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Selective Judicial Activism in the Equal Protection Context: Democracy, Distrust, and Deconstruction

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INTRODUCTION

The equal protection clause, ambiguous in its language and its history,[1] has over the last three decades been transformed from the "last resort of constitutional arguments"[2] into a significant force in shaping the American response to the continuing challenge of a pluralistic society. This transformation, achieved primarily by the Warren Court,[3] has been effected through development of a multi-tiered theory of equal protection. Beginning with *Korematsu v. United States*,[4] the Court has applied heightened scrutiny to those legislative schemes involving suspect classifications[5] or fundamental rights.[6] If the legislation involves neither a suspect classification nor a fundamental right, the Court applies minimal scrutiny, asking only whether the legislative scheme bears a rational relationship to a permissible state interest.[7] If one of the factors triggering heightened scrutiny is present, however, the Court demands that the

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1. *Compare* R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 3 (1977) (legislative history of fourteenth amendment indicates narrowly defined rights protected by amendment) *with* Bickel, *The Original Understanding and The Segregation Decision*, 69 HARV. L. REV. 1 (1955) (fourteenth amendment invites application based on current "moral and material state of the nation"); Farber & Muench, *The Ideological Origins of the Fourteenth Amendment*, 1 CONST. COMMENTARY 235 (1984); *and* Soifer, *Protecting Civil Rights: A Critique of Raoul Berger's History*, 54 N.Y.U. L. REV. 651-59, 705 (1979) (Berger interpretation of fourteenth amendment defines protected rights too narrowly).

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

3. *See, e.g.,* Harper v. Virginia Bd. of Elections, 383 U.S. 663, 665 (1966) (invalidating state poll tax on equal protection grounds); Baker v. Carr, 369 U.S. 186 (1962) (invalidating state legislative apportionment scheme on equal protection grounds); Brown v. Bd. of Education, 347 U.S. 483 (1954) (striking down racially segregated school system as violation of equal protection). *But see* Craig v. Boren, 429 U.S. 190, 204 (1976) (Burger Court's application of heightened scrutiny to gender discrimination); Graham v. Richardson, 403 U.S. 365, 371-72 (1971) (Burger Court's application of heightened scrutiny to discrimination on basis of alienage).

4. 323 U.S. 214 (1944).

5. Suspect classifications entitled to strict judicial scrutiny include race, Korematsu v. United States, 323 U.S. 214, 216 (1944), alienage, Graham v. Richardson, 403 U.S. 365, 371-72 (1971), and national origin, Hernandez v. Texas, 347 U.S. 475, 480-81 (1954). "Quasi-suspect" classifications, which are subjected to "quasi-strict" scrutiny, include gender, Craig v. Boren, 429 U.S. 190, 197 (1976), and illegitimacy, Levy v. Louisiana, 391 U.S. 68, 71-72 (1968). *See generally* Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection*, 86 HARV. L. REV. 1 (1972) (analysis of Burger Court's equal protection decisions). For the purposes of this Article, the difference between strict and quasi-strict scrutiny is not important, and the broader phrase "heightened scrutiny" will be used.

6. Fundamental rights include voting, Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966), interstate travel, Shapiro v. Thompson, 394 U.S. 618, 634 (1969), and privacy, Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

7. *See, e.g.,* Vance v. Bradley, 440 U.S. 93, 97, 111 (1979) (upholding mandatory retirement age for foreign service personnel); Dandridge v. Williams, 397 U.S. 471, 483-87 (1970) (upholding $250

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government show both a more significant governmental interest and a tighter fit between the means and the end.[8] The Court thus has adopted a practice of selective judicial activism, identifying suspect classifications and fundamental rights as contexts that trigger a more activist stance.

The Court has never clearly articulated the purposes of heightened scrutiny nor sufficiently explained the nexus between the factors that make a classification suspect and the need for both a stronger governmental interest and a tighter fit.[9] One major problem with the current doctrine of selective judicial activism in the equal protection area is a lack of congruence between the justifications offered for context-specific judicial activism and the identification of specific contexts that trigger that activism. This problem takes two forms. Either the justification is persuasive, but the contextual limits are too narrowly circumscribed,[10] or the contextual limits are broad but are not justified in constitutional terms.[11]

This Article is an attempt to explain and defend selective judicial activism while showing that the only persuasive justification for such selectivity necessitates changing the current lines of selection.[12] I will argue that: (1) the purpose of heightened scrutiny in equal protection cases is to identify those instances in which class-based prejudice or indifference has likely influenced the legislative outcome; (2) the "suspect classifications" doctrine often used by the Court in the contexts of race and gender is fundamentally inconsistent with this purpose and should be replaced by a "disfavored class" doctrine; and (3) extension of a "disfavored class" doctrine to race and gender would change results in two significant areas by validating most affirmative action programs and subjecting neutral statutes with a disparate impact to heightened scrutiny.

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monthly welfare payment limit); Railway Express Agency v. New York, 336 U.S. 106, 108-09 (1949) (upholding state law prohibiting advertising on some but not all vehicles).

8. The requirement is captured in a variety of phrases, but the Court most often requires either a "necessary" relationship to a "compelling interest," Shapiro v. Thompson, 394 U.S. at 634, or a "substantial" relationship to an "important interest." Craig v. Boren, 429 U.S. at 197.

9. Several Justices have criticized the heightened scrutiny approach for this failure. Chief Justice Burger has charged that "the Court, in a rather casual way, has articulated the code phrase 'suspect classifications' as though it embraced a reasoned constitutional concept." *In re* Griffiths, 413 U.S. 717, 730 (1973) (Burger, C.J., dissenting); *see also* Vlandis v. Kline, 412 U.S. 441, 458-59 (1973) (White, J., concurring) (noting that Court's "assessment of the weight and value of the interest involved" affects treatment of government interest); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 98-99 (1973) (Marshall, J., dissenting) ("decisions in the field of equal protection defy . . . easy categorization").

10. John Ely, for example, persuasively suggests that "process defects" are the only legitimate justification for heightened judicial review of legislative action. *See generally* J. ELY, DEMOCRACY AND DISTRUST 135-79 (1980). Ely's theory, however, stops short of validating affirmative action and questioning neutral statutes that disproportionately affect minorities.

11. Owen Fiss, for example, argues for many of the contextual limits suggested in this Article, *see* Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 146-47 (1976), but fails to justify his theory on constitutional grounds. *See infra* text accompanying notes 81 to 83 (criticizing Fiss' theory).

12. *Cf.* Benedict, *To Secure These Rights: Rights, Democracy, and Judicial Review in the Anglo-American Constitutional Heritage*, 42 OHIO ST. L.J. 69, 69 (1981) (characterizing much recent constitutional scholarship as an attempt "to find a principled basis for [judicial] activism—something that would permit its continuation but would restrain Justices from simply imposing their personal social values on the country in the fashion of a super-legislature").

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I. THE PURPOSE OF HEIGHTENED SCRUTINY: TWO REJECTED MODELS

Heightened scrutiny of laws involving suspect classifications might be designed to serve any of three goals potentially furthered by the equal protection clause: (1) the prohibition of certain statutory techniques or "legislative outcomes" (the color-blind model); (2) the prohibition of certain substantive states of affairs or "real world outcomes" (the substance model); or (3) the prevention or remedy of certain defects in the legislative process (the process model). I will argue that neither the first nor the second model is wholly defensible and that the Court has, in fact, largely adopted the third model. I will then argue that the Court and most other advocates of the third model have mistaken its implications.

A. THE COLOR-BLIND MODEL

The color-blind model condemns "the government's deliberate use of race as a criterion of selection."[13] The model is derived primarily from two premises: a historical interpretation of the Civil War amendments as designed largely to combat the use of race as a selection criterion, and a moral or political conviction that "one should be judged not as a member of a particular racial group, but as an individual."[14] Additionally, the color-blind model has been defended as a neutral constraint on governmental action that does not require courts to make value judgments thought to be outside the competence of the judiciary.[15] There are two significant implications of the color-blind model. First, since the use of race as a selection criterion triggers heightened scrutiny, any governmental classification based on race—whether benign or harmful—is presumptively unconstitutional.[16] Second, since *only* the deliberate use of race triggers heightened scrutiny, neutral statutes with a disproportionate impact on racial minorities are subject only to the rational basis test and thus are almost always held to be constitutional.[17]

None of the justifications offered for the color-blind model is persuasive as an abstract matter, and a review of the Supreme Court's treatment of the equal protection clause suggests that, despite Justice Harlan's eloquent defense of the color-blind model in his dissent in *Plessy v. Ferguson*,[18] the Court has never

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13. Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540, 548 (1977). For a good description of the color-blind model, see Fiss, *supra* note 11, at 118-23. *See also* Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775, 783-92 (1979) (characterizing 20 years of Supreme Court equal protection decisions from 1954 to 1974 as supporting a color-blind theory).

14. Perry, *supra* note 13, at 540, 549; *see also* Brest, *The Substance of Process*, 42 OHIO ST. L.J. 131, 140-41 (1981) (fourteenth amendment rights are personal).

15. *See infra* notes 35 to 46 and accompanying text (arguing that color-blind model does not effectively constrain judicial discretion).

16. *See* Regents v. Bakke, 438 U.S. 265, 287 (1978) (opinion of Powell, J.) (racial classifications per se require strict scrutiny) and cases cited therein.

17. *See, e.g.,* Mobile v. Bolden, 446 U.S. 55, 71-73 (1980) (disproportionate impact of state's at-large electoral scheme alone not violation of fourteenth amendment); Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 273-75 (1979) (disproportionate impact of employment preference system for veterans not violation of fourteenth amendment); Washington v. Davis, 426 U.S. 229, 245-46 (1976) (disproportionate racial impact of District of Columbia police applicant examination not violation of fourteenth amendment).

18. Justice Harlan wrote:

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adopted this model and has in fact taken positions that cannot be reconciled with it.

1. The Historical Justification

If one makes the controversial assumption that the fourteenth amendment's history ought to be relevant to modern courts' interpretation of that amendment,[19] the historical evidence does not support the color-blind model. The framers of the fourteenth amendment were, in fact, color-conscious in the broadest and most laudable sense of the word. In light of the Civil War, the thirteenth amendment, and the Black Codes, it is indisputable that the framers were motivated primarily, if not solely, by a desire to remedy the desperate plight of newly freed blacks.[20] The references in both the Civil Rights Act of 1866 and the fifteenth amendment to "previous condition of servitude" also suggest the color-consciousness of those who framed both these enactments and the fourteenth amendment; only blacks had been in a condition of servitude. The debates on both the fourteenth amendment and the Civil Rights Act focused on the scope of the rights conferred on the newly-freed blacks: proponents attempted to meet the fears of opponents by assuring them of the limited objectives of the bills.[21] Moreover, the 1866 Civil Rights Act, enacted by the same Congress, explicitly conferred on all citizens the same rights as those "enjoyed by white citizens,"[22] suggesting an intention to protect blacks.[23] Finally, the earliest—and thus most significant[24]—judicial interpretation of the equal protection clause highlights the color-consciousness of that era. Justice Miller, writing for himself and four other Justices in the *Slaughter-House Cases*,[25] stated that he "doubt[ed] very much whether any action of a State not

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> [I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law.

Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

19. *Compare* R. BERGER, *supra* note 1 (legislative history of fourteenth amendment commands that intention of framers be binding on the Court) *and* Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 17 (1971) (emphasizing importance of framers' intent in finding existence of constitutional rights) *with* Brest, *The Misconceived Quest for the Original Understanding*, 69 B.U. L. REV. 204, 205 (1980) (concluding that theory of constitutional interpretation based on framers' intent is untenable) *and* Ely, *Constitutional Interpretation: Its Allure and Impossibility*, 53 IND. L.J. 399, 400 (1978) (concluding that Constitution was meant to be interpreted by each age in a contemporary context).

20. *See* III C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 265 (1922) (fourteenth amendment designed to make blacks the political equals of whites). Even those commentators who deplore the present Court's unwarranted expansion of the fourteenth amendment do not deny—in fact reaffirm—that the amendment was designed primarily as a protection for blacks. Their claim is merely that it was not intended as the broad protection read into it by the modern Court. *See* R. BERGER, *supra* note 1, at 166-83 (arguing that equal protection clause conferred only limited rights on blacks).

21. *See* P. BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 466-71 (1975) (excerpts from debates illustrate great concern over nature of rights being conferred on newly freed blacks); Bickel, *supra* note 1, at 1, 40-46 (same).

22. 42 U.S.C. §§ 1981, 1982 (1982) (devolved from 1866 Civil Rights Act).

23. *But see* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 289 (1976) (legislative history reveals that Civil Rights Act of 1866 viewed "by its opponents and supporters . . . as applying to the civil rights of whites as well as nonwhites").

24. *See, e.g.*, R. BERGER, DEATH PENALTIES 11 (1982) (it is a "canon of interpretation that contemporaneous constructions carry great weight").

25. 83 U.S. (16 Wall.) 36 (1872).

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directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision."[26] He found that clause to be "clearly a provision for *that race* and that emergency . . . ."[27]

It is, of course, unsurprising that the framers of the amendment did not adopt, even implicitly, the color-blind model; they did not, and could not, contemplate any context in which their color-conscious desire to assist blacks might come into conflict with the results mandated by a color-blind model. The historical justification for the color-blind model thus founders on the same shoals that most such analyses do: the 19th-century society and political climate was so immeasurably different from our own that many of the issues that concern us never occurred to the framers.[28] Proponents of the historical justification thus must either accept as constitutionally valid color-conscious legislation designed to help rather than harm blacks or abandon the historical perspective as a tool of constitutional interpretation. In either event, the justification fails to support the color-blind model.

2. The Individualist Perspective

The color-blind model also relies on an individualist perspective to reject all classifications based on race. The individualist perspective is based on the principle that one ought to be judged as an individual rather than as a member of a group. An illustration of the tautological nature of this argument may be found in an elaboration of the philosophical difference between classification and denotation.

To classify is to identify by specifying class membership conditions; to denote is to identify by name.[29] Classification thus uses general terms, or predicates, while denotation uses singular terms, or names. It is possible for two different classifications or predicates to pick out the same individuals: the classification "the first three prime numbers" and the (different) classification "the first three natural numbers" both pick out the numbers one, two, and three. Either classification is satisfactory if our purpose is merely to direct attention to the numbers one, two, and three. If, however, we wish to avoid classifying at all, we must list or name the referents individually: "one," "two," and "three." It is not possible for the same linguistic formulation to classify and to denote simultaneously; it is not possible for a word to be simultaneously a predicate or general term and a name or singular term.[30]

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26. *Id.* at 81.

27. *Id.* (emphasis added).

28. One response to this challenge is the hermeneutic tradition, in which the historian attempts to understand historical actors in the context of their own understandings of their world. *See* R. COLLINGWOOD, THE IDEA OF HISTORY (1946) (historical thinking focuses on texts "that describe not what is now being thought but what was thought by . . . historians at some time in the past"). The problem with this approach is that it utterly fails to serve interpretivism's underlying goals of determinacy and judicial restraint and thus denies the validity of its own history-oriented approach. *See* Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 799-802 (1983) (discussing this "dilemma of interpretivism").

29. *See generally* R. CARNAP, MEANING AND NECESSITY (1947); Black, *A Translation of Frege's Uebersinn Und Bedeutung (Sense and Reference)*, 57 PHIL. REV. 207 (1948).

30. *Cf.* Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1249-50 (1970) (drawing semantic distinction between "a law limiting income tax exemptions for children to

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When this elaboration is applied to legislation, the problem with the individualist perspective becomes clearer. Legislation always uses the human analogue of "the first three natural numbers" ("blacks"; "residents of Minneapolis"; "law school applicants with LSATs above 650") and never the human analogue of "one," "two," "three" ("Susan Jones," "Mary Smith," and "Anne Doe").[31] Because all legislation uses predicates, it cannot denote individuals. In other words, because the legislature does not—and presumably cannot—pick out a person except by specifying the class membership conditions of the groups to which that person belongs, it never treats the person as an individual but always as a member of a group. The significance of the distinction between classifying and denoting is that it is impossible for governmental action that classifies to treat people also as individuals.

What, then, are we to make of the color-blind theorist's demand to be treated as an individual? It cannot be a demand to be named rather than classified; I would suggest that it is, in fact, simply a demand to be differently classified. An example may illustrate the point. Allan Bakke's[32] complaint was not that he was treated as a member of a group, but that he was treated as a member of the wrong group. He wished to be treated as a member of the group "applicants with grades and MCATs above a certain arbitrary level" rather than as a member of the group "white applicants."[33] Thus, the individualist argument is nothing more than a restatement of the basic premise of the color-blind model that race is an impermissible basis on which to classify. The individualist argument fails to explain, however, why MCAT score is a permissible classificatory device and race is an impermissible one.[34] The argument, standing alone, thus cannot justify the color-blind model.

3. Constraining Judicial Discretion

Advocates of the color-blind model often contend that any broader or more flexible interpretation of the equal protection clause is both politically and practically intolerable. Politically, all interpretivists agree that without strict external constraints on the judiciary judges will substitute their values for

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the children of Caucasians" and "a law granting the exemption to 'the children of Asger H. Aaboe, Jerrit Aardewerk . . . .' "). I am indebted to Richard Eldridge for suggesting the numeric example used in the text.

31. It may, in fact, be unconstitutional under the bill of attainder clause for the legislature to deal in individuals rather than in classes. *Cf.* Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 472 (1977) (statute singling out former President Nixon is not a bill of attainder because Nixon "constitute[s] a legitimate class of one").

32. Regents v. Bakke, 438 U.S. 265 (1978).

33. *Id.* at 272-80. *See* Karst & Horowitz, *Affirmative Action and Equal Protection*, 60 VA. L. REV. 955, 961 ("A claim to be treated on the basis of one's 'individual attributes' either is a disguised claim to be treated as a member of the group possessed of one or more specified attributes or it is unintelligible"); *see also* R. DWORKIN, TAKING RIGHTS SERIOUSLY 227-28 (1977).

34. The argument that MCAT scores, unlike race, are related to individual merit, is equally fallacious. Neither race nor intellectual ability (the usual content of "merit") is the result of individual effort, and thus the decision to consider the one but not the other must be based not on a moral theory of just deserts but rather on a theory of social needs. *See* J. RAWLS, A THEORY OF JUSTICE 102 (1971) (natural endowment is "undeserved"); Dworkin, *Liberalism*, in PUBLIC AND PRIVATE MORALITY 137 (S. Hampshire ed. 1978) (talent seen as irrelevant); Karst & Horowitz, *supra* note 33, at 962 ("[i]n speaking of merit in a racial context, one . . . focuses on fulfilling social needs"); Shiffrin, *Liberalism, Radicalism, and Legal Scholarship*, 30 UCLA L. REV. 1103, 1163 (1983) (characterizing relative talent as a "morally arbitrary" selection criterion).

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those of the legislature. Allowing judges to impose their own values is both countermajoritarian, in that judges are not politically accountable, and inconsistent with a perceived need for principles of general applicability to generate determinacy and predictability in the judicial process.[35] By limiting judges to determining only whether the statutory classification scheme is sufficiently related to a legitimate end,[36] the color-blind model of heightened scrutiny is said to serve the purpose of constraining judicial discretion. Thus, the argument goes, the color-blind model confines judicial review to scrutiny of the means rather than of the ends of legislation.

In fact, the color-blind model does not serve these stated goals, as Alan Freeman has convincingly shown.[37] Freeman reasons that the irrationality of race-conscious statutes cannot be demonstrated without assuming either that segregation is itself an illegitimate end or that "racial classifications are almost always unrelated to *any* valid governmental purpose . . . ."[38] Neither assumption can be made "except in the context of a particular historical situation,"[39] and thus judges must engage in the very historical, color-conscious analysis that the color-blind model seeks to preclude. For example, a school principal's decision to segregate black and white students at a graduation ceremony for aesthetic reasons[40] is regarded as illegitimate solely by virtue of the history of race relations in the United States. A similar aesthetic choice, which segregated blondes from brunettes, or those wearing white gowns from those wearing black gowns, would not rest on an illegitimate purpose—assuming, of course, no correlation with race.

The color-blind model's response to the aesthetic segregation hypothetical must ultimately rest on an evaluation of historical circumstances, which the model seeks to avoid. A directly historical response would be to condemn aesthetic segregation as a potential reminder of the legacy of less benign segregation based on prejudice, or as a harbinger of the return of that era. A different response, which attempts to focus on the irrelevance of race, fails to explain why aesthetic relevance is insufficient, that is, why a more compelling state interest is necessary. Again, the explanation lies in circumstances outside the purview of the color-blind model. In other words, the color-blind model's attempt to focus solely on means cannot serve to constrain judicial discretion. A determination of the legitimacy of the end ultimately necessitates resort to sources beyond the fourteenth amendment and its history. The color-blind

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35. *See generally* R. BERGER, *supra* note 1; Berger, *Mark Tushnet's Critique of Interpretivism*, 51 GEO. WASH. L. REV. 532, 532 (1983) ("We are indeed better off being bound by the dead hand of the past than being subjected to the whims of willful judges trying to make the Constitution live").

36. *See* Fiss, *supra* note 11, at 120 (characterizing means scrutiny approach as "mechanical jurisprudence"); Gunther, *supra* note 5, at 1 (proposing means scrutiny approach analogous to remand to legislature for clarification of premises).

37. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978).

38. *Id.* at 1065 (emphasis in original).

39. *Id.* at 1066. *See also* Baker, *Neutrality, Process, and Rationality: Flawed Interpretations of Equal Protection*, 58 TEX. L. REV. 1029, 1030 (1980) ("focus on means is always a subterfuge for evaluation of ends"); *cf.* Fiss, *supra* note 11, at 165-66 (color-blind model is incomplete because it can provide no standard for judging legitimate state goals).

40. *See* P. BREST, *supra* note 21, at 489 (positing the hypothetical in context of discussion of scope of court's review).

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model lacks any principle that would both permit the unavoidable reference to such sources and, at the same time, link the sources and their limits to some constitutional principle. Thus, the color-blind approach to judicial restraint fails on its own terms. It is no more successful at constraining judges than any other model of heightened scrutiny. Its failure to recognize the necessity of some extraconstitutional analysis in fact may reduce its ability to formulate guidelines for restraint by preventing discussion of possible limits on such extraconstitutional principles.[41]

The practical argument in favor of the color-blind model is derived from the supposed impossibility of identifying which groups ought to receive the Court's special protection. Justice Powell has argued that only the deliberate use of race per se should trigger heightened scrutiny; otherwise the Court would be mired in endless speculation as to the effect of an infinite number of historical practices on the myriad ethnic groups in our society:

> There is no principled basis for deciding which groups would merit "heightened judicial solicitude" and which would not. Courts would be asked to evaluate the extent of the prejudice and consequent harm suffered by various minority groups. Those whose societal injury is thought to exceed some arbitrary level of tolerability then would be entitled to preferential classifications at the expense of individuals belonging to other groups. Those classifications would be exempt from exacting judicial scrutiny.[42]

There is in fact no inherent barrier to using this evaluative analysis to demonstrate that particular groups are not deserving of the special protection afforded by the application of heightened scrutiny: as Part III of this Article will show, the Court engages in precisely that sort of analysis in areas other than race and gender. Justice Brennan's plurality opinion in *Frontiero v. Richardson*[43] is an illuminating example of this process. In order to justify applying heightened scrutiny to gender-based statutes, Justice Brennan canvassed the history and continued existence of sex discrimination, the immutability and accidental nature of gender, and the frequent irrelevance of gender to any

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41. One response to this argument is, in essence, that there are certain governmental ends we all know to be invalid, and racial segregation is one of them. If judges are limited to invalidating only those ends condemned by public morality, the argument goes, that is all the constraint we need. *See* Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982). The problem with any theory of constitutional interpretation that proceeds from a notion of shared moral norms is that it operates only to perpetuate the status quo and to serve the needs of the already rich and powerful. *See* Baker, *supra* note 39, at 1055 ; Brest, *Interpretation and Interest*, 34 STAN L. REV. 765 (1982); Tushnet, *supra* note 28, at 785, 791-92. Since modern equal protection law is largely derived from the notion that it is the Court's special function to protect the least politically powerful segments of society, *see* United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938); Powell, Carolene Products *Revisited*, 82 COLUM. L. REV. 1087 (1982), this approach is untenable.

42. Regents v. Bakke, 438 U.S. 265, 296-97 (1978) (opinion of Powell, J.) (footnote omitted); *see also id.* at 289-90 ("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"); DeFunis v. Odegaard, 416 U.S. 312, 338, 340 (1978) (Douglas, J., dissenting); Note, *Suspect Classifications: A Suspect Analysis*, 87 DICK. L. REV. 407, 431 (1982) ("The equal protection doctrine was never meant to serve as a vehicle of inequality by enabling courts to protect those possessing one aspect of an irrelevant trait while neglecting those possessing other aspects").

43. 411 U.S. 677 (1973).

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legitimate government purpose.[44] A similar analysis has led the Court to conclude that illegitimacy[45] and alienage[46] are suspect or quasi-suspect classifications.

4. Precedents

The final criticism of the color-blind model is that it is inconsistent with numerous decisions of the Court.[47] First, it is difficult to reconcile the color-blind model with the Court's extension of heightened scrutiny to nonracial classifications, such as those based on gender or alienage. There is no doubt that the post-Civil War framers focused solely on racial classifications; the nineteenth amendment was not ratified until fifty years after the fifteenth. It is thus difficult to justify expanding a color-blind theory into a gender-blind theory if the basic interpretive principle is historical. Moreover, as noted earlier, the very extension of the doctrine involves a type of analysis that the model is designed to preclude: whatever analogy exists between race and gender, it can only be determined by an examination of historical and social conditions. Such an examination is a tacit recognition that heightened scrutiny must depend on factors other than the language and history of the equal protection clause.

Second, the color-blind model cannot be reconciled with cases validating color-conscious legislation. The Court has declined to apply heightened scrutiny to explicitly color-conscious governmental action in a variety of circumstances. First, the judiciary itself has acted in a color-conscious manner in ordering school busing as a remedy for segregated school systems. Where localities have previously segregated students by law, the Court has rejected the color-blind assignment of pupils to neighborhood schools and instead insisted on color-conscious methods of achieving racial balance.[48] Second, in *United Jewish Organizations (UJO) v. Carey*,[49] the Court upheld a New York redistricting plan concededly motivated solely by a color-conscious desire to increase black voting power; the Court declined to apply heightened scrutiny.[50] Finally, in *Fullilove v. Klutznick*,[51] the Court upheld a ten percent minority set-aside program without even a reference to heightened scrutiny. Chief Justice Burger's plurality opinion explicitly rejected the color-blind model[52] and observed that although "a program that employs racial or ethnic criteria . . .

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44. *Id.* at 684-86 (plurality opinion).
45. Levy v. Louisiana, 391 U.S. 68 (1968).
46. Graham v. Richardson, 403 U.S. 365 (1971).
47. This criticism is, of course, applicable only to the opinions of the Justices themselves, or to those who claim that the color-blind model is descriptive of the Court's work. Those who argue for the color-blind model as a *prescriptive* model are vulnerable to this criticism only insofar as they accept the decisions in the inconsistent cases noted in the text.
48. *See* Keyes v. School Dist. No. 1, 413 U.S. 189 (1973); Swann v. Charlotte-Mecklenburg Bd. of Education, 402 U.S. 1 (1971); *see generally* J. WILKINSON, FROM BROWN TO BAKKE: THE SUPREME COURT AND SCHOOL INTEGRATION 1954-1978 (1979) (integration has clashed with competing ideals of neighborhood schools and color-blind admissions).
49. 430 U.S. 144 (1977).
50. *Id.* at 161.
51. 448 U.S. 448 (1980).
52. *Id.* at 482. Justice Stewart, in dissent, explicitly supported the color-blind model. *Id.* at 522-27 (Stewart, J., dissenting).

calls for close examination," the Court is still "bound to approach [its] task with *appropriate deference to the Congress*."[53]

These cases cannot be reconciled with the color-blind model. The Court's posture in these cases is inevitably dependent on two assumptions that are inconsistent with the color-blind model: first, that racial classifications do not always trigger heightened scrutiny and its concomitant likelihood of invalidation, and, second, that the determination of the appropriateness of race as a selection criterion depends on an historical analysis of race relations in the United States.[54]

B. THE SUBSTANCE MODEL

The substance model reflects an approach directly opposite to that of the color-blind model. Adherents of this outcome-oriented model abandon all structural or procedural restraints on judicial behavior and rely instead on extralegal, extraconstitutional principles to justify particular results. Such principles include equality of respect[55] and equality of conditions.[56] The search of nonsubstance theorists for neutral constraints on the judiciary is dismissed as impossible,[57] with an almost tangible sense of utter frustration.[58]

The major flaw in the substance model is that it fails to explain when judicial activism is appropriate and therefore is unable to posit any limits to such activism. The failure to justify, on any constitutional basis, judicial interference with legislative prerogatives has been consistently condemned by courts and commentators since the demise of *Lochner v. New York*.[59] The absence of a generalized constitutional theory of judicial activism also traps the substance model in a classic paradox: the substantive results applauded by the various diverse adherents to the model are no more or less defensible, in constitutional

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53. *Id.* at 472 (emphasis added).

54. Freeman recognizes the basic contradiction between the color-blind model (encompassed in his model of "perpetrator perspective") and the Court's action in the area of remedies and labels the period of color-conscious remedies the era of contradiction. Freeman, *supra* note 37, at 1079.

55. *See* Baker, *supra* note 39, at 1030-31, 1058-59 (offering "the ethical principle that the government must respect people's equality of worth"); Baker, *Outcome Equality or Equality of Respect: The Substantive Content of Equal Protection*, 131 U. PA. L. REV. 933 (1983) (arguing for equality of political participation, equality of worth, and equality of resources and opportunities).

56. *See* Freeman, *supra* note 37, at 1052-53, 1070.

57. Most anti-process theorists argue that such restraints are a practical and theoretical impossibility. *See, e.g.*, Brest, *The Substance of Process*, 42 OHIO ST. L.J. 131, 142 (1980); Shiffrin, *supra* note 34, at 1103, 1201; Tushnet, *supra* note 28, at 781. Others argue that such restraints are unnecessary. *See* White, *Review Essay: Judicial Activism and the Identity of the Legal Profession*, 67 JUDICATURE 246 (1983) (arguing for greater confidence in legal training and use of established jurisprudential principles to produce "true" and "right" decisions).

58. For an eloquent description of this frustration and its consequences, see Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229; *see also* Shiffrin, *supra* note 34, at 1103, 1110 n.33 (radical recognition of irreconcilable contradictions of liberalism promotes "alternating attitudes of cynicism and despair").

59. 198 U.S. 45 (1905). John Ely has succinctly captured the argument against the *Lochner* approach: "A neutral principle may be a thing of beauty and a joy forever. But if it lacks connection with any value the Constitution marks as special, it is not a Constitutional principle and the Court has no business imposing it." Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 949 (1973); *see also* A. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 92-93 (1962) (arguing danger of judicial rule); Hand, *Due Process of Law and the Eight Hour Day*, 21 HARV. L. REV. 495 (1908) (criticizing *Lochner* for straying beyond boundaries of fourteenth amendment).

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or legal terms, than are any other results. The substance model, in its inherent inability to describe constitutional limits on judicial policymaking, leaves us at the mercy of judicial discretion. The posture of indifference to the Court's role and processes, moreover, deprives the substance model of any intellectually persuasive method of criticizing the Court's performance. To argue over the correctness of results alone is to grant at least some legitimacy to any decision of the Court. The substance model is counterproductive for legal advocacy and legal scholarship insofar as it deprives critics of the Court of the tool of rational argument. It is also internally inconsistent, because the background and socioeconomic status of Justices suggest that they are a segment of society most likely to perpetuate the very status quo deplored by most modern substance theorists.[60]

A brief criticism of the most extreme version of the substance model, the "deconstructionist"[61] approach of some members of the critical legal studies movement, illustrates the defects of the model. The legal deconstructionist denies the objective validity of any interpretation of a text because interpretations, like theories, language, and even "facts," are merely manifestations of subjective belief structures.[62] The act of interpretation is "not the art of construing but the art of constructing."[63] Deconstruction is thus a matter of "demystifying," of identifying and explaining the ideology or belief structures underlying any particular interpretation. The ultimate extension of such a position is what Owen Fiss has aptly termed "nihilism": the argument that "for any text . . . there are any number of possible meanings, that interpretation consists of choosing one of those meanings, and that in this selection process the judge will inevitably express his own values."[64] The basic premise of deconstructionism, then, is that texts—including the Constitution—are inherently indeterminate and that any interpretation is therefore as permissible as any other. The deconstructionists thus criticize the courts solely on the basis of outcome, reasoning that only substantive results count.

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60. Justices have overwhelmingly been members of the privileged classes whose upbringing and education cemented adherence to established norms. *See* Nowak, *Professor Rodell, The Burger Court, and Public Opinion*, 1 CONST. COMMENTARY 107, 114-15 (1984); *see also Developments: Representation of Women and Minorities Among Top Graduates of Twenty Leading Law Schools*, 32 J. LEGAL EDUC. 424 (1983) (indicating predominance of white males among top law school graduates). There are, of course, exceptions: judges whose privileged background does not prevent them from being champions of the powerless. *See* G.E. WHITE, EARL WARREN: A PUBLIC LIFE (1982).

61. The term, and perhaps the legal movement, is rooted in literary theory: the deconstructionists argue that no particular interpretation of a text is correct or incorrect. *See* Derrida, *Signature Event Context*, GLYPH 1 172, 179 (1977) (interpreter must deconstruct metaphysics of presence in order to leave the text bare); Miller, *The Critic as Host*, 3 CRITICAL INQUIRY 439 (1977) (describing deconstruction of poetry as a rhetorical discipline). The literary theory is explicitly applied to constitutional interpretation by some substance theorists. *See, e.g.*, Levinson, *Law as Literature*, 60 TEX. L. REV. 373, 391 (1982) (footnote omitted) ("There are as many plausible readings of the United States Constitution as there are versions of *Hamlet*, even though each interpreter, like each director, might genuinely believe that he or she has stumbled onto the one best answer to the conundrums of the texts").

62. *See generally* Gordon, *New Developments in Legal Theory*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 281, 286-90 (D. Kairys ed. 1982).

63. S. FISH, IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES 327 (1980).

64. Fiss, *supra* note 41, at 741; *see also* A. BICKEL, THE LEAST DANGEROUS BRANCH 81-83 (1962) (labeling legal realists as nihilists); White, *Law as Language: Reading Law and Reading Literature*, 60 TEX. L. REV. 415, 415 (1982) ("why are we reading . . . these old opinions if they mean only whatever we want them to mean?"); Miller, *Tradition and Difference*, 2 DIACRITICS 6, 12 (1972).

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In fact, the radical indeterminacy posited by legal deconstructionists is not the only alternative to the focus on the framers' intent typified by the colorblind model. In responding to the deconstructionist position I will argue first, that something less than radical or absolute indeterminacy is a plausible alternative to intentionalism and second, that a belief in the radical indeterminacy of legal texts is inconsistent with the whole notion of a legal system.

The notion of radical indeterminacy is derived from a rejection of the idea that words, sentences, or texts can have only one discoverable meaning. There is thus a clear contrast between intentionalists or interpretivists, on the one hand, who believe that the "meaning" of a text is what the author intended it to mean, and deconstructionists, who contend that the "meaning" of a text is what any reader interprets it to mean. In fact, neither approach is wholly valid: the fact that some indeterminacy exists because words and texts are unclear or ambiguous does not necessarily mean that the range of permissible interpretations is unlimited. Language is inexact, and it is therefore impossible for an author to say exactly what he means.[65] He can, however, give some indication of what he means and, more important, can make clear a number of things he *does not* mean. The process of interpretation therefore is one of choosing among a limited number of plausible meanings. The text itself indicates the range of permissible meanings.[66]

If we accept the existence of but a limited number of plausible meanings, the remaining question is whether the deconstructionist approach can be applied to the choice among these alternative interpretations. In other words, are all plausible alternatives equally acceptable? The deconstructionist would claim that they are, and the critical legal scholar would maintain that the choice is made solely on the basis of the judge's own values and preferences.

James Gordley has recently refuted this contention by describing the middle ground between the mechanical application of rules of decision and the unfettered exercise of judicial discretion.[67] What judges do, Gordley argues, is to begin with authoritative rules of decision (for example, with the Constitution) and to derive from these rules their underlying "criteria"—that is, the standard of "justice or rightness or usefulness"[68] on which the rules are based. These

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65. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat) 316, 414 (1819) ("such is the character of human language, that no word conveys to the mind, in all situations, one single definite idea . . . ."); *see also* W. ALSTON, PHILOSOPHY OF LANGUAGE 44 (1964) (virtually all words have more than one meaning); Gordley, *Legal Reasoning: An Introduction*, 72 CALIF. L. REV. 138, 141 (1984) ("language . . . does not come stacked with expressions that mean exactly what one wishes to say").

66. *See* Abrams, *The Deconstructive Angel*, 3 CRITICAL INQUIRY 425, 427-28 (1977) (while no one interpretation of passage exhausts everything it means, there are correct and incorrect interpretations); White, *supra* note 64, at 428-29 (there are interpretations that "cannot be right"); Wright, *Professor Bickel, The Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769, 785 (1971) (even vague constitutional provisions "rule out many alternative directions, goals, and ideals"). As Quine realized, the process of interpretation is neither the discovery of hidden meanings nor the creation of new ones, but rather the resolution of ambiguities and the filling in of the necessarily interstitial meaning of the author. W.V.O. QUINE, WORD AND OBJECT 258-59 (1960). Fish argues that it is not the text itself, but the context of the "interpretive community" that limits the range of meanings available; nevertheless, he does concede that such limits exist. S. FISH, *supra* note 63, at 293-99. For a critique of the notion of "interpretive communities," see Brest, *supra* note 41, at 765.

67. Gordley, *supra* note 65, at 138; *see also* S. FISH, *supra* note 63, at 335; Schauer, *An Essay on Constitutional Language*, 29 UCLA L. REV. 797, 806-07 (1982).

68. Gordley, *supra* note 65, at 142.

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criteria provide the starting point for the attempt to discover the "determinative circumstances"[69] in each case. These circumstances are those facts that "call for a particular result according to the authority's criteria."[70] While a judge may rarely, if ever, discern the full range of such circumstances, he can formulate rules that reflect some of them. Each case provides the opportunity for refinement of these "partial rules"[71] through the use of various analytical techniques. Gordley's point is that these refinements need not reflect mere subjective preferences. Instead, they may be based upon reasoning guided by appreciation of the criteria underlying the authoritative rule in question. While there is some judicial discretion in this process, that discretion is not unconstrained; rather, it is limited by the requirements that the judge explain his reasoning and justify his choice by recourse to institutional values.

The question then becomes why we should prefer a theory that limits judges to the institutional, result-independent choices that the Gordley position suggests. What is wrong with describing what judges do as the deconstructionists describe it, instead of as Gordley does? I see two serious problems with the deconstructionist approach. First, if judicial decisionmaking is essentially indeterminate, there can exist no criteria for evaluating the correctness of judicial interpretations or even of outcomes. Given this state of affairs, why should any interpretation, or any theory of interpretation, be preferred over any other? The deconstructionist's denial of the intrinsic correctness of any interpretation or interpretive theory must necessarily encompass his or her own interpretation as well. Deconstructionism thus not only denies the value of its own propositions, it makes criticism of them unproductive. As one critic of literary deconstruction has suggested, "[s]cholars are right to feel indignant toward those . . . writers who deliberately exploit the institutions of scholarship—even down to its punctilious conventions like footnotes and quotations—to deny the whole point of the institutions of scholarship, to deny, that is, the possibility of knowledge."[72]

Second, the denial of the possibility of knowledge, and specifically of correct legal or constitutional reasoning, may be provocative as an academic exercise, but it undermines the necessary presence in American society of dispute-resolving mechanisms. If one claims that there is no determinate basis for interpreting texts or resolving ambiguities, that claim radically alters the definition of judging. The deconstructionist position (and the substance theory in general) transforms the notion of "judging" from that of performing a particular action or process to that of achieving a particular result. Judging is an act or process only if it is envisioned as an independent or "adequately neutral"[73] method of reaching results in ambiguous situations. As soon as the judge's own values are deemed to be the basis for the decision, the process or act of

69. *Id.* at 163.

70. *Id.*

71. *Id.* at 162. *See also* Tushnet, *supra* note 28, at 818-19 (judging as a "craft").

72. E.D. HIRSCH, JR., THE AIMS OF INTERPRETATION 13 (1976); *see also* Rehnquist, *Act Well Your Part: Therein All Honor Lies*, 7 PEPPERDINE L. REV. 227, 231-33, 238-39 (1980) (criticism of Court must be based on principles, not results).

73. *See* Newman, *Between Legal Realism and Neutral Principles: The Legitimacy of Institutional Values*, 72 CALIF. L. REV. 200, 215 (1984) (noting that while perfect neutrality is impossible, adequate neutrality is sufficient).

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deciding has instead become the achievement or implementation of a particular decision.

The inevitable consequence of this transformation is to alter the range of criticisms to which judges may be expected to be responsive or accountable. Actors, including judges, can only be held accountable for breaking the "rules" that apply to the action they are performing. A change in the action being performed results in a corresponding change in the rules applied to its performance. Under the Gordley theory, an act of "judging" may validly be criticized for violating the "rule" of adequately distinguishing contrary precedent or the "rule" of serving such institutional values as simplicity or predictability. Under the substance theory, on the other hand, valid criticism of an act of "judging" takes a wholly different form. For a critical legal scholar such as Baker, an act of judging might be criticized for not following the "rule" of according all persons equal respect.[74] For a conservative such as Justice Rehnquist, on the other hand, an act of judging might be criticized for not following the "rule" that where there is a conflict between the government and an individual, the government ought to prevail.[75] Such criticisms are based on premises entirely independent of the function of the judiciary or the legal system and instead must import moral or political philosophy. The act of judging thus is essentially indistinguishable from any act by any citizen of the polity. Judges no longer are primarily responsible for providing answers to the legal disputes society needs to resolve.[76]

The theoretical basis for the substance model thus casts us adrift from the Constitution as a governing document, insofar as it leaves us neither with answers nor with any justifiable way of approaching the questions. While this approach may, perhaps, be defensible as a tool of literary interpretation, it is fundamentally incompatible with the role of legal interpretation. "Interpretation in the humanities," Paul Brest has pointed out, "is essentially concerned with exposing and illuminating ambiguity; it exalts indeterminacy. Legal interpretation seeks to resolve ambiguity."[77]

One appeal of the substance model has been its ability to achieve what seem to be just results unattainable under any other theory.[78] The color-blind theorist rejects affirmative action programs;[79] the process theorist rejects—or cannot satisfactorily justify—a presumption of invalidity of neutral statutes with a

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74. *See* Baker, *supra* note 55, at 933; Baker, *supra* note 39, at 1029.

75. *See* Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293, 294 (1976) (suggesting this as Justice Rehnquist's "rule" after 4 1/2 years on the Court).

76. *See generally* M.J. PERRY, THE CONSTITUTION, THE COURTS AND HUMAN RIGHTS: AN INQUIRY INTO THE LEGITIMACY OF CONSTITUTIONAL POLICYMAKING BY THE JUDICIARY (1982); *see also* D. RICHARDS, THE MORAL CRITICISM OF LAW 31 (1977) ("Judges do not have the abstract legal right to enforce whatever they believe to be morally right, or to declare illegal whatever is immoral").

77. Brest, *supra* note 41, at 765, 770; *see also* Schauer, *Does Doctrine Matter?*, 82 MICH. L. REV. 655 (1984) (suggesting that Justices *are* constrained by neutral principles).

78. This is not to suggest that either the substance theorist or the antisubstance theorist is essentially result-oriented. It is merely to observe that legal scholars, like all other human beings, cannot ignore what they perceive to be manifest social injustice and that the perception of injustice inevitably shapes their scholarship. *See* G.E. WHITE, PATTERNS OF AMERICAN LEGAL THOUGHT 136 (1978) ("the moral sensibility of scholars is necessarily molded by their social experience, and critical intelligence is in the end an arm of moral sensibility").

79. Regents v. Bakke, 438 U.S. 265 (1978) (opinion of Powell, J.)

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disproportionate impact.[80] At least one process theorist does attempt to argue in favor of this latter result.[81] Owen Fiss contends that the Supreme Court ought to adopt what he calls the "group-disadvantaging principle" instead of the "anti-discrimination principle."[82] Adoption of the former principle would, he reasons, achieve the two "just" results described above. Fiss ultimately fails to persuade, however, because he offers little justification for his "group-disadvantaging principle" beyond its inherent rightness and the fact that it leads to just results.[83] His analysis is, in the end, subject to the same criticisms as is the basic substance theory: in his eagerness to reach the results advocated by many substance theorists, he leaves us without sufficient nexus to the Constitution and devoid of restraints on the judiciary.

The rest of this article will be devoted to making the logical connection that seems to be missing from Fiss' otherwise insightful analysis: what constitutional principles justify heightened judicial review, and what limits do those principles impose? Part II summarizes one effort to develop such principles, the "process" theory suggested by *Carolene Products*[84] and elaborated by John Hart Ely.[85] Part III then demonstrates that the implications of this model lead to a focus on whether legislation operates to the detriment of a disfavored class, a focus that goes beyond Ely's concern with legislative motive and that in fact reflects the concern underlying the Court's best-reasoned equal protection decisions. Part IV represents a practical application of this "disfavored class" theory. The remainder of this Article thus should indicate how the model suggested here leads to the very results advocated by both Fiss and the substance theorists, while at the same time maintaining a constitutional basis through its emphasis on the nature of the legislative process.

II. STRICT SCRUTINY AND LEGISLATIVE MOTIVE: THE PROCESS MODEL

Those who seek to avoid the defects of the two extreme models just discussed must construct a theory that places some workable constraints on judicial action and that is consistent with both history and precedent. The Court has in fact adopted just such a middle course—a "process" model—but has failed to articulate in its opinions an adequate explanation for it; the most extensive justification for such an approach has come from John Hart Ely.[86] In explaining its heightened scrutiny approach, the Court generally relies on a cursory reference to the famous footnote four of *United States v. Carolene Products*[87] and simply states that heightened scrutiny is appropriate when, because the minority group affected by the statute is small, isolated, and powerless, the normal Madisonian principle that diversity defeats tyranny[88] fails to operate: the democratic political process is unable to rectify harms done to

80. Ely, *supra* note 30, at 1254-60.
81. Fiss, *supra* note 11, at 167.
82. *See generally id.*
83. *Id.* at 170-72, 174.
84. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).
85. J. ELY, *supra* note 10.
86. *Id.*
87. *Carolene Prods.*, 304 U.S. at 152 n.4.
88. THE FEDERALIST No. 10 (J. Madison).

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groups that do not fully participate in that process.[89] The notion of insularity is crucial to the process model; the mere existence of underrepresentation or relative lack of political power cannot justify heightened scrutiny. The process model does not contemplate the Court as a superlegislature, operating to hold unconstitutional all legislation that ignores minority preferences. Instead, the process model confronts the unique role that irrational prejudice and hostility play in an individual's decisionmaking process. It is the barrier that irrational prejudices create for even well-represented minorities attempting to work within the legislative process, and not the mere fact of underrepresentation, that constitutes the process defect that justifies judicial activism under the process model.[90]

As one commentator has observed, the consequence of prejudice is a failure by the prejudiced majority to recognize the advantages of exploring and furthering interests held in common with the despised minority: "The black minority's claim to judicial solicitude is not that it is voiceless but friendless, not politically invisible but politically unmarriageable."[91] The underlying premise of this aspect of the process model is that truly rational decisionmaking cannot reflect irrational biases[92] and thus that judicial interference is warranted because the legislative process is irremediably flawed in the context of legislation affecting minorities.

The Court has recognized that even the explicit use of racial classifications may be exempt from heightened scrutiny if it is obviously not motivated by hostility or prejudice. In upholding a New York redistricting plan concededly designed solely to increase the voting power of New York City's black residents, the Court declined to apply heightened scrutiny because the redistricting plan "represented no racial slur or stigma with respect to whites or any other race . . . ."[93]

As many commentators have noted, the requirement of a more important governmental purpose and a tighter fit between the means and the end is sim-

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89. *See, e.g.,* Toll v. Moreno, 458 U.S. 1, 23 (1982) (Blackmun, J., concurring); O'Bannon v. Town Court Nursing Center, 447 U.S. 773, 800-01 & n.8 (1980) (Blackmun, J., concurring). *See also* United States v. McDonald, 481 F.2d 513, 530 (D.C. Cir. 1973) (opinion of Bazelon, J.) ("where electoral accountability is absent, normal presumptions of legislative regularity have a weaker claim").

90. *See* J. ELY, *supra* note 10, at 153 (racial prejudice provides majority with common motive to disadvantage racial minorities); Baker, *supra* note 39, at 1044 (unfettered political process incorporates preferences to restrict or exploit minorities).

91. Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis,* 60 CALIF. L. REV. 275, 315 (1972). *See also* Cover, *The Origins of Judicial Activism in the Protection of Minorities,* 91 YALE L.J. 1287, 1296 (1982). The failure of the white majority to recognize blacks as members of a common community, and the resulting denigration of the interests of both groups, is illustrated by the facts of such cases as Palmer v. Thompson, 403 U.S. 217 (1971), and Evans v. Newton, 382 U.S. 296 (1966). *See* Burt, *Constitutional Law and the Teaching of the Parables,* 93 YALE L.J. 455, 457-58 (1984).

92. *See* J. RAWLS, A THEORY OF JUSTICE 251-53 (1971) (truly rational thought necessarily moral); *cf.* I. KANT, CRITIQUE OF PRACTICAL REASON 122 (Beck trans. 1956) (only rational principles are moral). This premise also suggests one reason for the process model's rejection of at least the extreme versions of the substance model. The deconstructionist position denies that there is any epistemological common ground among human beings; as Richard Rorty has noted, "[t]o suggest that there is *no* such common ground seems to endanger rationality." R. RORTY, PHILOSOPHY AND THE MIRROR OF NATURE 317 (1979).

93. UJO v. Carey, 430 U.S. 144, 165 (1977). The Court has elsewhere stressed that it will not interfere with ordinary legislative choices "absent some reason to infer antipathy" toward the group disadvantaged by the choice. Vance v. Bradley, 440 U.S. 93, 97 (1973).

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ply a method of avoiding any direct examination of legislative motivation while still identifying and invalidating those statutes likely to be based on racial hostility or other illicit motives.[94] For the process theorist, any satisfactory explanation of the doctrine of suspect classifications must recognize that what is "suspect" about those statutes subjected to heightened scrutiny is the motivation of the legislature. Any rationale used to justify application of heightened scrutiny therefore must center on the likelihood of illicit motives, ranging from hostility to prejudice-based indifference.[95] The next section of this Article will attempt to show that the Court has lost sight of this central feature of heightened scrutiny as a result of logical and linguistic confusion generated by the Court's interchangeable use of the concepts of "class" and "classification."

III. THE IMPLICATIONS OF THE PROCESS MODEL

A. DEFINING CONSTITUTIONAL TERMS: CLASS OR CLASSIFICATION?

In determining whether to apply heightened scrutiny to a particular statute, the Court often evidences some confusion as to what it is about a statute that triggers heightened scrutiny. In some cases, the Court appears to reject the *classification* itself—the general characteristic by which the statutory line is drawn. At other times, the Court focuses instead on a disfavored *class*: those persons who, because they possess one particular aspect of the identifying characteristic, are disadvantaged by the statute.[96] All classifications (such as

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94. Michael Perry, for example, has suggested that any statute likely to be "predicated on the view that one . . . group is by virtue of race morally inferior," Perry, *Modern Equal Protection: A Conceptualization and Appraisal,* 79 COLUM. L. REV. 1023, 1046 (1979) [hereinafter cited as *Modern Equal Protection*], should be deemed suspect in order to "obviate . . . the need for *either* party to introduce evidence probative of actual state of mind." *Id.* at 1034 (footnote omitted). *See also* J. ELY, *supra* note 10, at 145 (suspect classification functions as "handmaiden of motivation analysis"); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1932 (1978) (strict scrutiny used for government acts that, in historical context, are most likely to reflect racial prejudice); Brest, *Foreword: In Defense of the Anti-Discrimination Principle,* 90 HARV. L. REV. 1, 15, (1977) (strict scrutiny proxy for direct inquiry into integrity of decision making process); Ely, *The Constitutionality of Reverse Racial Discrimination,* 41 U. CHI. L. REV. 723, 731 (1974) (historical fact of indefensible disadvantage makes suspect legislation singling out group for disadvantage); Goodman, *supra* note 91, at 275, 319 (racial classifications most often the product of racial animus); Perry, *The Principle of Equal Protection,* 32 HASTINGS L.J. 1133, 1151 (1981) (function of strict scrutiny to reveal illicit legislative considerations) [hereinafter cited as *Principle of Equal Protection*]; Simon, *Racially Prejudiced Governmental Actions: A Motivation Theory of the Constitutional Ban Against Racial Discrimination,* 15 SAN DIEGO L. REV. 1041, 1069 (1978) (suspect classification doctrine addresses laws likely premised on prejudicial attitudes); Note, *A Madisonian Interpretation of the Equal Protection Clause,* 91 YALE L.J. 1403, 1415 n.41 (1982) (use of suspect classification in statute suggests prejudice); *cf.* Stone, *Content Regulation and the First Amendment,* 25 WM. & MARY L. REV. 189, 230-31 (1983) (same argument in context of content-based restrictions on expression). Illicit racial motives also can include racially based indifference. *See* Brest, *supra,* at 7-8, 14.

95. It also might be argued that heightened scrutiny is justified on the basis of a judgment of inappropriateness. Use of certain classifications might either be unfair or likely to lead to undesirable consequences and therefore is disfavored. The problem with this argument is that it does not explain why the judiciary, rather than the legislature, ought to make the determination of unfairness or undesirability. If the legislature determines that it is neither unfair nor potentially divisive to tax the wealthy at higher rates, the Court accepts that judgment unless it is patently irrational. The "inappropriateness" thesis fails to distinguish between the tax statute and a racially discriminatory statute on the basis of any principle that could serve to limit judicial discretion to second-guess the legislature.

96. *Compare* Regents v. Bakke, 438 U.S. 265, 289-90 (1978) (opinion of Powell, J.) ("[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color") *with* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307,

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race or gender) yield two or more classes (such as black/white or male/female) possessing distinguishable aspects of the identifying characteristic. Whether the Court justifies application of heightened scrutiny on the basis of the distinguishing classification or the disadvantaged class has profound consequences for the cohesiveness and intellectual persuasiveness of the doctrine of heightened scrutiny.[97] The distinction between class and classification also clarifies the use of heightened scrutiny in two particularly difficult contexts: reverse or benign discrimination and neutral statutes with a disproportionate impact on a particular class.

Two examples should illustrate how the distinction between class and classification has confounded the Court. In *Craig v. Boren*,[98] the Court invalidated an Oklahoma statute that prohibited the sale of 3.2% beer to males under 21 or to females under 18. In a few brief paragraphs, Justice Brennan's majority opinion concluded that *all* "statutory classifications that distinguish between males and females" are subject to heightened scrutiny and must therefore "serve important governmental objectives and . . . be substantially related to achievement of their objectives."[99] The majority thus engaged exclusively in classification-based analysis, applying heightened scrutiny to all classifications using the disfavored characteristic of gender, without inquiring whether the class disadvantaged by Oklahoma's statute was a disfavored class.[100] Justice Rehnquist used a class-based approach in his dissent, arguing vigorously that the Court's opinion was inadequate to justify heightened scrutiny, since it did not suggest "that males in this age group are in any way peculiarly disadvan-

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312 (1976) ("equal protection analysis requires strict scrutiny of a legislative classification only when the classification . . . operates to the peculiar disadvantage of a suspect class").

97. The Court's use of class-based and classification-based analysis interchangeably is analogous to what Gilbert Ryle termed a category-mistake: it asks the same questions about classes and classifications, thus treating classifications "as if they belonged to one logical type or category . . . when they actually belong to another." G. RYLE, THE CONCEPT OF MIND 16 (1949). Ryle's example of a category-mistake is useful in this context:

> A foreigner visiting Oxford or Cambridge for the first time is shown a number of colleges, libraries, playing fields, museums, scientific departments and administrative offices. He then asks 'But where is the University? I have seen where the members of the Colleges live, where the Registrar works, where the scientists experiment and the rest. But I have not yet seen the University in which reside and work the members of your University.'

Id.

Just as "the University" is the composite of all the other entities listed, and not a coordinate entity, the relationship between a class and classification is that between categories, not within a category. A visitor to New York, being told that there is a "race problem" in the United States, and shown the neighborhoods of Queens, Harlem, and Chinatown, would make a category-mistake if he asked: "I have seen white people, black people and Asian people, but where are the race of people you say you have such a problem with?" Whites, blacks, and Asians are members of various *classes* falling under the *classification* "race," and it is logically absurd to equate the class with the classification. It is my contention that the Court is wielding the concepts of class and classification incorrectly when it applies the same scrutiny to a statute involving a disfavored classification and to a statute disadvantaging a disfavored class.

98. 429 U.S. 190 (1976).

99. *Id.* at 197. The *Craig* test is still the standard by which most gender-based classifications are judged. *See* Mississippi Univ. for Women v. Hogan, 458 U.S. 724 (1982) (invalidating nursing school's policy of admitting only women).

100. Justice Rehnquist recognized this problem, noting that the majority opinion "treats gender classification as a talisman which—without regard to the rights involved or the persons affected—calls into effect a heavier burden of judicial review." Craig v. Boren, 429 U.S. 190, 200 (1976) (Rehnquist, J., dissenting).

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taged, subject to systematic discriminatory treatment, or otherwise in need of special solicitude from the courts."[101]

While in *Craig* Justice Brennan engaged in unexamined classification-based analysis, in *Regents v. Bakke*[102] it is Justice Powell's opinion that most closely tracks classification-based analysis; the Brennan[103] opinion strongly suggests a class-based analysis. Powell condemned the affirmative action program at issue as "a line drawn on the basis of race and ethnic status."[104] He firmly rejected as impractical and unprincipled the idea of bestowing special status—and thus the advantage of heightened scrutiny—on only *some* classes possessing *some* aspects of racial or ethnic identifying characteristics. Justice Brennan rejected this rigid view of the uses of heightened scrutiny[105] and instead focused on the social status of the disadvantaged group, concluding that "whites as a class [do not] have any of the 'traditional indicia of suspectness' . . . ."[106] This class-based analysis echoes Rehnquist's criticism of Brennan's majority approach in *Craig*.[107]

Craig and *Bakke* are not random examples of the Court's confusion. In fact, race and gender are the only areas in which any members of the Court have seriously engaged in classification-based analysis,[108] and even then the Justices have done so only when the statutory scheme is perceived as reverse or benign discrimination. In reviewing statutes disadvantaging illegitimates, aliens, the elderly, and the poor, the Court has been much more likely to use a class-based analysis than a classification-based analysis.[109] Moreover, whenever the Court engages in sustained coherent analysis of the issues, it seems to favor a

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101. *Id.* at 219.

102. 438 U.S. 265 (1978).

103. The opinion was jointly authored by Justices Brennan, Marshall, White, and Blackmun, and is referred to as Justice Brennan's for convenience.

104. Regents v. Bakke, 438 U.S. 265, 289 (1978) (opinion of Powell, J.) (footnote omitted).

105. *Id.* at 355 (opinion of Brennan, J.) ("[T]he position that [racial or ethnic] factors must be 'constitutionally an irrelevancy,' summed up by the shorthand phrase 'our Constitution is color-blind,' has never been adopted by this Court") (citations omitted).

106. *Id.* at 357; *see also id.* at 387-96 (opinion of Marshall, J.).

107. Justice Brennan's seemingly inconsistent positions in *Craig* and *Bakke* might be reconciled if the determination of which class is disadvantaged by a challenged statute includes consideration of the possible perpetuation of stereotypes. *See infra* notes 117 to 125 and accompanying text (discussing concepts of stereotype and stigma).

108. The Court uses classification-based analysis when scrutinizing schemes based on national origin, but the Court's discussion of national origin strongly suggests that it considers national origin the equivalent of race. *See* Hernandez v. Texas, 347 U.S. 475, 478, 479 (1954); Korematsu v. United States, 323 U.S. 214, 223 (1944). *See also* L. TRIBE, *supra* note 94, at 1052 n.3 ("The Supreme Court has assimilated discrimination based on specific national origin to racial or ancestral discrimination"). This confusion is understandable since most examples of discrimination on the basis of national origin are directed against either Asians or Hispanics; the former is a racial group and the latter is popularly perceived as one. *Cf.* Lusky, *Footnote Redux: A* Carolene Products *Reminiscence*, 82 COLUM. L. REV. 1093, 1105 n.72 (1982) (describing Hispanics and Asians as "ethnic groups . . . who are held at arm's length" from the community). For an elaboration of how national origin fits into class-based analysis, see *infra* notes 166 to 186 and accompanying text.

109. In fact, outside the areas of race and gender, the Court frequently frames the issue as whether the challenged statute "operates to the disadvantage of some suspect class." Plyler v. Doe, 457 U.S. 202, 216 (1982) (alienage); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312 (1976) (age); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 17 (1973) (wealth); Levy v. Louisiana, 391 U.S. 68, 71 (1968) (illegitimacy); *see also Principle of Equal Protection*, *supra* note 94, at 1133, 1149 (age). One commentator has charged that even when the Court seems to be focusing on the distinguishing characteristic this merely masks a deeper focus on the class: "The Court applies equal protection by determining a group that should receive judicial solicitude and then discovering which trait forms the

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class-based analysis; classification-based analysis is usually the result of poor or insufficient reasoning. This is because a thorough consideration of the rationales behind the doctrine of heightened scrutiny entails adoption of class-based analysis.

An examination of the factors thought to justify heightened scrutiny bears out this point. In its consideration of what level of scrutiny to apply, the Court has frequently discussed four factors: (1) the existence of past and present discrimination against the affected class, especially where such discrimination has led to a condition of perpetual powerlessness; (2) the stereotypes reflected in the classification scheme; (3) the societal relevance of the distinguishing characteristic; and (4) the degree to which an individual can control or change the characteristic.[110] A close examination of all four factors yields the conclusion that the justifications for applying heightened scrutiny are persuasive only in the context of a class-based analysis. Such an analysis suggests that process theory necessarily must move beyond a concern with the facial neutrality of legislative enactments.

B. IN SUPPORT OF CLASSIFICATION: EXAMINING THE REASONS FOR STRICT SCRUTINY

1. Political Powerlessness and Discrimination

The Court frequently justifies heightened scrutiny by reference to Justice Stone's *Carolene Products* footnote.[111] In particular, the Court asks whether the group affected by the statute is a "discrete and insular minority."[112] This language has come to be a shorthand phrase for the combination of historical discrimination and political powerlessness thought to justify special judicial

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basis for distinguishing that group from the rest of the population. The trait, once determined, becomes disfavored and, hence, a basis for suspect classification." Note, *supra* note 42, at 407, 430 n.193.

Earlier courts and Justices, before the development of the suspect classifications doctrine, apparently viewed the equal protection clause as affording primarily class-based protection. *See* The Civil Rights Cases, 109 U.S. 3, 24 (1883) (fourteenth amendment prohibits legislation that denies rights to "any race or class"); Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 81 (1873) (fourteenth amendment limited to "negroes as a class"); G. DUNNE, HUGO BLACK AND THE JUDICIAL REVOLUTION 315 (1977) (fourteenth amendment viewed at time of Reconstruction as directed at protection of former slaves). Moreover, an emphasis on the stigmatizing effect of discriminatory legislation—which suggests a class-based focus—is found in the thought of one of the most prominent framers of the fourteenth amendment, Charles Sumner. Sumner contended that segregated schools violated "that fundamental right of all citizens, equality before the Law," because they branded "a whole race with the stigma of inferiority." W. PEASE & J. PEASE, THE ANTISLAVERY ARGUMENT 288 (1965); *see generally* Farber & Muench, *supra* note 1.

The Court's inconsistency in this area is an apt illustration of the maxim that hard cases make bad law. In the absence of political pressure or conflicting values, the Court uses the more coherent class-based analysis. It is only when class-based analysis yields results the Justices prefer not to reach—i.e., in reverse discrimination cases—that the Court resorts to classification-based analysis.

110. *See* L. TRIBE, *supra* note 94, at 1053 (describing factors considered by Court in invoking strict scrutiny).

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

112. *See, e.g.,* Toll v. Moreno, 458 U.S. 1, 23 (1982) (Blackmun, J., concurring); Vance v. Bradley, 440 U.S. 93, 113-14 n.1 (1979) (Marshall, J., dissenting) ; Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313-14 (1976); Graham v. Richardson, 403 U.S. 365, 372 (1971). Justice Rehnquist has charged that a judicial finding of discreteness and insularity automatically invalidates any legislation disadvantaging the disfavored class: "The approach taken in Graham and these cases appears to be that whenever the Court feels that a societal group is 'discrete and insular,' it has the constitutional mandate to prohibit legislation that somehow treats the group differently from some other group." Sugarman v. Dougall, 413 U.S. 634, 657 (1973) (Rehnquist, J., dissenting).

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solicitude for the disfavored class. The focus is on whether the class possesses "the traditional indicia of suspectness": Is the class "saddled with such disabilities, or subject to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritaritan political process?"[113] In emphasizing the political powerlessness or isolation of a class, or the history of discrimination against the class, the Court is focusing on the social status of a *class* rather than on the classification or identifying characteristic itself.

It is clear, for example, that in the following passage from his opinion in *Bakke* Justice Brennan is expressing his belief that the evil of race discrimination is not inherent in the mere classification along racial lines but rather in the disadvantaging of racial minorities:

> Unlike discrimination against racial minorities, the use of racial preferences for remedial purposes does not inflict a pervasive injury upon individual whites in the sense that wherever they go or whatever they do there is a significant likelihood that they will be treated as second-class citizens because of their color. This distinction does not mean that the exclusion of a white resulting from the preferential use of race is not sufficiently serious to require justification; it does mean that the injury inflicted by such a policy is not distinguishable from disadvantages caused by a wide range of government actions, none of which has ever been thought impermissible for that reason alone.[114]

Brennan's focus on the difference between the consequences of state action disadvantaging blacks and the consequences of state action disadvantaging whites implies that it is not the distinguishing characteristic (race) that triggers heightened scrutiny, but rather the social and political disadvantages that members of a class possessing that characteristic have historically suffered. Justice Rehnquist recently recognized a similar limitation on strict scrutiny, suggesting in *Michael M. v. Superior Court*[115] that a gender-specific statutory rape law can withstand judicial scrutiny in part because there is "nothing to suggest that men, because of past discrimination or peculiar disadvantages, are in need of the special solicitude of the courts."[116]

2. Stereotypes

A second factor frequently cited in discussions of statutes thought to violate

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113. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973); *accord* Regents v. Bakke, 438 U.S. 265, 357 (1978) (opinion of Brennan, J.); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976).

114. Regents v. Bakke, 438 U.S. 265, 375 (1978) (opinion of Brennan, J.).

115. 450 U.S. 464 (1981).

116. *Id.* at 476 (plurality opinion); *see also* Craig v. Boren, 429 U.S. 190, 218-19 (1976) (Rehnquist, J., dissenting) (nothing suggests males aged 19 to 20 peculiarly disadvantaged). An analogous idea is the notion, expressed in several recent gender discrimination cases, that gender discrimination is constitutional when men and women are "not similarly situated." *See* Lehr v. Robertson, 103 S. Ct. 2985, 2996 (1983) (men and women differently situated for purposes of parental custody); Rostker v. Goldberg, 453 U.S. 57, 78 (1981) (men and women not similarly situated for purposes of draft registration because of combat requirements of military); Michael M. v. Superior Court, 450 U.S. 464, 469 (1981) (possibility of pregnancy of women makes men and women differently situated for purposes of statutory rape law).

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the equal protection clause is the statutes' reliance on or perpetuation of negative stereotypes about class members.[117] The existence of stereotypes, however, cannot by itself suggest that a class is disfavored. First, as Ely has suggested, the constitutional infirmity of stereotyping lies in the unwitting legislative overvaluation of generalizations, not in the mere fact that the generalizations do not always hold true. All statutes generalize; the focus must be on the *causes* of such overgeneralizations. Only overgeneralizations based on ignorance or undervaluation of the interests of otherwise disfavored groups are suspect.[118]

Second, a stereotype about one class is almost always a generalization about that class' *relative* abilities or characteristics and thus implies a converse stereotype about another class. For example, the statute at issue in *Craig v. Boren*[119] might be based on questionable stereotypes of females as reaching legal maturity at an earlier date because their inferior role in society demands less time in the protective cradle of legal minority[120] or as merely passively following the irresponsible lead of older male companions.[121] On the other hand, these stereotypes inevitably suggest that young males are correspondingly less mature and more actively irresponsible than young females.[122] But since all statutes rely on some type of overgeneralization or stereotype, there is nothing to explain why gender stereotypes are any worse than other kinds of stereotypes.[123]

The Court's use of the existence of stereotypes to invalidate statutes is therefore puzzling unless we move from the stereotypes exhibited by any particular statute to the prevalence of certain stereotypes in society in general. In other words, while a statute's stereotyping of women may be relevant to the question whether that statute in fact advantages or disadvantages women,[124] it cannot

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117. *See, e.g.*, Caban v. Mohammed, 441 U.S. 380, 398 (1979) (Stewart, J., dissenting) (gender-based statutes deserve heightened scrutiny because they may reflect or perpetuate stereotypes about roles and capabilities of men and women); Vance v. Bradley, 440 U.S. 93, 114 (1979) (Marshall, J., dissenting) (statute deficient because it negatively stereotypes aged); Craig v. Boren, 429 U.S. 190, 198-99 (1976) (negative stereotype of young males inappropriate legislative premise); Mathews v. Lucas, 427 U.S. 495, 523 (1976) (Stevens, J., dissenting) (illegitimacy classification embodies inappropriate negative stereotype); Kahn v. Shevin, 416 U.S. 351, 357 (1974) (Brennan, J., dissenting) (discrimination in favor of widows and against widowers reflects stereotype of women).

118. J. ELY, *supra* note 10, at 155-60.

119. 429 U.S. 190 (1976).

120. Brief for Appellant at 5-6, 46 n.14, Craig v. Boren, 429 U.S. 190 (1976).

121. *See* Baker, *supra* note 39, at 1092 n.180 (noting social practice of women's involvement with older men); Ginsburg, *Sex, Equality and the Constitution*, 4 WOMEN'S RIGHTS L. REP. 143, 145 (1978) (discussing social stereotype of women as docile and submissive).

122. Baker, *supra* note 39, at 1092. The potential for the *Craig* statute to be interpreted this way also suggests the difficulty in distinguishing negative from positive stereotypes.

123. *See* J. ELY, *supra* note 10, at 159-60 (suggesting ease of acceptance of most generalizations).

124. *See* UJO v. Carey, 430 U.S. 144, 173-74 & n.3 (1977) (Brennan, J., concurring):

> [E]ven preferential treatment may act to stigmatize its recipient groups, for although intended to correct systemic or institutional inequities, such a policy may imply to some the recipients' inferiority and especial need for protection . . . . This phenomenon seems to have arisen with respect to policies affording preferential treatment to women: thus groups dedicated to advancing the legal position of women have appeared before this Court to challenge statutes that facially offer advantages to women and not men. This strategy, one surmises, can be explained on the basis that even good faith policies favoring women may serve to highlight stereotypes concerning their supposed dependency and helplessness.

See also Regents v. Bakke, 438 U.S. 265, 360 (1978) (opinion of Brennan, J.); Kahn v. Shevin, 416 U.S. 351, 357 (1974) (Brennan, J., dissenting).

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tell us whether disadvantaging someone on the basis of gender is a suspicious legislative exercise. A particular statute's stereotyped view is relevant to that latter question only insofar as it is evidence of the widespread acceptance of similar stereotypes.

The question then becomes why the prevalence of certain gender-based stereotypes leads us to question the legislature's impartiality more than we would in the absence of such widely accepted generalizations. That is, how does the popular acceptance of stereotypes corrupt the legislative process and justify judicial intervention? If there is any distinction between a statute based on inaccurate generalizations about the differences between opticians and optometrists or between truck companies and railroads and a statute based on inaccurate generalizations about the differences between men and women, it must be that only in the latter case is one class consistently denigrated in popularly accepted stereotypes. Negative stereotyping is a method of stigmatizing, of distancing oneself from an inferior "other."[125] If a group is consistently negatively stereotyped, that fact is evidence of its insularity and its inability to combat overt or covert prejudice against group members. But it is the evidence of prejudice against one class, and not the fact that the *classification* may be based on inaccurate stereotypes of both classes, that suggests the use of heightened scrutiny.

3. Irrelevance

A third factor frequently relied on by the Court is the societal irrelevance of the distinguishing characteristic.[126] In *Toll v. Moreno*,[127] for example, the dispute between Justice Rehnquist's dissent and Justice Blackmun's concurrence turned on whether the characteristic of alienage was relevant to the statutory purpose of providing educational benefits to residents.[128] A discussion that focuses on the relevance of the characteristic itself would appear to suggest the epitome of classification-based analysis: the question of relevance is a question of the legitimacy of using a particular characteristic to draw lines. Justice Rehnquist's analysis illuminates how consideration of the relevance of an identifying characteristic can be linked to classification-based analysis. He reasoned that "[t]he Equal Protection Clause . . . reflects the judgment of its Framers that *some distinguishing characteristics may seldom, if ever, be the basis*

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125. *See generally* G. ALLPORT, THE NATURE OF PREJUDICE 3-15, 48-65, 189-204 (1954); F.J. DAVIS, MINORITY-DOMINANT RELATIONS 47-51 (1978); H. EHRLICH, THE SOCIAL PSYCHOLOGY OF PREJUDICE 20-60 (1973); E. GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 109 (1963); R. MORGAN, THE ANATOMY OF FREEDOM 283 (1982); W. RYAN, EQUALITY (1981); W. RYAN, BLAMING THE VICTIM (1971); A. SCHAEF, WOMEN'S REALITY 69-70 (1981); Karst, *Why Equality Matters*, 17 GA. L. REV. 245, 248-49 (1983); Wirth, *The Problem of Minority Groups*, in THE SCIENCE OF MAN IN THE WORLD CRISIS 347, 347-72 (R. Linton ed. 1945).

126. *See, e.g.*, Toll v. Moreno, 458 U.S. 1, 22 (1982) (Blackmun, J., concurring); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 105 (1973) (Marshall, J., dissenting); Ely, *supra* note 94, at 730-31 (irrelevance to any legitimate public purpose is major factor justifying special scrutiny of racial classifications).

127. 458 U.S. 1 (1982).

128. *Compare id.* at 22 (Blackmun, J., concurring) (alienage may be constitutionally relevant to political activity, but not to private activity such as education) *with id.* at 41-42 (Rehnquist, J., dissenting) (cases involving exclusion from office recognize alienage may be constitutionally permissible classification).

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for difference in treatment by the legislature."[129] His conclusion that citizenship status was not such an automatically forbidden classification led him to consider whether it was a relevant characteristic in that case, and his treatment of that issue further illustrated how a classification-based analysis focuses on the characteristic rather than on those who possess one or more aspects of it. He described earlier cases as accepting the constitutional relevance of "alienage, *or the other side of the coin*, citizenship . . . ."[130]

A simple classification-based treatment of irrelevance, however, merely begs the question of *why* certain characteristics should not be considered legitimate. More important, it raises the question of which branch of government should make the factual and ethical decisions regarding relevance. The relevance of a particular characteristic is ordinarily a legislative judgment except where, for whatever reasons, we do not trust the legislature to determine relevance impartially. The Court does not, for example, question a state university's use of such arguably irrelevant admissions factors as athletic ability or the wealth or alumni status of the applicant's parents.[131] In fact, the Court tends not to rely on the irrelevance of a characteristic as a justification for heightened scrutiny unless it has reason to believe that the legislature's use of the characteristic is motivated or influenced by class-based animus. For example, in *Clements v. Fashing*[132] the Court upheld a limitation on the ability of certain state and county officials to run for other elective offices without resigning their present posts, despite the apparent lack of any relevant difference between them and other local officials not subject to the resignation requirement. Justice Rehnquist, in a part of his opinion joined by three other Justices, suggested that such a distinction among different office-holders, "absent an insidious purpose, is not the sort of malfunctioning of the State's lawmaking process forbidden by the Equal Protection Clause."[133] Moreover, any discussion of irrelevance as a reason for heightened scrutiny that fails to advert to the likelihood of class-based animus does not provide a sufficient nexus to the central basis for heightened scrutiny: the suspicion of legislative motives. To maintain this nexus, the irrelevance of the characteristic may only be used, in conjunction with a history of hostile use of the same characteristic, to suggest that the legislature's prejudice is interfering with its judgment. Again, it is the process rather than the result that is suspect. This leads back to a class-based analysis that focuses on the Court's best guess as to the general ability of the class to participate in or influence the legislative process—including its ability to com-

129. *Id.* at 39 (Rehnquist, J., dissenting) (emphasis added).

130. *Id.* at 41-42 (Rehnquist, J., dissenting) (emphasis added); *see also* Sugarman v. Dougall, 413 U.S. 634, 658-61 (1973) (Rehnquist, J., dissenting).

131. *See* Regents v. Bakke, 438 U.S. 265, 404 (1978) (opinion of Blackmun, J.); *cf.* Ely, *supra* note 94, at 730-31 (irrelevance alone, without history of legal disadvantage, not enough to evoke strict scrutiny of racial classifications).

132. 457 U.S. 957 (1982).

133. *Id.* at 971. *Cf.* United States Railroad Retirement Bd. v. Fritz, 449 U.S. 166, 180-81 (1980) (Stevens, J., concurring) ("adverse impact on disfavored class" suspect if apparent aim of legislature, but not if necessary cost of achieving larger goal); UJO v. Carey, 430 U.S. 144, 165 (1977) (redistricting plan based on race to facilitate election of nonwhite representatives did not violate equal protection because it "represented no racial slur or stigma"); Hunter v. Erickson, 393 U.S. 385, 394-95 (1969) (Harlan, J., concurring) (ordinance invalid because of invidious purpose to reduce minorities' ability to achieve antidiscrimination legislation).

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bat prejudice and hostility. Thus a more careful examination of the relevance factor supports a class-based analysis.

4. Immutability

Finally, the Court often focuses on whether the characteristic is immutable, or whether the individual can or should be held responsible for possessing the characteristic. The Court has often stated that classification schemes based on factors over which the individual has no control are "contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing."[134] The lack of individual responsibility pertains to all aspects of a distinguishing characteristic—neither blacks nor whites can alter their race—and this suggests a classification-based analysis.

As with the relevance factor, however, any detailed discussion of immutability raises questions about *why* heightened scrutiny is applied to classifications based on immutable characteristics. The explanation that it is unfair to disadvantage someone for a characteristic for which he or she is not responsible is too simplistic because it does not explain our willingness to distribute benefits and burdens on the basis of such morally arbitrary characteristics as intelligence or physical ability.[135] Moreover, in at least one context, the Court has rejected the argument that penalizing an individual for a voluntary characteristic is an appropriate method of inducing change: discrimination against aliens who are eligible for citizenship but choose not to become citizens is no less suspect than discrimination against ineligible aliens, even though an eligible alien chooses his or her status.[136] Finally, classifications based on immutable characteristics are not forbidden, merely subject to heightened scrutiny.[137] A more persuasive explanation for the importance of immutability may be

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134. Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972); *accord* Pickett v. Brown, 103 S. Ct. 2199, 2204 (1983); Caban v. Mohammed, 441 U.S. 380, 398 (1979) (Stewart, J., dissenting); Regents v. Bakke, 438 U.S. 265, 360-61 (1978) (opinion of Brennan, J.); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 108-09 (1973) (Marshall, J., dissenting); Labine v. Vincent, 401 U.S. 532, 551 n.19 (1971) (Brennan, J., dissenting); Korematsu v. United States, 323 U.S. 214, 243 (1944); *see also Modern Equal Protection, supra* note 94, at 1065.

135. *See* J. ELY, *supra* note 10, at 150 (intelligence and physical characteristics typically accepted as legitimate bases for classification even by those who argue immutable bases suspect); Shiffrin, *supra* note 34, at 1163 (although equality of opportunity guaranteed for access to positions, selection based on morally arbitrary features such as comparative talent); Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1073 n.51 (1980) (intelligence, height, strength all immutable but not unconstitutional bases for classification). While superior intelligence is usually given as a reason to distribute benefits, it can also be used to impose burdens. At least one court has upheld a landlord's refusal to rent to a woman whom he felt might give him trouble because of her intelligence. Kramarsky v. Stahl Management, 92 Misc. 2d 1030, 1032 (N.Y. Sup. Ct. 1977).

136. *See, e.g.,* Nyquist v. Mauclet, 432 U.S. 1, 9 n.11 (1977) ("element of voluntariness in . . . retention of alien status" does not dilute propriety of strict scrutiny). In Mathews v. Diaz, 426 U.S. 67 (1976), which upheld a federal classification of aliens based on the length of their residency in the United States, the Court (in a unanimous opinion written by Justice Stevens) focused not on the characteristic but rather on the attributes of members of the class: "Citizens and those who are most like citizens qualify [for the benefits]. Those who are less like citizens do not." *Id.* at 83. *Cf. In re* Griffiths, 413 U.S. 717, 722 (1973) (invalidating discrimination against aliens by stressing similarities between citizens and aliens).

137. *See* Regents v. Bakke, 438 U.S. 265, 355-56 (1978) (opinion of Brennan, J.) (equal protection clause permits classification based on race when justified by "overriding statutory purpose"); UJO v. Carey, 430 U.S. 144, 161 (1977) (no per se rule against using race as classification to achieve black majority voting districts). Ronald Dworkin makes a similar point in rejecting the allegedly "axiomatic" proposition "that any legal distinction based on race is offensive to democracy":

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derived from Ely's suggestion that suspect classifications are those based on "a comparison between a 'we' stereotype and a 'they' stereotype . . . ."[138] The immutability of an identifying characteristic assures legislators that the "we" group (including the legislators) can never be subject to a statute disadvantaging the "they" group,[139] and thus allows hostility, insensitivity, or mere indifference full play, untempered by the normal reluctance to disadvantage a group to which the legislators know they may eventually belong.[140] Immutability thus is important as a factor justifying heightened scrutiny primarily because the stability inherent in an immutable characteristic facilitates the operation of class-based animus.[141]

IV. Implications Of Class-Based Analysis

A. GENERAL IMPLICATIONS

1. Affirmative Action

The implications for affirmative action of adopting a class-based analysis are very clear. Legislative schemes discriminating against a nondisfavored class (affirmative action quotas, for example) would ordinarily not be subject to

> Legislation based on racial prejudice is unconstitutional not because any distinction using race is immoral but because any legislation that can be justified only by appealing to the majority's preferences about which of their fellow citizens are worthy of concern and respect, or what sorts of lives their fellow citizens should lead, denies equality.

Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 513, 514-15 (1981).

138. Ely, *supra* note 59, at 920, 933 n.35; *see also* L. TRIBE, *supra* note 94, at 1053 n.5.

139. Pregnancy regulation provides an illustration of how this reassurance functions to allow unexamined passage of laws affecting the rights of only one class. Predominantly male legislators, secure in the knowledge that they can never become pregnant, are likely to be less concerned about restricting the choices available to pregnant women.

140. For example, classifications disadvantaging the elderly are, correctly, not subject to strict scrutiny, at least in part because most legislators and voters will someday be old. Vance v. Bradley, 440 U.S. 93, 113-14 n.1 (1979) (Marshall, J., dissenting); *see* Ely, *supra* note 94, at 723, 733 n.43; Streib, *Are the Aged a Minority Group*, in MIDDLE AGE AND AGING 35 (B. Neugarten ed. 1968); *but see* LEVINE, AGEISM 69 (1980); Barron, *Minority Group Characteristics of the Aged in American Society*, 8 J. GERONTOLOGY 477 (1953). *Cf.* Price v. Cohen, 715 F.2d 87, 92-93 (3d Cir. 1983) (individuals between 18 and 45 not a suspect class).

141. The theory I have just described is a natural extension of the American rejection of the English concept of "virtual representation." In England, the intimate connection between those who elected members of Parliament and those who did not guaranteed that the latter could not be unduly disadvantaged without harm befalling the former as well. Since the interests of the American colonists were not so intimately related to those of the English electors, however, the colonists refused to accept "virtual" representation as a substitute for actual representation. B. BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 167-68 (1967); J. ELY, *supra* note 10, at 82-83. Judicially created limitations on state power to regulate interstate commerce also recognize the principle that legislative power cannot extend beyond those actually represented in the legislative body. *See, e.g.*, Southern Pac. Co. v. Arizona, 325 U.S. 761, 767-68 n.2 (1945) (impact of legislation on interests outside the state unlikely to influence state legislative processes); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 435-36 (1819) (state lacks power to impose tax on persons not represented in state legislature).

This mistrust of an unrepresentative and therefore potentially ill-motivated legislature also is reflected in the ultimate American rejection of Locke's doctrine of natural political virtue. As one scholar summarized it, that doctrine is based on the belief that "a majority, which is simply a random sample of those who voted, will . . . tend to act with some responsibility toward those in the minority." P. LASLETT, INTRODUCTION TO J. LOCKE, TWO TREATISES OF GOVERNMENT 109 (1967). When, as with classifications based on immutable characteristics, the interests of the legislators and of their disfavored constituents become more and more divergent, the bankruptcy of both the "virtual representation" and "majority responsibility" theories leads one to question the ability of a democratic polity to respond to the problems of a perpetual minority.

heightened scrutiny at all. The only exception to this rule is that if a statute superficially benefiting a disfavored class actually disadvantaged or stigmatized that class, heightened scrutiny would be invoked. Heightened scrutiny would be appropriate, however, not because of the classification but because of the identity of the class actually disadvantaged by the statute. Thus, while reverse racial classifications would not ordinarily be subject to heightened scrutiny, plaintiffs would be given an opportunity to demonstrate any negative effects on the minority class. If such effects were demonstrated, heightened scrutiny would become appropriate.[142]

Examples of reverse classifications that involve a disadvantage to the superficially benefited class might include the statutory rape law at issue in *Michael M. v. Superior Court*[143] and the differential drinking age invalidated in *Craig v. Boren*.[144] In both cases, the statutes reflected and perpetuated negative stereotypes of women that contributed to their subordinate position in society. It is important to differentiate between negative stereotypes based on inherent characteristics of the class and negative stereotypes based on the relative position of the class in society. A stereotype based on an inherent characteristic—"women are passive"—suggests the sort of prejudice that heightened scrutiny is designed to identify and forbid. A stereotype based on societal status—"blacks are societally disadvantaged"—does not stigmatize the object of the generalization as inherently inferior and thus is not evidence of prejudice. Consequently, statutes that reflect a belief that a disfavored class needs assistance in overcoming societally-created hurdles are not detrimental to the class; statutes reflecting a belief that a disfavored class needs assistance or protection from its own inherent limitations are detrimental to the class.[145] The burden, however, ought to be on the challenger to show that the statute reflects a stere-

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142. Under what appears to be the new mode of bifurcated standing analysis, *see* Los Angeles v. Lyons, 103 S. Ct. 1660, 1676 (1983) (Marshall, J., dissenting) (characterizing majority opinion as holding that standing to seek injunctive relief must be analyzed separately from standing to seek damages), a white plaintiff's attempt to show that an affirmative action program had negative effects on the minority class might raise intriguing standing questions. Since a minority member would clearly have standing, however, even the denial of standing to the white plaintiff would not preclude review of the program.

143. 450 U.S. 464 (1981). Justice Brennan suggested that the statute reflected and perpetuated outmoded sexual stereotypes. *Id.* at 495-96 (Brennan, J., dissenting). A 1964 California Supreme Court decision had justified the law on the ground that a young woman

> is presumed too innocent and naive to understand the implications and nature of her act. . . . The law's concern with her capacity or lack thereof to understand is explained in part by a popular conception of the social, moral and personal values which are preserved by the abstinence from sexual indulgence on the part of a young woman.

Id. at 495-96 n.10 (Brennan, J., dissenting) (quoting People v. Hernandez, 61 Cal. 2d. 529, 531, 393 P.2d 673, 674, 39 Cal. Rptr. 361, 362 (1964)).

144. 429 U.S. 190 (1976). Appellants in that case argued that the statute's acceptance of an earlier age of majority for women was probably "derived from Victorian and frontier notions of 'naturally' and/or 'divinely' mandated and stereotyped sex roles," including "a sentiment that the male ought to be the breadwinner of the family" and therefore needed 21 years of parental support before he could "successful[ly] discharge" this responsibility. Brief for Appellants at 5-6, Craig v. Boren, 429 U.S. 190 (1976); Ginsburg, *supra* note 121, at 145 (*Craig* statute "rested on a familiar stereotype: the active boy, aggressive and assertive; the passive girl, docile and submissive"); *see also* Stanton v. Stanton, 421 U.S. 7 (1975) (statute fixing lower age for termination of child support for females as opposed to males unconstitutional because based on "old notion[]" that man needs more education and training).

145. *See Modern Equal Protection*, *supra* note 94, at 1043-50 (1979) (racial preference constitutional when based on "sociohistorical status," not moral superiority, of one race).

otype about inherent rather than societally-based characteristics. This would be an easy hurdle to overcome in such cases as *Craig* and *Michael M.*, but would be quite difficult in the case of programs specifically designed to compensate for prior discrimination.

This scheme leaves with the legislature, in the first instance, the decision whether or not to adopt compensatory reverse classifications and the choice of which groups to include.[146] A failure to adopt any affirmative action program at all is not subject to heightened scrutiny or any other kind of scrutiny because it is not governmental action.[147] Moreover, under this analysis, a legislative decision to establish an affirmative action program for blacks but not for Hispanics would not be subject to heightened scrutiny unless a Hispanic plaintiff could show (1) that she was a member of a disfavored class and (2) that the legislative decision left her worse off than if no affirmative action program had been adopted at all. In the context of a medical school admissions program, for example, this second requirement might be satisfied by a Hispanic plaintiff's showing that she would have been admitted under the normal standards had not a black with lesser credentials been given preferential treatment. In other words, only a member of a disfavored class actually harmed by the legislative favoring of another class could argue that the governmental decision to close the category of affirmative action applicants to her class constituted class-based discrimination.

Other commentators have defended affirmative action on various constitutional grounds, but none has questioned the initial applicability of heightened scrutiny to racial or gender-based classifications. Instead, they have argued that some type of exception to heightened scrutiny should be carved out for reverse or benign suspect classifications.[148] A major difficulty with this ap-

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146. *See* Van Alstyne, *supra* note 13, at 805-08.

147. A failure to adopt an affirmative action program might, under some circumstances, be subject to heightened scrutiny under the disparate impact strand of class-based analysis. *See infra* notes 152 to 154 and accompanying text (discussing disparate impact issue).

148. For example, Kenneth Karst and Harold Horowitz have defended affirmative action by arguing that it satisfies the "compelling state interest" requirement imposed on suspect classifications. Karst & Horowitz, *supra* note 33, at 965-66; *see also* citations collected at Ely, *supra* note 94, at 726 & n.23. This approach is particularly vulnerable to abuse insofar as the "compelling state interest" test, to retain its vitality, must remain rigid and difficult to manipulate.

John Ely has argued, simply, that a classification scheme by which a majority disadvantages itself is not suspect. Ely, *supra* note 94, at 723. While his conclusion is based on some of the same premises as is my argument that the Court ought to focus on classes rather than classifications, it does not adequately avoid the appearance of result-oriented partiality towards minorities, nor is it sufficiently tied to constitutional principles.

Michael Perry argues that because affirmative action is not based on the premise that whites are "by virtue of race morally inferior to . . . nonwhites" and because the preferential treatment accorded nonwhites is based on the morally relevant factor "sociohistorical status," at least some affirmative action programs are constitutional. *Modern Equal Protection*, *supra* note 94, at 1043-50. Perry's approach is useful because it points in the right direction: by pinpointing sociohistorical status as the relevant factor he implicitly indicates that the focus should be on the attributes of the class members and not solely on the distinguishing characteristic. Like Ely, however, Perry fails to justify this selective judicial activism on other than pragmatic grounds.

Owen Fiss has undertaken the most elaborate theoretical defense of both affirmative action and disparate impact analysis. Fiss, *supra* note 11. Fiss argues that a better guide for applying the equal protection clause is a "group-disadvantaging principle" rather than an antidiscrimination principle. His primary justification for the former principle, however, seems to be that it achieves the desired results, rather than that it is constitutionally required. *See id.* at 170-72 (discussing different result produced by group-disadvantaging rather than antidiscrimination principle). His approach thus is sub-

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proach is the lack of a coherent and principled method of confining it. As Kenneth Karst has noted:

> The concern is that if we validate a racial preference for this purpose, we cannot be sure where such a validation will lead. Just as the idea of equality is "not easily cabined," it may also be difficult to find principled limits to the validity of race as a legislative classification.[149]

A class-based explanation for heightened scrutiny avoids the appearance of creating an exemption for some kinds of race discrimination.[150] Moreover, any approach that seeks to justify affirmative action by explaining why estab-

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ject to the criticisms that have been leveled at all substance theorists. *See supra* notes 55 to 83 and accompanying text (criticizing substance model). Fiss also fails to explain adequately the role of heightened scrutiny in his scheme, although he appears to recognize its usefulness. Fiss, *supra* note 11, at 167 (comparing group-disadvantaging principle to heightened scrutiny).

149. Karst & Horowitz, *supra* note 33, at 973 (footnote omitted). Alexander Bickel made the argument first: "So also one must view as a device of expediency a 'principle' that race is a proscribed ground of legislative classification, except that it may be used sometimes." A. BICKEL, *supra* note 59, at 59; *see also* A. BICKEL, THE MORALITY OF CONSENT 133 (1975) (reverse discrimination turns evaluation of racial classifications into "a matter of whose ox is gored").

150. It may be argued that confining heightened scrutiny to disfavored classes rather than disfavored classifications is vulnerable to the same charge of judicial manipulation and inconsistency as the theories discussed *supra* in note 148. The Court's doctrine of suspect classifications is itself a judicial invention, however, designed to make logical and practical sense out of an almost limitless clause. *See* Fiss, *supra* note 11, at 108 (words of equal protection clause "do not state an intelligible rule of decision"). As Justice Rehnquist has noted, "the crux of the problem is whether persons are similarly situated for the purposes of the state action in issue. Nothing in the words of the Fourteenth Amendment specifically addresses this question in any way." Trimble v. Gordon, 430 U.S. 762, 780 (1977) (Rehnquist, J., dissenting); *see also* Greenwalt, *How Empty is the Idea of Equality?*, 83 COLUM. L. REV. 1167, 1169, 1178 (1983) (in absence of substantive criteria, principle of equality provides no guidance as to how people should be treated); Karst & Horowitz, *supra* note 33, at 957 ("judges . . . classify when they define the issues of equality"); *Principle of Equal Protection*, *supra* note 94, at 1133, 1136 (equality "vacuous notion" until we define particular principles defining particular legally protected equalities). An example of conflicting definitions of equality may be found in a comparison between the traditional belief that truly equal treatment satisfies an equality requirement and Catherine MacKinnon's position that gender equality may in fact require *unequal* treatment: "To feminism, equality means the eradication not of gender differentiation but of gender hierarchy." C. MacKinnon, The Future of Women's Rights 2 (Mar. 16, 1982) (unpublished debate with Phyllis Schlafly, Stanford Law School); *see also* C. MacKinnon, Women as Women in Law: On Exceptionality 3 (Oct. 4, 1982) (unpublished address at University of Minnesota Law School); *cf.* Regents v. Bakke, 438 U.S. 265, 407 (1978) (opinion of Blackmun, J.) ("In order to treat some persons equally, we must treat them differently"). In other words, *The Slaughterhouse Cases* Court's vision of equal protection, the *Carolene Products*/Ely vision of equal protection, and the MacKinnon vision of equal protection are different conceptions of the concept of equal protection. *See* R. DWORKIN, *supra* note 33, at 134-37 (distinguishing underlying general "concept" from more specific "conceptions"); *see also* G. CALABRESI & R. BOBBITT, TRAGIC CHOICES 24-25 (1978) (advocating equal treatment of "people who [are] relevantly equal," and discriminating among those who are "relevantly unequal").

If one recognizes the inevitability of some judicial discretion in delineating proscribed classifications, *but see* R. BERGER, *supra* note 1 (limited purposes of fourteenth amendment are clear and should be binding on the Court), then the well-established doctrine of suspect classifications affords a good starting place for further refinements. The difference between the theory suggested in this Article and those discussed *supra* in note 148 is that while the latter take the doctrine of suspect classifications at face value and attempt to find a way around the doctrine's obvious disfavor of benign discrimination, the former approaches the question earlier in the chain of argument, realigning the doctrine of suspect classifications so that it is more internally consistent. Such a theory of equal protection is thus superior insofar as it offers, within the parameters of acceptable conceptions of equal protection, a more useful, practical tool in avoiding the dangers of both the Court's present approach and the approaches suggested by Ely and other commentators. *Cf.* Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 36, 62 (1977) ("[T]he true test of any equal protection theory is not whether its ideal of equality is superior in the abstract; it is first, whether the

lished rules of law should *not* apply to it is vulnerable as a practical matter insofar as it fails to advance any positive position. It is always less persuasive to refute one's opponents by negating their premises than by advancing one's own.[151]

2. Disparate Impact

An equally important effect of a class-based analysis is to switch the focus of debate from the language of a statute to its impact. The logical differences between classification and class suggest that while a challenge on the basis of the former is essentially a technical matter—the elimination of all statutes containing the offensive words that classify—the latter is more concerned with what the statute does than with what it says. Thus, if heightened scrutiny means that the Court displays solicitude for the class affected by a statute, rather than intolerance for the classification on which the statute is based, the Court is freer—perhaps obligated—to consider the disparate impact of a facially neutral statute.[152] Other commentators have recognized the inherent practical problems with extending heightened scrutiny to *all* statutes which result in disparate impact and have suggested various limitations. For instance, heightened scrutiny might be applied only where the disparate impact is the direct result of prior discrimination,[153] or a standard lower than heightened scrutiny but higher than mere rational basis might be applied.[154]

None of these suggestions can coherently be implemented until it is first explained why a neutral statute with a disparate impact is the sort of discrimination that justifies heightened scrutiny in the first place. An analysis based on class provides this explanation within the framework of the process model. This Article argues that heightened scrutiny is justifiable only in the context of an actual disadvantageous effect on a disfavored class. This has both a narrowing and a broadening effect on the application of heightened scrutiny.

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theory provides an acceptable view of the idea of equality and second, whether in practice the theory constitutes an improvement over other mediating principles").

151. *Cf.* Rhode, *Equal Rights in Retrospect*, 1 J.L. & INEQUALITY 1, 15-16 (1983) (same argument made in context of explaining political failure of Equal Rights Amendment).

152. The Court has categorically refused to subject neutral statutes with a disparate impact on minorities to heightened scrutiny. *See, e.g.,* Mobile v. Bolden, 446 U.S. 55, 62-63, 66-70 (1980); Personnel Adm'r v. Feeney, 442 U.S. 256 (1979); Washington v. Davis, 426 U.S. 229 (1976). An earlier Court was less harsh, *see* Hunter v. Erikson, 393 U.S. 385, 390-91 (1969) (unconstitutionality of charter amendment making it more difficult to pass fair housing ordinances); *but see* Washington v. Seattle School Dist. No. 1, 458 U.S. 457, 467-87 (1982) (interpreting *Hunter* as not involving disparate impact), and some commentators still contend that disparate impact theory should be an essential part of equal protection law. *See* Eisenberg, *supra* note 150, at 36 (proposing heightened scrutiny on basis of impact); *Modern Equal Protection, supra* note 94, at 1039-40 (same).

153. *See* Eisenberg, *supra* note 150, at 36 (suggesting "causation principle" encompassing causation in fact and proximate cause); Perry, *supra* note 13, at 540 (suggesting focus on "disproportionate racial impact" related to prior discrimination); *cf.* Schnapper, *Civil Rights Litigation After* Monell, 79 COLUM. L. REV. 213, 238-39 (1979) (advocating analogous principle under § 1983).

154. *See Modern Equal Protection, supra* note 94, at 559-61 (disproportionate impact test between strict scrutiny and rational relationship test); *cf.* Griggs v. Duke Power Co., 401 U.S. 424 (1971) (creating intermediate standard under Title VII); Resident Advisory Bd. v. Rizzo, 564 F.2d 126 (3d Cir. 1977) (intermediate scrutiny for disparate impact under Title VIII), *cert. denied*, 435 U.S. 908 (1978); United States v. City of Black Jack, 508 F.2d 1179, 1184-85 (8th Cir. 1974) (balancing test for disparate impact under Title VIII), *cert. denied*, 422 U.S. 1042 (1975); Comment, *Justifying a Discriminatory Effect Under the Fair Housing Act: A Search for the Proper Standard*, 27 UCLA L. REV. 398 (1979) (same).

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First, as suggested in the discussion of affirmative action, heightened scrutiny is narrowed to focus only on those actions disadvantaging a minority. Second, when the triggering mechanism is shifted from whether a statute classifies on the basis of race to whether it disadvantages one particular race, a neutral statute with a disproportionately negative impact on a minority meets the triggering criterion. It is the recognition that, even under a process model, the Court ought to be concerned with classes, not with classifications, that works these changes.

B. THE DISAPPEARANCE OF MOTIVATION THEORY

The role of motivation in the foregoing analysis is peculiar but crucial. Motivation provides the essential link between the analysis suggested here and process theory (and thus to the Constitution). It forms the overriding framework within which each factor must be understood, and yet motivation itself is irrelevant to the final result. An accurate assessment of the role of motivation should lead process theorists to the same result as that reached by substance theorists: when a disfavored class is disadvantaged, it is the result, not the intent, that counts.[155]

This transformation of the role of motivation is unsurprising if process theory is deconstructed to expose its underlying concerns. The process theorist's attention to motivation is a recognition that the legislative process should be permitted to lead to "unfair" results only if those results arise from a proper operation of the process, rather than from bias. The role of bias in the legislative process, however, cannot be as narrowly defined as is implied by the phrase "legislative motive." The societal bias against a discrete and insular minority inevitably informs, and distorts, the judgment of legislators—who are, after all, members of the society. Thus the question of legislative motivation is a question of societal discrimination, and judicial intervention is warranted whenever the disadvantaged class is one whose voice cannot be heard by the legislature.[156]

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155. Many process theorists, because they do not examine the purposes of strict scrutiny, fail to recognize that the purportedly race-neutral demand for procedural regularity implies special judicial protection for particular classes and thus condemn any "effects" analysis as not within the antidiscrimination principle. *See* Blumstein, *Defining and Proving Race Discrimination: Perspectives on the Purpose vs. Results Approach From the Voting Rights Act*, 69 VA. L. REV. 633, 634-35 & n.4 (1983) (only purposefully discriminatory conduct can violate nondiscrimination norm); Ely, *supra* note 30, at 1254-60 (suggesting illicit motive in jury selection necessary for heightened judicial review). Owen Fiss argues that result-oriented analysis ought to *replace* the antidiscrimination principle, and fails to perceive that the former already *follows from* the latter. *See* Fiss, *supra* note 11, at 107.

156. Naomi Scheman's critique of the "individualist assumption" provides a philosophical basis for the disappearance of motivation. The "individualist assumption" is that "the objects of psychology—emotions, beliefs, intentions, virtues, and vices—attach to us singly (no matter how socially we may acquire them)." Scheman, *Individualism and the Objects of Psychology*, in DISCOVERING REALITY 225, 226 (S. Harding & M. Hintikka eds. 1983). She rejects this assumption and contends instead that psychological states such as emotions, motives, and beliefs are no more individualistic or atomistic states than are such clearly relational states as being a major general, being divorced, or being the most popular girl in the class. She thus suggests that it is incorrect to view "intending to do x" as analogous to "being five feet tall"; "intending to do x" is rather analogous to "being divorced." Just as it is not possible to determine whether one is "divorced" without examining the particular legal structure governing marriage, it is impossible to determine the motives (or emotional states) of legislators without examining the social structure in which they function.

Scheman argues that the individualist assumption stems from the ideology of liberal individualism.

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There is an identifiable progression from legal realism, through early process theory and Ely's more sophisticated process theory, to class-based analysis. If legal realism recognized the subjectivity of all legal decisionmaking, thus raising novel doubts about motivation, early process theory drew on that recognition to equate justice with process.[157] One substantial flaw in early process theory is the ease with which procedures may be manipulated by any ill-motivated legislator,[158] thereby defeating the process theorist's solution to the legal realist's puzzle. Ely's process theory attempts to remedy this flaw by pinpointing the general circumstances under which legislative motivation may be suspect. There is an inherent limitation in Ely's theory, however. The centrality of motivation to the theory necessarily suggests that "pure" motives, however they are to be demonstrated, can justify even suspicious legislative action. Thus Ely must reject strict scrutiny of neutral laws that cannot be shown to be improperly motivated, even though such laws have a disproportionate impact on minorities. The only exception to this posture is where the impact is so substantial as to suggest the likelihood of illicit motivation.[159] This Article's progression to a class-based analysis demonstrates that Ely's requirement of improper motivation is an artificial one, derived from a misunderstanding of the justifications for selective judicial activism.

C. APPLICATION

The class-based analysis suggested in this Article should prove no more difficult to apply than the classification-based analysis the Court currently uses in many race and gender cases. The factors currently relied on by the Court to

She contends that our ordinary attribution of psychological states such as "motivation" to atomistic individuals is based on liberalism's inability to recognize the intersubjectivity of human beings. Michael Sandel defines intersubjective conceptions of human beings as those which "allow that in certain moral circumstances, the relevant description of self may embrace more than a single, individuated human being." M. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 62 (1982). An intersubjective conception of the human self thus allows us to understand that the motives of an individual legislator are not distinct from the beliefs and intentions of other members of the society.

157. *See generally* G.E. WHITE, PATTERNS OF AMERICAN LEGAL THOUGHT 136-50 (1978); Nowak, *Resurrecting Realist Jurisprudence: The Political Bias of Burger Court Justices*, 17 SUFFOLK U. L. REV. 549, 554-60 (1983); Tushnet, *Truth, Justice and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 TEX. L. REV. 1307, 1314-15 (1979); White, *The Inevitability of Critical Legal Studies*, 36 STAN. L. REV. 649, 661-63 (1984).

158. For a paradigmatic example of such manipulation, *see* White, *supra* note 157, at 663-64:

> Suppose that the [tenure] candidate is first evaluated by a faculty subcommittee whose members, for their own political and personal reasons, have resolved to deny him tenure. Indeed the committee members are quite explicit about this decision: They openly discuss how best to accomplish their aim. They resolve to critique his scholarship and teaching in such a way as to suggest that he falls below acceptable standards for tenure "on the merits." Their evaluation of the candidate is tainted by their a priori decision to recommend against tenure: They manipulate evidence about his teaching, supply criticism of the candidate's scholarship that gives it no credit for its positive contributions, dismiss favorable outside commentary on the candidate from other faculty members that are not comments on his teaching and scholarship but comments on his personality and lifestyle. They then solemnly announce that, after a full evaluation of the candidate's scholarship, teaching, and service to the institution, they have concluded that the candidate fails to meet tenure standards.

White plausibly concludes that this would, in ordinary cases, be deemed compliance with proper procedures, at least if the committee's motivation was not uncovered.

159. *See* Ely, *supra* note 30, at 1254-60 (unless statistical evidence overwhelming, convincing evidence of random selection will rebut inference of improper motive from statistical disparity).

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determine whether a classification is suspect in fact depend on the status of a particular class,[160] and thus are perfectly suited to class-based analysis. In addition to the four specific factors discussed above,[161] "traditional indicia of suspectness"[162] include such things as continuing widespread poverty status, confinement to particular roles or jobs, and segregated residential patterns.[163] The paradigmatic case of blacks can serve as a model of a suspect class as well as of a suspect classification.

A few examples, already considered by various members of the Court, may illustrate. As Justice Brennan and Justice Rehnquist have argued, neither whites nor males meet the criteria for disfavored class status.[164] The Court already considers the question whether to treat as suspect or disfavored such groups as illegal aliens, the handicapped, or the poor within the framework of class-based rather than classification-based analysis.[165] National origin groups also raise few problems. The Court has implicitly recognized that Hispanic-Americans still face sufficient pervasive discrimination to be considered a disfavored class.[166] Asian-Americans also should be considered a disfavored class on the basis of income level, segregated residential patterns, and discriminatory treatment.[167]

There is one group with a unique status in American society: American Jews. For Jews, application of the class-based analysis is both difficult and troubling. Under a classification-based analysis, religion may be seen as analogous to race or national origin and thus treated as a suspect characteris-

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160. *See supra* notes 111 to 116 and accompanying text (discussing cases deciding whether legislation disadvantaging particular group required strict scrutiny).

161. *See supra* text accompanying note 110 (discussing Court's use of factors to determine heightened scrutiny).

162. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

163. *See, e.g.,* DAVIS, MINORITY-DOMINANT RELATIONS 4, 27-30 (1978); MacKinnon, *Excerpts from MacKinnon/Schlafly Debate,* 1 J. L. & INEQUALITY 341, 350 (1983); Wirth, *supra* note 125, at 347 (minorities barred from many socioeconomic opportunities, often geographically segregated, and restricted in occupational advancement).

164. *See, e.g.,* Michael M. v. Superior Court, 450 U.S. 464, 476 (1981) (plurality opinion of Rehnquist, J.) (nothing suggests that men need special protection from the courts); Regents v. Bakke, 438 U.S. 265, 357 (1978) (opinion of Brennan, J.) (whites as class have no traditional indicia of disfavored class); Craig v. Boren, 429 U.S. 190, 219 (1976) (Rehnquist, J., dissenting) (males aged 18 to 20 not peculiarly disadvantaged).

165. *See supra* notes 96 to 110 and accompanying text (discussing court determinations of suspect classifications).

166. *See* Hernandez v. Texas, 347 U.S. 475, 479-80 (1954) (recognizing Hispanics in Jackson County, Texas as class deserving of fourteenth amendment protection). Hispanic-Americans exhibit the same indicia of historic and continuing discrimination as do blacks: they tend to be clustered at the low end of the economic scale, in low-paying and low-prestige occupations, and in poor, ghetto neighborhoods. *See also* Jencks, *Discrimination and Thomas Sowell,* N. Y. Rev. of Books, Mar. 3, 1983, at 34 (Hispanics at bottom of income scale); Lusky, *supra* note 108, at 1095, 1105 n.72 (Chicanos sizable ethnic group held at arm's length by dominant social groups in United States); Mujica, *Bilingualism's Goal,* N. Y. Times, Feb. 26, 1984, at E17; Romero, *Chicanos and Occupational Mobility,* in MINORITIES IN THE LABOR MARKET 66 (P. Bullock ed. 1977) (Chicanos remain concentrated in unskilled and semiskilled occupations).

167. *See, e.g.,* Korematsu v. United States, 323 U.S. 214, 235-40 (1944) (Murphy, J., dissenting) (describing military's rationale for incarceration of Japanese-Americans as based on "misinformation, half-truths, and insinuations"); G.E. WHITE, *supra* note 60, at 69-70 (Japanese-Americans "generally barred from entry into non-Japanese communities"); Cabezas, *Evidence for the Low Mobility of Asian Americans in the Labor Market,* in MINORITIES IN THE LABOR MARKET, *supra* note 166, at 39 (Asians continue to earn less than mean income of whites); Kim & Kim, *Asian Immigrants in American Law,* 26 AM. U. L. REV. 373, 404 (1977) (Asian immigrants typically unemployed or under-employed).

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tic.[168] The class-based theory suggested in this Article, however, requires a more detailed examination of the Jewish experience in the United States. Such an examination serves as both an example of how to apply the class-based analysis, and a concrete illustration of the theoretical foundations of that analysis.

Jews have suffered, and to some extent still suffer, from pervasive societal discrimination.[169] Much of this discrimination is based on negative stereotypes.[170] Despite discrimination, however, Jews have achieved a measure of political, economic, and social success unequaled by blacks or Hispanics.[171] The concerns engendered by earlier discrimination have surfaced, however, in the new affirmative action controversy: Jews, traditionally liberal politically,[172] have begun to oppose the "liberal" remedy of affirmative action out of fear that quotas cannot be restricted to benign uses.[173]

Application of the Court's criteria of suspectness yields an ambiguous answer to the question whether Jews are a disfavored class. The criterion of societal relevance is difficult to assess in the case of American Jews. Many Jews perceive themselves as dependent upon their children to preserve their culture and traditions. Assimilation, the goal of many other ethnic groups, is often actively discouraged.[174] The desire of many Jews to preserve cultural differences may make application of the irrelevance factor turn on an impossible case-by-case analysis. It is only the immutability factor that unequivocally indicates that Jews are a disfavored class. Jews are often perceived to be identifi-

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168. Religious discrimination also may be treated as a violation of the religion clauses. However, claims of discrimination against Jews (as well as other non-Christians) have not fared well in the courts under the religion clauses. *See* Lynch v. Donnelly, 104 S. Ct. 1355 (1984) (city-erected Christmas display not violation of establishment clause); Braunfeld v. Brown, 366 U.S. 599 (1961) (upholding law prohibiting retail sale of certain goods on Sundays as applied to Orthodox Jews).

169. *See generally* N. BELTH, A PROMISE TO KEEP: A NARRATIVE OF THE AMERICAN ENCOUNTER WITH ANTI-SEMITISM (1979); N. BELTH, BARRIERS: PATTERNS OF DISCRIMINATION AGAINST JEWS (1958); H. QUINLEY & C. GLOCK, ANTI-SEMITISM IN AMERICA (1979); G. SELZNICK & S. STEINBERG, THE TENACITY OF PREJUDICE: ANTI-SEMITISM IN CONTEMPORARY AMERICA (1969).

170. *See* H. QUINLEY & C. GLOCK, *supra* note 169, at 2-5 (discussing stereotypes of Jews); G. SELZNICK & S. STEINBERG, *supra* note 169, at 6-16 (same).

171. *See generally* N. GLAZER & D. MOYNIHAN, BEYOND THE MELTING POT 143-44 (1963) (Jewish incomes generally exceed those of non-Jews); Goldstein, *American Jewry 1970: A Demographic Profile*, in THE JEW IN AMERICAN SOCIETY 97, 154-58 (M. Sklare ed. 1974) (median income of Jews well above population as a whole); I. HOWE, WORLD OF OUR FATHERS: THE JOURNEY OF THE EAST EUROPEAN JEWS TO AMERICA AND THE LIFE THEY FOUND AND MADE 609-11 (1976) (Jews disproportionately represented among professional and technical occupations in American society).

172. *See* N. GLAZER & D. MOYNIHAN, *supra* note 171, at 166-71.

173. *See* Brief of Queens Jewish Community Council and the Jewish Rights Council as Amici Curiae; Brief of Anti-Defamation League of B'nai B'rith, Jewish Labor Committee, National Jewish Commission on Law and Public Affairs, et al. as Amici Curiae; Brief of American Jewish Committee, American Jewish Congress, et al. as Amici Curiae, Regents v. Bakke, 438 U.S. 265 (1978).

174. *See* N. GLAZER, AMERICAN JUDAISM 181-84 (2d ed. 1972) (ethnic loyalty has become increasingly significant component of Judaism); N. GLAZER & D. MOYNIHAN, *supra* note 171, at 160-61 (group social pressure against marriage with non-Jews); Himmelfarb, *Research on American Jewish Identity and Identification*, in UNDERSTANDING AMERICAN JEWRY 56, 62 (M. Sklare ed. 1982) (American Jews tend not to assimilate); I. HOWE, *supra* note 171, at 613, 617-18, 641 (Jews who moved to suburbs kept persistent attachment to Jewish identity); Schwartz, *Intermarriage in the United States*, in THE JEW IN AMERICAN SOCIETY, *supra* note 171, at 307, 307-08 (many rabbis reluctant to accept intermarriage); M. SKLARE, JEWISH IDENTITY ON THE SUBURBAN FRONTIER 291-97 (1967) (Jewish children who assimilate generally do so against wishes of parents).

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able, by both surname and physiognomy, as a distinct group.[175] Individual Jews may choose not to practice their religion, but that choice does not protect them from anti-Semitism; Jewishness thus is effectively immutable.

The issue is complicated by the fact that direct legislative discrimination against Jews is rare or nonexistent.[176] Most legislation that disadvantages Jews does so through a disparate impact and is often the result of apathy or ignorance rather than hostility. A paradigmatic example of such discrimination may be found in the myriad instances of official approval of Christian religious observances, from the singing of Christmas carols in schools to the existence of several national holidays commemorating Christian festivals.[177]

For Jews, the class-based analysis' focus on motivation and process demands a more sharply defined approach. Whether to accord this group disfavored class status must turn, in each case, on the decisionmaking body and the context of the decision. If, for example, a discriminatory decision is made by a political body in which Jews are underrepresented in proportion to their representation in the affected community, heightened scrutiny would be appropriate on the grounds that the decision is likely to be the result of nonparticipation, prejudice, or indifference—the existence of which is suggested by the fact of underrepresentation in conjunction with the other criteria already discussed. Moreover, even if the group is proportionately represented in the decisionmaking body, the continued existence of private prejudice creates a likelihood that, in certain contexts, prejudice has interfered with the individual decisionmaking process. The enactment of discriminatory legislation in this context suggests that prejudice may have influenced non-Jewish legislators to outvote their Jewish colleagues.

Consider two hypothetical statutes passed by a municipality in which Jews *are* proportionately represented in the governing body. The first is a statute allowing a tuition tax credit to parents of private school students.[178] It is plausible to argue that such an enactment should not be subject to heightened scrutiny. Despite the possibility that such a tax credit might have a disproportionately negative impact on Jews, the context of the legislation (academics and education) is one in which Jews are successful, and perhaps even

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175. Jews are frequently described as a "race." Auerbach, *Legal Education and Some of Its Discontents*, 34 J. LEGAL EDUC. 43, 49 (1984).

176. Direct governmental discrimination against Jews would presumably be prohibited by the first amendment's establishment clause. *But see supra* note 168 (discussing historical lack of success in presenting claims of religious discrimination against Jews). The analysis presented here is independent of any potential establishment clause violations.

177. For a discussion of non-Jews' indifference to the negative effect such public observances have on Jews, *see* H. QUINLEY & C. GLOCK, *supra* note 169, at 16 (most Americans support singing of Christmas carols in schools and are unsympathetic to possible Jewish objections); G. SELZNICK & S. STEINBERG, *supra* note 169, at 49-50 (same). A classic example of non-Jews' insensitivity to the problem may be found in Justice O'Connor's concurring opinion in Lynch v. Donnelly, 104 S. Ct. 1355 (1984). In upholding the public financing and maintenance of a Christmas display including a nativity scene, Justice O'Connor simultaneously identified the evil with which the establishment clause is concerned as practices that "have the effect of communicating a message of government endorsement . . . of religion," *id.* at 1368, and denied that the municipal erection of a creche has that effect. *Id.* at 1369. The dissent recognized that the city's practice "relegate[s non-Christians] to the status of outsiders." *Id.* at 1373 n.7 (Brennan, J., with Marshall, Blackmun & Stevens, JJ., dissenting) (quoting Fox v. City of Los Angeles, 22 Cal. 3d 792, 803, 587 P.2d 663, 670, 150 Cal. Rptr. 867, 874 (1978) (Bird, C.J., concurring)).

overrepresented.[179] Imagine, on the other hand, that this same representative body passes legislation sanctioning the observance of Christian holidays. Such legislation might be subject to heightened scrutiny under the "discriminatory context" prong of the proposed analysis because traditional notions of "appropriate" religious observances incorporate discrimination. Thus, absent a sufficiently compelling state interest, such legislation would violate the equal protection clause (regardless of whether it also violated the establishment clause).

The only recent case in which the Court dealt with legislative action with a disparate impact on Jews is *UJO v. Carey*.[180] While a majority of the Court could not agree on a rationale, eight Justices upheld a New York City redistricting plan that deliberately increased black representation at the expense of the Hasidic Jewish community. There were three distinct lines of reasoning used by the various Justices. Justice White found that even the use of "specific numerical quotas" for black districts was consistent with the equal protection clause as long as the redistricting plan "represented no racial slur or stigma,"[181] suggesting that only hostile discrimination triggers heightened scrutiny. Justice Brennan applied less than heightened scrutiny to the redistricting plan on the grounds that both it and the Voting Rights Act were "cast in a remedial context with respect to a disadvantaged class,"[182] suggesting that reverse discrimination does not trigger heightened scrutiny. Finally, Justice Stewart declined to apply heightened scrutiny on the grounds that the racial effect of the plan represented only disparate impact and not purposeful discrimination.[183] None of these rationales adequately explains both the result in *UJO* and the results in other discrimination cases.

Justice White's position is inconsistent with the Court's almost unwavering refusal to examine or take into account the stigmatizing effects of other instances of reverse discrimination: it is inconsistent with the *Bakke* Court's rejection of nonstigmatizing numerical quotas and it is inconsistent with the Court's failure to consider the potentially stigmatizing aspects of the statutory rape provision upheld in *Michael M.* Moreover, this approach would presumably validate an attempt to increase Irish-Catholic voting power at the expense of blacks if it could be shown that the legislature was truly not motivated by racial animus.

Justice Stewart's position is inconsistent with *Gomillion v. Lightfoot*,[184] as Justice Burger's dissent points out: "If *Gomillion* teaches anything, I had thought it was that drawing of political boundary lines with the sole, explicit objective of reaching a predetermined racial result cannot ordinarily be squared with the Constitution."[185] The conceded motive for New York's re-

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179. *See* Lipset & Ladd, *Jewish Academics in the United States*, in THE JEW IN AMERICAN SOCIETY, *supra* note 171, at 259, 261-62 (Jews constitute large portion of academic community); N. GLAZER & D. MOYNIHAN, *supra* note 171, at 146 (majority of New York City's teaching force and principals Jewish).

180. 430 U.S. 144 (1977).

181. *Id.* at 162, 165 (opinion of White, J.).

182. *Id.* at 170 (opinion of Brennan, J.).

183. *Id.* at 179-80 (opinion of Stewart, J.).

184. 364 U.S. 339 (1960).

185. 430 U.S. at 181 (Burger, C.J., dissenting).

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districting was to create more " 'substantial non-white majorities.' "[186] Justice Brennan's approach fails to consider that this is not purely reverse or benign discrimination: there is a distinctly negative effect on another minority—Hasidic Jews—and Brennan should have explained why that effect did not convert the redistricting plan into a *Gomillion* situation.

In fact, the result in *UJO* can be explained by combining all three approaches, and the resulting amalgam fits easily into the analysis suggested in this Article. State action that uses nonstigmatizing racial classifications (White) to help rather than harm blacks (Brennan) and that has only a disparate impact on Jews (Stewart) in a context and a geographic location in which Jews are well-represented, should not trigger heightened scrutiny. All four elements—lack of stigma, no harm to a disfavored racial class, only disparate impact on Jews, and an appropriately nondiscriminatory location and context—are necessary to the finding that heightened scrutiny is not appropriate. A redistricting plan that disadvantaged blacks (*Gomillion*), or that stigmatized blacks as inferior, or that deliberately disadvantaged Jews, or that disadvantaged Jews in an area where they were already underrepresented in the legislature, *would* trigger heightened scrutiny.

CONCLUSION

This Article is, in one sense, a simple exercise in deconstruction. I have tried to demonstrate that it is internally inconsistent to limit the implications of process theory to a demand for even-handed race-neutral legislation. I have also offered an alternative vision of the consequences of process theory. It is a vision that moves process incrementally closer to justice and thus is an attempt to narrow the widening gap between liberal process theorists and their radical critics.[187] A process theory of judicial activism is intriguing and persuasive because it offers both a link to the Constitution and a principled method of identifying the contexts in which judicial activism is appropriate. The challenge for process theorists is to develop a middle course to counter the increasing temptation to abandon all attempts at objectivity.[188]

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186. *Id.* at 152 (opinion of White, J.).

187. *See generally* Trillin, *A Reporter At Large: Harvard Law*, The New Yorker, Mar. 26, 1984, at 53 (noting polarization of Harvard Law School faculty).

188. Failing to possess incontrovertibly sound demonstrative arguments for claims that all human beings ought to adopt certain rules of conduct and failing to possess a method, or even a glimmer of a method, for constituting such arguments, it may well seem difficult not to feel compelled to adopt [a] skeptical attitude . . . .

Eldridge, *On Knowing How To Live: Coleridge's "Frost At Midnight"*, 8:1 PHIL. & LITERATURE 213, 214 (1984).

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