed, at least for the present, to Powell's position. Furthermore, it is likely that had Stevens reached the constitutional issue, he would have supported Powell's position as well.

Justice White's focus upon an inquiry into "purposive discrimination," rather than mere determination of race impact, is favored by a majority of the Court. Perhaps he is somewhat more activist in equal protection cases and more restraintist in substantive due process contexts than most other members. Nonetheless, this pragmatic, long-time swing member should be expected to gain adherents to his position.

Justice Stevens seems drawn to the center. He does not wish to involve himself in the debate regarding the number of levels of equal protection scrutiny. He contends that his colleagues have employed a single standard all along and should get on with the business of applying it with care, being especially searching where stereotyping may be present. Perhaps his opinion in Bakke, narrowly focusing upon the statutory issue, is another instance of his effort to have the Court avoid confrontation over volatile constitutional issues where

395. See notes 145-50 supra and accompanying text.
396. See notes 165-73 supra and accompanying text.
397. See notes 154-56 supra and accompanying text.
398. See notes 162-63 supra and accompanying text.
400. This supposition is based upon his general pattern in equal protection cases and his broad endorsement of race-conscious remedial relief to enforce the Voting Rights Act. See note 367 supra and accompanying text.
401. See note 275 supra and accompanying text.
402. See notes 261, 271-72 supra and accompanying text.
403. See notes 278-80 supra and accompanying text.
405. See notes 362-64 supra and accompanying text.
another avenue is available and dispositive. His efforts to join in a broad Court consensus are evidenced by his expressed sentiments in other contexts as well: his willingness to employ the phenomenon of purposive discrimination as determinative (while still emphasizing the importance of disproportionate impact), his counsel of restraint in public employment situations, and his assumptions about state court competence.

III. The Collective Portrait

A. The Court's View of its Responsibilities

Giving somewhat more weight to the priorities of Justices Powell, White, and Stevens, but taking into account the perceptions of their colleagues, the author suggests the following enumeration as positions now endorsed by the Burger Court:

1. A claimant should be denied standing absent personal injury (or imminent threat) brought about by the government action being called into question. Some vague stake in the outcome or generalized grievance will not suffice, nor will injuries to third persons, unless there is strong reason to permit the claimant to assert the rights of third persons. Rather, other prudential considerations should be taken into account. These include reflecting upon the strength of the causal link between the plaintiff’s present situation and the challenged government conduct, as well as the likelihood that the judicial relief sought will redress the injury. The Court believes that no remedy should sweep more broadly than is necessary.

2. The primary responsibility for policy making lies with the elected branches; the Supreme Court has only narrow responsibility. When it appears that classifications may be the result of improper stereotyping or may interfere with personal rights deemed worthy of judicial protection, the Court should examine such regulations closely. Otherwise, it should seek to defer to the other branches of government. The Court cannot be expected to provide

407. See note 376 supra and accompanying text.
408. See note 366 supra.
409. See notes 382-83 supra and accompanying text.
410. See notes 383-86 supra and accompanying text.
411. See note 145 supra.
412. See notes 147, 329 supra and accompanying text.
413. See notes 146-50 supra.
414. See notes 145, 170, 172, 207 supra and accompanying text.
relief in every case when political unfairness or arbitrary government action may have taken place.  

3. Specifically, it is for the Congress and the state legislatures, not the Court, to develop comprehensive policies regarding national concerns. Where it appears that the national and state legislatures have made serious efforts to deal with such matters, the Court should exhibit judicial restraint. Absent judicial findings of purposive discrimination, it is for those political institutions to choose either neutral racial policies or affirmative action programs benefiting the minority—whether it be in apportionment, employment, public school assignment, or university admissions.  

What is the permissible scope of such affirmative action programs? Bakke is important to consider in seeking an answer. Yet given the four-one-four split in the Court, much is left unresolved; however, Bakke and other case law suggest the following:

A. Affirmative action programs are constitutional. Race may be considered as a factor. That is, the Constitution does not forbid voluntary governmental programs in which the racial status of a minority applicant is weighted positively in considering his application on an individual basis.  

B. Governmental exclusionary race preferences offend the

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416. See note 280 supra.

417. Where there is a conflict between Congress and a state, of course, federal law—provided it is deemed in pursuance of the Constitution—will preempt any state policy that stands as an “obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” Hines v. Davidowitz, 312 U.S. 52, 67 (1941).


419. Id.

420. See, e.g., Washington v. Davis, 426 U.S. 229 (1976) (Court noted that Congress, without showing purposive discrimination, may prohibit by statute private employment testing that has disproportionate racial impact).

421. See, e.g., Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971). In dicta, the Court endorsed school district authority, absent purposive discrimination, to take race into account for racial balance. Id. at 16.


423. Id. (Powell, Brennan, Marshall, Blackmun, White, JJ.). The latter four would go further, of course. Id. at 2782-94 (Brennan, J., concurring in part and dissenting in part).

424. Id. at 2764. Voluntary school board busing to improve racial balance probably need not proceed on an individual basis, since the program works no total exclusion from the system. This is in contrast to a voluntary university race-conscious minority admissions program even where race is only a factor. See note 421 supra.

425. The Court would be unlikely to label an acceptable fixed racial preference as a “quota.” Yet the label “quota” or “goal” is not automatically determinative. See Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 25 (1971) (“use . . . of mathematical ratios [to remedy de jure race segregation in the public schools] was no more than a starting point in the process of shaping a remedy, rather than an inflexible
Constitution unless established upon demonstrated need by authorita-
tive governmental bodies. Only authoritative findings by the ap-
propriate judicial, legislative, or administrative institution or agency
that fixed racial percentages are needed to redress discrimination

requirement”) (Burger, C.J.). But see Regents of the Univ. of Calif. v. Bakke, 98 S. Ct. 2733, 2748 (1978) (“semantic distinctions” between goals and quotas are beside the point; in this case there was a “line drawn on the basis of race and ethnic status” which marked a total exclusion) (Powell, J.). In Bakke, both courts below characterized the classification as a quota. Id. at 2748 n.26. Justice White in his separate opinion in United Jewish Orgs. v. Carey, 430 U.S. 144, 147 (1977) stated: “[A] re-apportionment cannot violate the Fourteenth or Fifteenth Amendment merely because a State uses specific numerical quotas in establishing a certain number of black majority districts.” Id. at 162 (emphasis added). Chief Justice Burger, dissenting, labeled the apportionment there an objectional “strict quota approach.” Id. at 182. The term “quota” may connote either acceptance of the unqualified to meet a fixed number or percentage or a continuation of the preference for a period or to a degree beyond the need for remedying discrimination. Governmentally established goals with reasonable and flexible timetables for private institutions seeking government contracts probably would continue to pass con-
stitutional muster.

426. See Regents of the Univ. of Calif. v. Bakke, 98 S. Ct. 2733, 2759 (1978) (Powell, J., concurring). Of course, Justice Powell spoke only for himself here. Justice Brennan in his opinion for the four dissenters did not disagree outright with the requirement for an authoritative government body. Rather, he contended that “the manner in which a State chooses to delegate governmental functions is for it to decide.” Id. at 2788 n.42. He maintained that the university regents who established the program were an authoritative body under the California Constitution.

In employment situations, in which the challenged classifications are established by the legislature or a rule making agency, Justices Powell and Stevens’ opinions suggest a willingness to find those bodies “authoritative.”

427. Id. at 2755 n.41. The concept of findings apparently is construed broadly to include consent decrees where employer-defendant enters into settlement while dis-

428. An authoritative government body may properly determine that a violation has taken place requiring exclusionary racial classification (not a color-blind approach) although no discriminatory intent has been proven. See Furnco Constr. Corp. v. Waters, 98 S. Ct. 2943 (1978) (defendant may rebut prima facie case of discrimination in employment “treatment” by showing it was “reasonably related to achievement of some legitimate purpose.” Id. at 2950. There is no additional obligation to show the method was directed toward consideration of the qualifications of the “largest number of minority applicants.” Id.); Lau v. Nichols, 414 U.S. 563, 568 (1974) (discussed by Powell, J., in Regents of the Univ. of Calif. v. Bakke, 98 S. Ct. 2733, 2756 (1978); “Lau . . . rested solely on the statute, which had been construed by the responsible administrative agency to reach educational practices ‘which have the effect of subjecting individuals to discrimination.’” The Court found a statutory violation in the “failure of the San Francisco school system to provide remedial English instruction for . . . students of oriental ancestry who spoke no English . . . .” Id. at 2755); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (“disparate treatment” and burden shifting); Griggs v. Duke Power Co., 401 U.S. 424, 435-36 (1971) (under Title VII, where there has been a “disparate impact” upon racial minorities or women, employer has burden of establishing that the
will permit employment of such percentages. 429 Otherwise, the Su-

qualifying test used is sufficiently job-related).

Bakke involved a racial classification by a state university. While such a classification by a private university probably would not violate the Federal Constitution, given the absence of state action, it no doubt would violate Title VI which speaks in terms of “any” program, so long as it is receiving federal monies. See 42 U.S.C. § 2000d (1976).

429. Regents of the Univ. of Calif. v. Bakke, 98 S. Ct. 2733 (1978). Although it is true that Powell spoke only for himself there, one must take account of his middle position on the Court. It is fair to conclude that Chief Justice Burger and Justice Rehnquist—probably no more predisposed than Justice Powell toward claims by racial minorities—would require such an authoritative body. Indeed, Chief Justice Burger even dissented to the remedial approach in United Jewish Orgs. v. Carey, 430 U.S. 144 (1977), even though it was endorsed by the Justice Department and a state legislature. Justices Stewart and Stevens probably would require such a body as well. The other Justices might choose not to disagree with the text proposition, but might disagree over whether a particular governmental unit was “authoritative.” See 98 S. Ct. at 2787 n.42 (Brennan, J., dissenting). See also Friday v. Uzzell, 98 S. Ct. 3139 (1978) (racial preference in student senate and disciplinary panel).

The Court is likely to require that exclusionary percentage preferences, even by an “authoritative” body in order to pass constitutional muster, must be remedial in nature to cure individual, group, or perhaps industry-wide discrimination, not merely abstract societal discrimination. This probably would be so even in the case of federal legislation. But the Justices doubtless would seek, if possible, to construe the legislation to meet that condition. An alternative strategy would be for the Court to construe the legislation as not intending the classification which was administratively created. The Court avoided reaching the question whether the Public Works Employment Act of 1977, 42 U.S.C.A. § 6705(l)(2) (Cum. Supp. 1978), providing 10 percent of federal contracts to minority employers, was constitutional. The four Justices in the Brennan group likely would sustain the statute as consistent with the commitment owing racial minorities under the Constitution. A fifth Justice could be found to vote to uphold, given the disposition of the latter five Justices to defer to the authoritative political institutions. Moreover, at least one among that second group probably would satisfy himself that implicit findings, at least with regard to industry-wide discrimination, served as a predicate for the congressional remedial effort. But see note 54 supra.

The Court would have difficulty sustaining the collective bargaining agreement at issue in Weber v. Kaiser Aluminum & Chem. Corp., 563 F.2d 216 (5th Cir. 1977). In that case, a collective bargaining agreement, entered into to seek to abide by Exec. Order No. 11,246, 60 C.F.R. 2 (1977), calling for the preferential hiring of minority men and women (one minority male or woman for every white male hired) was found to violate Title VII. The federal district court made a determination that there had not been any prior employer discrimination. Weber v. Kaiser Aluminum & Chem. Corp., 415 F. Supp. 761 (E.D. La. 1976), aff’d, 563 F.2d 216 (5th Cir. 1977). The executive order was issued in pursuance of federal legislation and thus could not override express congressional intent. (See Regents of the Univ. of Calif. v. Bakke, 98 S. Ct. at 2743 n.12 (Stevens, J.), citing McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 280 (1976): “Title VII prohibits racial discrimination against . . . white petitioners . . . upon the same standards as would be applicable were they Negroes . . . .”). The Court could rule narrowly—if the Tribunal were to hear the Kaiser case—finding that the collective bargaining agreement went beyond the requirements of the executive order.

Court construction of statutes and administrative regulations is a major and complex task for the Justices. Sharp disagreement about the proper interpretation perhaps can be expected most particularly in cases of percentage exclusion. When Justices on the one side find Title VI “crystal clear” in prohibiting the exclusion, and Justices on the other side deem legislative history conclusive to permit it notwithstanding a statute’s “cryp-
preme Court will hold unconstitutional a program using them. This will be the case no matter how “benign” the purposes of the non-authoritative governmental unit instituting the program.430

4. Where a federal court has ordered substantial busing, the Court must scrutinize the record to assure itself that invidious discrimination—and not residential patterns or other neutral causes—is responsible for the current condition.431

5. The states, administering public law and providing essential community services, are important parts of our constitutional system. Congress should not intrude upon their financial capacity to carry out their responsibilities.432 The state political institutions should be assumed to act in good faith unless there is sufficient evidence to the contrary. States should be encouraged to provide adequate levels of governmental services grounded upon equitable funding policies.433

6. A federal district court is ordinarily not an appropriate forum to review the multitude of public personnel decisions.434

7. State judges are assumed to be as committed as their federal counterparts to enforcement of constitutional guarantees—whether in cases of alleged infringement of personal liberties or those in which property rights are at issue.435

B. An Assessment of the Collective View

1. The inclination to rely upon the state courts

Implicit in the collective portrait is a disposition by the present Court to place much more reliance than the Warren Court would...
have placed upon state courts to safeguard individual rights. The Court's current orientation is seen in its recent abstention decisions, its narrowing of federal habeas corpus relief in fourth amendment cases, its construction of section 1983, its restrictive standing requirements, and its employment of the "causation" doctrine to deny or limit access.

This willingness to trust the state tribunals is unfortunate because it assumes an essential parity between the federal and state courts. Such parity in competence and commitment to constitutional norms is questionable. Our fifty state court systems offer widely disparate levels of ability and differing perspectives regarding their constitutional duties. While far from perfect, the federal courts present a marked contrast. On balance, they attract individuals of higher caliber to the tenured federal bench; their traditions embody a greater sense of obligation to enforce constitutional safeguards; their institutional environment is subject to the direct supervision of the Supreme Court; and they possess a more uniform, and generally higher level of competence.

The framers, however, had entrusted to state tribunals the power to enforce the Bill of Rights. Under the Constitution, only the United States Supreme Court had to be established; the framers left it to Congress to determine whether to set up a more elaborate federal court system. By the Supreme Court's decisions, a new opportunity is being presented to the state courts. They can vindicate that renewed faith by demonstrating that any disparity between the two court systems is not a substantial one and will be narrowed.

439. See notes 35, 145, 209 supra. The author opposes such restrictions unless there is risk that permitting access will result in undue continual monitoring of the executive branch.
440. See notes 149, 158, 163, 167 supra. The causation notion, borrowed from torts, involved no physicist's determination of cause and effect, but rather implicates policy factors. The Court should not misuse the concept by employing it to deny relief at that threshold stage. Only where the absence of a link between injury and defendant's conduct is patent should the Court invoke the doctrine.
2. The disposition to be supportive of other organs of government

The propositions reveal a closer scrutiny of the elected institutions in certain particulars. The Burger Court, for example, has formulated new doctrines restricting such organs in drawing classifications based upon gender, illegitimacy, alienage, and family relations. It has limited state power to confine the mentally ill and extended prisoner rights. Thus contrasted with pre-1954 Courts, the Burger Court is not restraintist, but it is deferential, attempting not to interfere with social and economic policy. Given the nature of the Court as an institution and the principle of democratic governance, however, the new direction is a sound one.

There are inevitable risks in that approach, of course. One risk relates to the essentially “political” perspective of the executive or legislative official. Even the most “activist” judge is restricted by the judicial environment of records, briefs, and legal argument. By contrast, while the politician may reflect at times upon the fairness of some proposed government action, he probably lacks both the time and the inclination to develop a continuing constitutional perspective.

A second risk lies in expecting any institution to monitor its own actions. Deference to the states or to the Congress will not automatically foster a greater sense of constitutional obligation. National

446. O'Connor v. Donaldson, 492 U.S. 563 (1975) (state confinement of mentally ill individual without treatment or any demonstration that confinement was necessary for his safety or that of community held violative of due process).
448. See notes 39, 52, 175, 341 supra. In Regents of the Univ. of Calif. v. Bakke, 98 S. Ct. 2733 (1978), eight Justices were restraintists. Chief Justice Burger, and Justices Rehnquist, Stevens and Stewart deferred to the will of Congress. Id. at 2815. Justices Brennan, Blackmun, Marshall and White deferred to the state university program after determining that the federal statute was not controlling—especially given the assessment of the constitutional commitment owed to racial minorities. Id. at 2766. The ninth Justice, Justice Powell, at least indicated his inclination to be deferential to university affirmative action programs. See id. at 2799. Such an inclination presupposes the good faith of university officials in implementing a program which is not used automatically to exclude applicants. Thus, he would defer where minority race status was only one factor in considering applicants on an individual basis. Id. Apparently, he would defer to such an admissions program even where the admissions committee recognized that a small pool of minority students might create a sense of isolation among these students, thereby making it more difficult for them to develop and achieve their potential. See id. at 2764-66 (Appendix describing Harvard College Admissions Program).
League of Cities v. Usery\(^\text{449}\) protected the states' fiscal integrity from federal legislation, but that case does not assure either that the Court will hold the states to a constitutional obligation\(^\text{450}\) to provide basic services or that the states will commit themselves to furnish such benefits. As for the Congress, it is instructive to remember that suspicion about that body's disposition to exercise only those powers granted by the Constitution led to the adoption of the Bill of Rights.

Notwithstanding such risks, there is no viable alternative to placing substantial trust in the political institutions. No single institution can shoulder the task of constitutional protection. The active support of other organs, as well as the toleration of key constituencies is indispensable to any meaningful implementation of declared rights.

Even if the Court on its own could effectively enforce such rights, the politically unpopular and "insular" should think twice about particular reliance upon the Supreme Court. Although the Warren Court came to be perceived by diverse disadvantaged groups as their protector, the institution has not identified with those groups historically. Some contend that the body usually will reflect a conservative bias, as would any institution composed of old, propertied, professional, non-minority males. Admittedly, some judges may feel themselves well-insulated from outside pressures, and free to reexamine their basic premises. Others may speak from an egalitarian or consumer perspective. Nonetheless, an individual who would look to the Court must gamble that new appointees will endorse his value positions.

There are other internal institutional factors that lead to hesitancy to impose a grandiose responsibility upon the Court. Its basic structure is that of an appellate court. Only through the prism of the case—the record from below, the appellate briefs, the oral arguments, the limited research by clerk and judge—can the judge get a sense of the nature of the case and its broader implications. Such a process is an inadequate mechanism\(^\text{451}\) for gathering and comprehending the broader "legislative" or impact facts. Yet sound policy requires meaningful assessments of the nature of a problem and the likely impact of alternative courses of action.

\(^{449}\) 426 U.S. 833 (1976).
\(^{450}\) See Tribe, Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Governmental Services, 90 HARV. L. REV. 1065 (1977). Tribe contends that at least the logic of Usery, if not the Court's design, will support the development of such a constitutional obligation.
Admittedly, the legislative process does not guarantee a better result, but at least that process is more open-ended because of the greater range of witnesses testifying in the rough and tumble hearing rooms, the research machinery available and the expanded potential input from the public. Therefore, it is more likely that the elected branches will come closer to an acceptable accommodation of vital interests. In addition, mistakes in policy development by them are more easily rectified. In contrast, changes in court doctrine must await appropriate future cases and may be delayed further by concerns about overruling precedent. Although it is no small task for a legislative body to reverse itself, such an institution at least is a self-starter.

More important, should major national policy come from a non-elected body? There is endless debate concerning the nature of our democracy and the place of the Court. One side, viewing the Court as antimajoritarian, argues that it should be restricted in its role. Another side sees it as a positive force in making our unique constitutional democracy work. Whatever one's perspective, however, most agree that Court policy-making on too broad a scale violates the democratic principle.

IV. CONCLUSION

This study has presented the Justices' differing viewpoints regarding their responsibilities. It has offered a collective portrait, as well, particularly stressing the key roles of Justices Powell, White, and Stevens. The author criticizes the present inclination of the Court to place greater reliance upon the state courts but endorses the current philosophy of deference to the elected institutions. The search must be for meaningful, narrowly based Court restrictions upon the actions of such political bodies. In acknowl-

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452. See notes 144-201 supra and accompanying text.
453. See notes 243-81 supra and accompanying text.
454. See notes 359-99 supra and accompanying text.
455. See notes 436-41 supra and accompanying text.
456. See note 451 supra and accompanying text.
457. The author believes that Justice Powell's opinion in Regents of the Univ. of Calif. v. Bakke, 98 S. Ct. 2733, 2738 (1978), is such an appropriate narrow based approach. It incorporates two central values: the interest in consideration of the individual as an individual, and the interest in recognizing the reality of racial minority status in America. Admittedly, it makes a major assumption: that officials will implement a voluntary program in good faith while continuing to consider the applicant as an individual. Doubtlessly, there is not enough time and energy to monitor each program to assure that it is not simply a race quota system; however, the author feels that it is worth the
edging its own limited role, the Tribunal is in a better position to gain the support of both the elected organs and key community leaders. In placing some clear boundaries upon political decision making, it can prod the governmental institutions into placing important policy questions on their own agendas for serious consideration. Consequently, narrowly patterned interference would be consistent with our twin ideals—ever in a state of tension—of majority rule and constitutional limits on democratic governance.

risk, rather than automatically reading out of consideration one or the other of those central values.

There is risk, of course, even in an "authoritative" court's, legislature's, or agency's remedial efforts based upon findings of prior identifiable discrimination or upon consent decrees which take the allegations as "proven" for the purposes of remedy. See notes 426-30 supra and accompanying text. Fairness suggests that individuals or their representatives who would be affected adversely by such actions should be made parties to the proceedings. Moreover, there should be a periodic examination to determine whether injuries have been sufficiently addressed; only then can the basic value of individual consideration be restored.