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CONCURRENT POWERS

In *The Federalist*, James Madison wrote that in fashioning the federal relationship "the convention must have been compelled to sacrifice theoretical propriety to the force of extraneous circumstances." These sacrifices which produced a "compound republic, partaking both of the national and federal character" were "rendered indispensable" by what Madison termed "the peculiarity of our political situation." An important feature of the compound republic is the idea of concurrent powers.

Concurrent powers are those exercised independently in the same field of legislation by both federal and state governments, as in the case of the power to tax or to make bankruptcy laws. As Alexander Hamilton explained in *The Federalist* #32, "the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States." Hamilton goes on to explain that this "alienation" would exist in three cases only: where there is in express terms an exclusive delegation of authority to the federal government, as in the case of the seat of government; where authority is granted in one place to the federal government and prohibited to the states in another, as in the case of imposts; and where a power is granted to the federal government "to which a similar authority in the States would be absolutely and totally *contradictory* and *repugnant*, as in the case of prescribing naturalization rules." This last, Hamilton notes, would not comprehend the exercise of concurrent powers which "might be productive of occasional interferences in the *policy* of any branch of administration, but would not imply any direct contradiction or repugnancy in point of constitutional authority." The only explicit mention of concurrent power in the

Constitution occurred in the ill-fated Eighteenth Amendment which provided that "the Congress and the several States shall have concurrent power to enforce this article."

The story of concurrent power in modern American constitutional history has largely been the story of federal preemption. The concurrent authority of the states is always subordinate to the superior authority of the federal government and generally can be exercised by the states only where the federal government has not occupied the field, or where Congress has given the states permission to exercise concurrent powers. Thus in *McCulloch v. Maryland* (1819), Maryland's concurrent power of taxation had to give way when the state sought to tax a federal instrumentality, because such a tax was utterly repugnant to federal supremacy.

In the years since *McCulloch* the Supreme Court has devised an intricate system for determining when a federal exercise of power has implicitly or explicitly worked to diminish or extinguish the concurrent powers of the states. The federal government's steady expansion of power over the years has, of course, placed more restrictions on concurrent action by the states as, in more and more areas, the federal government has occupied the whole field of legislation.

The Court's decision in *Pacific and Electric Company v. Energy Resources Commission* (1983) provides a useful summary of the factors that determine whether federal preemption may be said to have taken place: whether Congress is acting within constitutional limits and explicitly states its intention to preempt state authority; whether the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress intended for the state to be excluded from concurrent regulation; whether, even though the regulation of Congress is not pervasive, the operation of concurrent powers on the part of the state would actually conflict with federal law; and whether, in the absence of pervasive legislation, state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress. It is not difficult to see that most of the states' concurrent powers today exist at the forbearance of the federal legislature. This result was not entirely anticipated by the Framers of the Constitution;

but it was the inevitable consequence of the centripetal forces embodied in the national features of the compound republic.

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DISCRETE AND INSULAR MINORITIES

The idea of the "discrete and insular minority" originated in the now famous footnote four of the opinion in *United States v. Carolene Products Company* (1938). Justice Harlan F. Stone, writing for only a plurality of the Court, queried—without answering the question—"whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." In the wake of the Court's about-face in 1937, Justice Stone was serving notice that the Court might not accord the same deference to statutes directed at "discrete and insular minorities" than it would to statutes directed at economic regulation.

The Court made little use of the concept until the early 1970s, when it began to delineate the class characteristics of such groups. Included were groups had been "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." Although race, nationality, and

alienage seem to have been firmly established as class characteristics of the “discrete and insular minority,” the Court has refused to extend such class status to illegitimates, the poor, or conscientious objectors.

Regents of the University of California v. Bakke (1978) presented the question of the “discrete and insular minority” in a new light. The question in *Bakke* was whether the same “solicitude” should be applied to test a governmental action designed to benefit rather than injure a “discrete and insular” minority. The university, citing *Carolene Products*, argued that strict scrutiny was reserved exclusively for “discrete and insular minorities.” Four Justices agreed that a white male need no special protection from the political process that authorized the actions of the university. Justice Lewis F. Powell rejected this argument: “the ‘rights created by the . . . Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights . . .’ The guarantee of Equal Protection cannot mean one thing when applied to one individual and something else when applied to a person of another color.” In *Fullilove v. Klutznick* (1980) the Court, for the first time since the Japanese American Cases (1943-1944), upheld a racial classification that was express on the face of a law. *Fullilove* involved a challenge to an act of Congress authorizing federal funds for local public works projects and setting aside ten percent of those funds for employment of businesses owned by Negroes, Hispanics, Orientals, American Indians, and Aleuts. Chief Justice Warren E. Burger, writing for a plurality, called for judicial deference to Congress’s power under section 5 of the Fourteenth Amendment, as equivalent to “the broad powers expressed in the Necessary and Proper Clause” The irony was that the idea of the “discrete and insular minority” in its inception was designed to curtail such deference when racial classifications were involved.

Benign racial classifications, it is sometimes said, are justified because they do not involve the stigma of invidious discrimination. The recipients of the benefits that accrue from the “benign” classification are not branded as members of an “inferior race” as they would be if the classification were an invidious one. This theory erects “stigma” as the standard for Equal Protection rights. Absent any such stigma the implication is

that the Constitution is not offended, even if individuals must bear burdens created by a classification that otherwise would be disallowed by the Equal Protection Clause. As Burger stated in *Fullilove*, “‘a sharing of the burden’ by innocent parties is not impermissible.” To use the idea of stigma as a racial class concept is, in effect, to translate Equal Protection rights into class rights.

But the intrusion of class into the Constitution is a dangerous proposition, one that is at odds with the principles of the constitutional regime—principles ultimately derived from the proposition that “all men are created equal.” Class considerations explicitly deny this equality because they necessarily abstract from the individual and ascribe to him class characteristics that are different—and necessarily unequal—from those of individuals outside the class. A liberal jurisprudence must disallow all class considerations. When there is a conflict between two different “discrete and insular minorities,” which should be accorded preference? No principle can answer this questions. And the question is not merely theoretical. The Court has already faced this dilemma in cases such as *United Jewish Organizations v. Carey* (1977) and *Castenada v. Partida* (1977), and in a pluralistic society it is inevitable that many more such cases will arise. Equal protection can be the foundation of a genuine liberal jurisprudence only if it applies to individuals. As Justice John Marshall Harlan remarked in his powerful dissent in *Plessy v. Ferguson* (1896), the case that established the separate-but-equal doctrine, “[o]ur Constitution is colorblind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law.” This is undoubtedly still the essential principle of liberal government.

James Madison argued, in *The Federalist* #10, that in a large, diverse republic with a multiplicity of interests it was unlikely that there would ever be permanent majorities and permanent minorities; thus there would be little probability that “a majority of the whole will have a common motive to invade the rights of other citizens.” On this assumption, the majorities that do form will be composed of coalitions of minorities that come together for limited self-interested purposes. The majority will thus never have a sense of its own interest as a majority.

By and large, the solution of the Founders has worked remarkably well. There have been no permanent majorities, and certainly none based exclusively on race. Understanding American politics in terms of monolithic majorities and “discrete and insular minorities”—as the Supreme Court appears to do—precludes the creation of a common interest that transcends racial class considerations. By transforming the Fourteenth Amendment into an instrument of class politics, the Court risks either making a majority faction more likely by heightening the majority’s awareness of its class status as a majority, or transforming the liberal constitutional regime into one no longer based on majority rule.

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EX POST FACTO

In *The Federalist* #84 Alexander Hamilton argued that “the creation of crimes after the commission of the fact, or, in other words, the subjecting of men to punishment for things which, when they were done, were breaches of no law” has been “in all ages” one of “the favorite and most formidable instruments of tyranny.” Indeed, ex post facto legislation has generally been regarded as a violation of the fundamental due process requirement that there must be fair warning of the conduct which gives rise to criminal penalties. The Framers of the Constitution believed so strongly that ex post facto laws were contrary to the principles of republican government that they proscribed their use in two different provisions of the Constitution: Article I, section 9, as a specific exception to the

powers of the United States Congress, and Article I, section 10, as a specific prohibition on the powers of state legislatures.

Justice Samuel Chase in *Calder v. Bull* (1798) provided what has since come to be regarded as the authoritative delineation of the kinds of legislation that fall within the Constitution's prohibition against ex post facto enactments:

1st. Every law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action. 2d. Every law that *aggravates a crime*, or makes it *greater* than it was, when committed. 3d. Every law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed. 4th. Every law that alters the *legal rules of evidence*, and received less, or different, testimony, than the law required at the time of the commission of the offence, *in order to convict the offender*.

Although there is some question about the Framers' intent, the Supreme Court has consistently followed Chase's lead in restricting the ex post facto rule to criminal laws. Thus the Court has held that the deportation of aliens, the loss of a passport, and the denial of certain benefits do not fall within the ex post facto exception because they are not punishments in a criminal sense even though they may be "burdensome and severe." In the *Test Oath Cases* (1867), however, the Court held that oaths that disqualified people from holding certain offices or practicing certain professions constituted ex post facto laws.

The essential ingredient of an ex post facto law is its retrospective character; but not all retrospective laws are ex post facto in the technical meaning of the term. An ex post facto law not only is retrospective but also injures those to whom it is directed by imposing or increasing criminal penalties. For example, *Weaver v. Graham* (1981) invalidated retroactive application to a prisoner of a law reducing "good time" credits against a sentence. Retrospective laws that ameliorate penalties, however, are not ex post facto.

The rights affected by retrospective legislation must be substantial. As the Court held in *Beazell v. Ohio* (1925), statutory changes in trial procedures or rules of evidence "which do not deprive the accused of a defense and which operate only in a limited and unsubstantial manner to his disadvantage, are not prohibited." Thus, the ex post facto prohibition secures "substantial personal rights against arbitrary and oppressive legislation without limiting legislative control of remedies and procedures that do not affect matters of substance." Of its own weight, the ex post facto prohibition applies only to legislative acts, and not to changes in the law effected by judicial decisions. But where an unforeseeable statutory construction by a court is applied retrospectively in a manner that is tantamount to ex post facto legislation, that construction is barred by the due process clause. Although the particular application of the ex post facto clause has generated much controversy and debate, and involves, on occasion, the most intricate and detailed considerations, there seems to be almost universal agreement that the Constitution's prohibition against ex post facto legislation remains one of the mainstays of constitutional government.

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The City of Memphis, Tennessee, laid off white fire-fighters with more seniority to protect the positions of less senior blacks who had been employed under a "race conscious" affirmative action plan. The white firefighters sued, alleging that their seniority rights were explicitly protected by the Civil Rights Act of 1964.

Justice Byron R. White, writing for the Supreme Court's majority, agreed, noting that "mere membership in the disadvantaged class is insufficient to warrant a seniority award; each individual must prove that the discriminatory practice had an impact on him." White thus affirmed the proposition, which is explicit from the plain language of Title VII, that rights vest in the individual and not in the racial class, and that this fact demands a close fit between injuries and remedies. White's opinion raises some doubt about the power of courts to fashion classwide remedies where, as in race-conscious affirmative action plans, benefited individuals are not required to demonstrate individual injury. This case signals an important move toward the restoration of the principle that rests at the core of liberal jurisprudence—that rights adhere to the individual, and not to the racial class that one happens to inhabit.

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JUDICIAL LEGISLATION

The term "judicial legislation" appears to be something of an oxymoron, as the Constitution clearly assigns the principal task of legislation to the Congress. The Constitution does, of course, give the President a role in the legislative process through the veto power and through his power to recommend legislation to Congress that "he shall judge necessary and expedient." The Framers explicitly rejected, however, a similar role for the judiciary. Several attempts to create a council of revision, composed of the executive and members of the Supreme Court, to review the constitutionality of proposed legislation, were defeated in the Constitutional Convention. The most effective arguments against including the Court in a council of revision were derived from considerations of the separation of powers. Elbridge Gerry, for example, remarked that including members of the Supreme Court in a revisory council "was quite foreign from the nature of the office," because it would not only "make them judges of the policy of public measures" but would also involve

them in judging measures they had a direct hand in creating. Assigning ultimate legislative responsibility to the Congress apparently reflected the Framers' belief that, in popular forms of government, primary lawmaking responsibility should be lodged with the most representative branches of the government. In James Madison's words, "the people are the only legitimate fountain of power."

Justice Felix Frankfurter expressed the same view in his concurring opinion in *American Federation of Labor v. American Sash and Door Co.* (1949). "Even where the social undesirability of a law may be convincingly urged," he said, "invalidation of the law by a court debilitates popular democratic government Such an assertion of judicial power deflects responsibility from those on whom in a democratic society it ultimately rests—the people." Frankfurter continued his brief for judicial restraint by arguing that because the powers exercised by the Supreme Court are "inherently oligarchic" they should "be exercised with rigorous self-restraint." The Court, Frankfurter laconically concluded, "is not saved from being oligarchic because it professes to act in the service of humane ends."

The modern Supreme Court is not so easily deterred as Frankfurter was by charges of oligarchy. Since the landmark *Brown v. Board of Education* decision in 1954, the Court has actively and overtly engaged in the kind of lawmaking and policymaking that in previous years was regarded as exclusively the province of the more political branches of government. William Swindler explained the Court's transition from judicial deference to judicial activism in these terms: "If the freedom of government to act was the basic principle evolving from the Hughes-Stone decade, from 1937-1946, the next logical question—to be disposed of by the Warren Court—was the obligation created by the Constitution itself, to compel action in the face of inaction. This led in turn to the epochal decisions in *Brown v. Board of Education*, *Baker v. Carr*, and *Gideon v. Wainwright*."

Some scholars have argued that it was the identification of Equal Protection rights as class rights and the attendant necessity of fashioning classwide remedies for class injuries that gave the real impetus to the

Court's judicial activism in the years immediately following *Brown*. The Court, in other words, effectively legislated under its new-molded equity powers.

The Court's legislative role is usually justified in terms of its power of judicial review. But judicial review—even if it be regarded as a necessary inference from the fact of a written constitution—is not a part of the powers explicitly assigned to the Court by the Constitution. The Court made its boldest claim for the legitimacy of judicial legislation in *Cooper v. Aaron* (1958). Justice William J. Brennan, writing an opinion signed by all the members of the Court, outlined the basic constitutional argument for judicial supremacy. Brennan recited "some basic constitutional propositions which are settled doctrine," and which were derived from Chief Justice John Marshall's argument in *Marbury v. Madison* (1803). First is the proposition, contained in Article VI of the Constitution, that the Constitution is the supreme law of the land; second is Marshall's statement that the Constitution is "the fundamental and paramount law of the nation"; third is Marshall's declaration that "[i]t is emphatically the province and duty of the judicial department to say what the law is." Justice Brennan concluded that *Marbury* therefore "declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* Case is the supreme law of the land. ..." The defect of Brennan's argument, of course, is that it confounds the Constitution with constitutional law.

Marshall did indeed say that the Constitution was "the fundamental and paramount law of the nation," and that any "ordinary legislative acts" "repugnant to the constitution" were necessarily void. But when Marshall wrote the famous line relied upon by Brennan that "it is emphatically the province and duty of the judicial department to say what the law is," he was referring not to the Constitution but to "ordinary legislative acts." In order to determine the law's conformity with the Constitution it is first necessary to know what the law is. And once the law is ascertained it is

also necessary to determine whether the law is in conformity with the "paramount law" of the Constitution. This latter, of course, means that "in some cases" the Constitution itself "must be looked into by the judges" in order to determine the particular disposition of a case. But Marshall was clear that the ability of the Court to interpret the Constitution was incident to the necessity of deciding a law's conformity to the Constitution, and not a general warrant for constitutional interpretation or judicial legislation. Marshall was emphatic in his pronouncement that "the province of the court is, solely, to decide on the rights of individuals."

"It is apparent," Marshall concluded, "that the framers of the constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature." As he laconically noted in the peroration of his argument, "it is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the constitution, have that rank." For Marshall, Brennan's assertion that the Court's decision in *Brown* was "the supreme law of the land" would indeed make "written constitutions absurd" because it would usurp the "original right" of the people to establish their government on "such principles" that must be "deemed fundamental" and "permanent." If the Supreme Court were indeed to sit as a "continuing constitutional convention," any written Constitution would certainly be superfluous since, under the circumstances, there would be no "rule for the government of courts." After all, by parity of reasoning, if one were to accept Brennan's argument, it would also be necessary to hold that the Court's decision in *Dred Scott v. Sandford* (1857) was the supreme law of the land. But *Dred Scott* gave way because forces other than the Supreme Court decided that it was a decision not "pursuant" to the "fundamental and paramount law" of the nation. As John Agresto has cogently remarked: "If Congress can mistake the meaning of the text [of the Constitution], which is what the doctrine of judicial review asserts, so, of course, can the Court. And if it be said that it is more dangerous to have interpretive supremacy in the same body that directs the nation's public policy—that is, Congress—then (especially in this age of pervasive judicial direction of political and social life) an independent ju-

dicial interpretive power is equally fearsome for exactly the same reasons."

In *Swann v. Charlotte-Mecklenburg Board of Education* (1971) the Court was confronted with the question of the federal judiciary's equity powers under the Equal Protection Clause of the Fourteenth Amendment. At issue was whether the Court could uphold School Busing as a "remedy for state-imposed segregation in violation of Brown I." As part of the Civil Rights Act of 1964 the Congress had included in Title IV a provision that "nothing herein shall empower any official or court . . . to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another . . . or otherwise enlarge the existing power of the court to insure compliance with constitutional standards." Chief Justice Warren E. Burger, writing for a unanimous Court, remarked that on its face this section of Title IV is only "designed to foreclose any interpretation of the Act as expanding the *existing* powers of federal courts to enforce the Equal Protection Clause. There is no suggestion of an intention to restrict those powers or withdraw from courts their historic equitable remedial powers." According to Burger these equity powers flow directly from the Fourteenth Amendment—despite the fact that section 5 of the Amendment gives Congress explicit enforcement authority, an authority that was mistakenly restricted by the Court in the *Slaughterhouse Cases* (1873) and the *Civil Rights Cases* (1883).

A serious question arises, however, concerning Burger's claim that forced busing is one of the "historic" equity powers of the Court. It was never asserted as such by the Court prior to 1964, and as late as two years *after* the *Swann* decision it was still being described by Justice Lewis F. Powell as "a novel application of equitable power—not to mention a dubious extension of constitutional doctrine." Congress's response to *Swann*, the Equal Educational Opportunity and Transportation of Students Act of 1972, contained restrictions similar to those included in Title IV. These provisions suffered the same fate as the Title IV provisions, only now the Court was able to use *Swann* as authority for its ruling.

The *Swann* rationale derives equity powers directly from the Constitution. But the way in which the Court exercises its equity powers is indistinguishable from legislation. Thus, in effect, the Court now derives what is tantamount to legislative power from the Constitution. Because this power rests upon an interpretation of the Constitution, no act of Congress can overturn or modify the interpretation. Many scholars argue that if the Congress were to attempt to curtail the Court's power to order forced busing under the exceptions clause, the Court would be obligated, under the *Swann* reasoning, to declare such an attempt unconstitutional, because the Court's obligation to require busing as a remedy for equal protection violations is derived directly from the Constitution.

Judicial legislation incident to statutory interpretation is less controversial, for the Congress can overturn any constructions of the Court by repassing the legislation in a way that clarifies congressional intent. The interpretation of statutes necessarily involves the judiciary in legislation. In many instances the courts must engage in judicial legislation in order to say what the law is. In years past the Court's sense of judicial deference confined such judicial legislation to what Justice Oliver Wendell Holmes called the "interstices" of the law. It was generally believed that the plain language of the statute should be the controlling factor in statutory construction and that extrinsic aids to construction such as legislative history should be used only where they were necessary to avoid a contradictory or absurd result.

The courts are not always the aggressive agents in the process of judicial legislation. In recent years courts have acted to fill the void created by Congress's abdication of legislative responsibility. Many statutes passed by Congress are deliberately vague and imprecise; indeed, the Congress in numerous instances charges administrative agencies and courts to supply the necessary details. This delegation of authority to administrative agencies with provisions for judicial oversight of the administrative process has contributed to the judiciary's increased participation in judicial legislation. This tendency was intensified by the Court's decision in *Immigration and Naturalization Service v. Chadha* (1983), holding the legislative veto unconstitutional. Congress had for years used the sin-

gle-house legislative veto as a device for overseeing the activities of administrative agencies. But, as Judge Carl McGowan has noted, "the question inevitably recurs as to whether judicial review is an adequate protection against the abdication by Congress of substantive policy making in favor of broad legislation of what may essentially be the power to make laws and not merely to administer them."

The volume of litigation calling for "legislation" on the part of the courts also increases in proportion with the liberalization of the rules of standing. In previous years the Court's stricter requirements for standing were merely a recognition that the province of the judiciary, in the words of John Marshall quoted earlier, "was solely to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion." Liberalized rules of standing tend to produce what Court of Appeals Judge Antonin Scalia has called "an overjudicialization of the process of self-governance." Judge Scalia reminds us of the question posed by Justice Frankfurter—whether it is wise for a self-governing people to give itself over to the rule of an oligarchic judiciary. James Bradley Thayer wrote more than eighty-five years ago that "the exercise of [judicial review], even when unavoidable, is always attended with a serious evil, namely, that the correction of legislative mistakes comes from the outside, and the people thus lose the political experience, and the moral education and stimulus that comes from fighting the question out in the ordinary way, and correcting their own errors. The tendency of a common and easy resort to this great function, now lamentably too common, is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility."

If, on the other hand, the processes of democracy are unsuited for protecting democratic ends—if, that is, in the words of Jesse Choper, it is necessary for the Supreme Court generally to act "contrary to the popular will" to promote "the precepts of democracy"—then the question whether the American people can be a self-governing people is indeed a serious one. It was once thought that constitutional majorities could rule safely in the interest of the whole of society—that constitutional government could avoid the formation of majority faction. Today many scholars—and often

the Supreme Court itself—simply assume that the majority will always be a factious majority seeking to promote its own interest at the expense of the interest of the minority. This requires that the judiciary intervene not only in the processes of democracy but also as the virtual representatives of the interest of those who are said to be permanently isolated from the majoritarian political process. If American politics is indeed incapable of forming nonfactious majorities—and America has never had such a monolithic majority—then the American people should give itself over honestly and openly to "government by judiciary," for if constitutional government is impossible, then so too is the possibility of self-governance.

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O'CONNOR, SANDRA DAY (1930-)

Sandra Day O'Connor, the first woman Justice to serve on the Supreme Court, was appointed by President Ronald Reagan in 1981. She had served previously as the nation's first woman senate majority leader in her home state of Arizona and as a member of the Arizona Court of Appeals. In announcing her nomination the President extolled her as someone who would be a rigid adherent of constitutional

principles, taking an exacting view of the separation of powers as a limitation on judicial activism, and respecting the role of federalism in the constitutional scheme. Although there is little doubt that one motivation in appointing O'Connor was to deprive the Democrats of the opportunity of appointing the first woman Justice, the President's expectations have, by and large, not been disappointed.

For O'Connor constitutional jurisprudence means, above all, an adherence to enduring constitutional principles, recognizing that, while the application of these principles may change, the principles themselves are rooted in the constitutional text and in the precepts that animate the Constitution. In her dissent in *Akron v. Akron Center for Reproductive Health* (1983), O'Connor complained that the majority's decision rested "neither [on] sound constitutional theory nor [on] our need to decide cases based on the application of neutral principles." It is not entirely clear yet whether the Justice mistakenly identifies constitutional principles with "neutral principles." Her opinions generally indicate an awareness that the Constitution is not neutral with respect to its ends and purposes. She has refused to accept the prevailing view that the Constitution is merely a procedural instrument that is informed by no purposes or principles beyond the procedures themselves.

In criminal procedure cases O'Connor has adhered to the principle she enunciated in *Kolender v. Lawson* (1983): "Our Constitution is designed to maximize individual freedoms within a framework of ordered liberty. Statutory limitations on those freedoms are examined for substantive authority and content as well as for definiteness or certainty of expression." The Justice has used this rationale to resist unwarranted attempts to expand criminal due process rights beyond those clearly prescribed or fairly implied by the Constitution. For example, in *Oregon v. Elstad* (1985) O'Connor refused to extend the fruit of the poisonous tree doctrine either to uncoerced inculpatory statements made after police violation of the *Miranda* Rules, or as in *New York v. Quarles* (1984), to non-testimonial evidence produced as a result of a *Miranda* violation. In the latter case O'Connor concluded that Justice William H. Rehnquist's majority opinion had created "a fine-spun new doctrine on public safety exi-

gencies incident to custodial interrogation, complete with the hair-splitting distinctions that currently plague our Fourth Amendment jurisprudence." Moreover, dissenting in *Taylor v. Alabama* (1982), O'Connor would not have allowed an illegal arrest to taint a confession that followed appropriate *Miranda* warnings; in *South Dakota v. Neville* (1983) she would have allowed the claim that the refusal to take a blood-alcohol test is protected by the right against self-incrimination.

O'Connor has been no less resolute in her to protect the constitutional role of the states federal system. In her dissent in *Garcia v. San Antonio Metropolitan Transit Authority* (1985) she remarked that the principle of "state autonomy . . . requires the Court to enforce affirmative limits on federal regulation of the states." The majority opinion, she continued, created the "real risk that Congress will gradually erase the diffusion of power between state and nation on which the Framers based their faith in the efficiency and vitality of our Republic." O'Connor has also staunchly supported the "exhaustion" doctrine of federal habeas corpus review as a means "to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings." The rule that all federal claims must first be exhausted in state court proceedings is, as she wrote in *Engle v. Isaac* (1982), a recognition that "the State possesses primary authority for defining and enforcing the criminal law." She continued that "[f]ederal intrusions into State criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." And in *Hawaii Housing Authority v. Midkiff* (1984) O'Connor made clear that the Court would accord the utmost deference to state legislatures in matters of "social legislation."

O'Connor was less deferential, however, in the instance where a state maintained a women-only nursing school: Writing for the majority in *Mississippi University for Women v. Hogan* (1982), O'Connor stated that in "limited circumstances a gender classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened." Here, the sex discrimination actually harmed the intended beneficiaries by perpetuating "stereotyped" and "archaic" notions about the role of women in society.

O'Connor has urged the Court to reexamine some important issues connected with the Establishment of Religion clause of the First Amendment. Concurring in *Wallace v. Jaffree* (1985), O'Connor agreed that an Alabama law providing for a moment of silence was unconstitutional because it sought to sanction and promote prayer in public schools. She dissented, however, from the Court's decision in *Aguilar v. Felton* (1985) striking down the use of federal funds to provide remedial education by public school teachers for parochial school students. While agreeing in *Lynch v. Donnelly* (1983) that every governmental policy touching upon religion must have a secular purpose, O'Connor suggested that the entanglement test propounded in *Lemon v. Kurtzman* (1971) should be reexamined.

In the area of Equal Protection rights, O'Connor has taken the firm stance that rights belong to individuals. In *Ford Motor Company v. Equal Employment Opportunity Commission* (1982), and in her concurring opinion in *Firefighters Local # 1784 v. Stotts* (1984), O'Connor argued that remedies must be limited to those who can demonstrate actual injury and must be fashioned in a way that protects the settled expectations of innocent parties. She thus adheres to the original intention of the framers of the Fourteenth Amendment and of the Civil Rights Act of 1964, reaffirming the principle that lies at the heart of constitutional jurisprudence—that rights belong to individuals and not to the racial or gender group of which they are members. Employing narrowly construed and analytical opinions, O'Connor has begun to build a solid base for the Court's return to a jurisprudence that looks to the articulation of the Constitution's enduring principles.

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CAPITAL PUNISHMENT AND RACE

In *McCleskey v. Kemp* (1987), the Supreme Court grappled with the difficult issue of race and capital punishment. Confronted with statistical studies that indicated potential racial discrimination in the assignment of death sentences in the state of Georgia, the Court considered Eighth Amendment and Equal Protection challenges to the application of the Georgia death penalty statute. Whereas no significant disparities existed with respect to the race of defendants, statistical evidence, using sophisticated regression analysis, indicated that blacks were 4.3 times more likely to receive death sentences when they killed whites than when they killed blacks.

McCleskey, a black, had killed a white police officer during an armed robbery. The fact that the race of the victim made it more likely that he would receive the death penalty was, McCleskey argued, a violation of Equal Protection guarantees and the Eighth Amendment's ban on cruel and unusual punishment. The Court, although expressing some reservations about both the credibility and the relevance of the statistical evidence, nevertheless assumed their validity in order to reach the constitutional questions.

Speaking through Justice Lewis F. Powell, the Court's majority of five refused to break new ground in its Equal Protection jurisprudence. Powell began by noting that it was a settled principle that "a defendant who alleges an equal protection violation has the burden of proving 'the existence of purposeful discrimination' " and that the purposeful discrimination had "a discriminatory effect on him." Therefore, "McCleskey must prove that the decisionmakers in *his* case acted with discriminatory purpose." Statistical inference, the Court ruled, could at best indicate only that there was a risk that racial discrimination had been a factor in McCleskey's sentencing. The Court has in certain contexts—selection of jury venire and Title VII—accepted statistics as *prima facie* proof of discrimination. Moreover, the statistics (particularly in the jury cases) do not

have to present a "stark" pattern in order to be accepted as sole evidence of discriminatory intent.

Yet the Court in *McCleskey* distinguished capital sentencing cases as less amenable to statistical proof because of the "uniqueness" of each capital case and the consequent difficulty of aggregating data. Each jury is unique and "the Constitution requires that its decision rest on consideration of innumerable factors that vary according to the characteristics of the individual defendant and the facts of the particular capital offense." In contrast, the jury-selection and Title VII cases are concerned only with limited ranges of circumstances and are thus more amenable to statistical analysis.

The Court therefore held that for McCleskey's claim of purposeful discrimination to prevail, he "would have to prove that the Georgia Legislature enacted or maintained the death penalty statute *because* of an anticipated racially discriminatory effect." But, as the Court laconically notes, this was a claim that was rejected in *Gregg v. Georgia* (1976). Thus, the Court concluded that "absent far stronger proof, . . . a legitimate and unchallenged explanation" for McCleskey's sentence "is apparent from the record: McCleskey committed an act for which the United States Constitution and Georgia laws permit imposition of the death penalty."

McCleskey also sought to use statistics to support his Eighth Amendment claim that the discretion given to sentencers in the Georgia criminal justice system makes it inevitable that any assignment of the death penalty will be "arbitrary and capricious." The Court has interpreted Eighth Amendment requirements to mean that sentencers must be governed by state laws that contain carefully defined standards that narrow the discretion to impose the death penalty. That is, sentencers must exercise only "guided discretion." But there can be no limits with respect to the sentencer's discretion not to impose the death penalty.

As the Court stated in *Lockett v. Ohio* (1978), "the sentencer" cannot be "precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the of-

fense that the defendant proffers as a basis for a sentence less than death." Discretion that ensures the treatment of all persons as "uniquely individual human beings" is thus an essential ingredient of Eighth Amendment jurisprudence. The Court has ruled that mandatory death sentences are unconstitutional because the "respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."

The presence of such discretion, however, makes it impossible for actual decisions to result in racial proportionality. And to stipulate racial proportionality as a requirement either of Equal Protection or the Eighth Amendment would mean that the sentencer's discretion would have to be limited or extinguished. Proportionality requirements also present the daunting prospect that blacks who are convicted of killing blacks will have to receive the death penalty at an accelerated rate. Of course, proponents of the use of statistics as a measure of Equal Protection and Eighth Amendment rights do not expect any such result. Rather, their ultimate purpose is to abolish capital punishment under the guise that it is impossible to mete out death sentences in any rational or otherwise nonarbitrary manner. The Court, however, remains unwilling to accept statistical evidence as a sufficient proof of capriciousness and irrationality.

Because the existence of discretion will always produce statistical disparities, the "constitutional measure of an unacceptable risk of racial prejudice influencing capital sentencing decisions" cannot be defined in statistical terms. Rather, the constitutional risk must be addressed in terms of the procedural safeguards designed to minimize the influence of racial prejudice in the criminal justice system as a whole. After a thorough review of the Georgia system in *Gregg*, the Court concluded that procedural safeguards against racial discrimination were constitutionally adequate. As the Court rightly said, "where the discretion that is fundamental to our criminal process is involved, we decline to assume that what is unexplained is invidious."

The Eighth Amendment is not limited to capital sentencing but extends to all criminal penalties. Thus, a racial proportionality requirement for capital sentencing would open the possibility that all sentences could be challenged not only on the grounds of race but on the grounds of any irrelevant factor that showed enough of a statistical disparity to indicate that the sentencing was "irrational" or "capricious." Some cynics have described this as a kind of affirmative action for sentencing decisions. Such a situation not only would prove unworkable but, by limiting the discretion that remains at the heart of the criminal justice system, would also prove to be unjust. The vast majority of convicted murderers, for example, do not receive death sentences, because the discretionary element of the system spares them. The small percentage who do receive death sentences have thorough and exhaustive procedural protections. Under these circumstances, it would be impossible to argue that statistical disparities based on race indicate systemic racism in the criminal justice system or that the statistical disparities indicate a fundamentally unjust system.

Moreover, some scholars have questioned the validity of the statistics used in the *McCleskey* case. Interracial murders are more likely to involve aggravating circumstances (e.g., armed robbery, kidnapping, rape, torture, or murder to silence a witness to a crime) than same-race murders, which involve more mitigating factors (e.g., quarrels between friends and relatives). Given the relative rarity of blacks being murdered by whites, the statistics are bound to be skewed, but they do not necessarily prove or even indicate racial discrimination.

Taking into account the different levels of aggravating and mitigating circumstances, one recent study of Georgia sentencing practices concluded that evidence "supports the thesis that blacks who kill whites merit more serious punishment and are not themselves the victims of racial discrimination. By the same token, the same evidence suggests that blacks who kill blacks deserve less punishment and are not being patronized by a criminal justice system because it places less value on a black life."

Given the controversial nature of the statistical evidence proffered in the *McCleskey* case and the doctrine that Equal Protection and Eighth

Amendment rights belong to "uniquely individual human beings" rather than racial groups, the Supreme Court was wise to reject abstract statistical disparities as proof of individual injury.

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RACE-CONSCIOUSNESS

It was once widely believed that *Brown v. Board of Education of Topeka* (1954, 1955) had removed the last vestiges of race-consciousness from the Constitution. Many observers saw the *Brown* decision as a vindication of Justice John Marshall Harlan's lone dissent in *Plessy v. Ferguson* (1896). Harlan's critique of the majority's separate but equal doctrine was summarized in these famous words: "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." In the years between *Plessy* and *Brown*, the ideal of a "color-blind" Constitution served as one of the central tenets of liberal constitutionalism.

Today, however, some leading liberal constitutionalists argue that adherence to the ideal of a color-blind Constitution was a mistake. It has been only recently discovered that "color-blindness" was all along a "myth" or, at best, a "misleading metaphor." The principal reason for the volte-face on the part of liberal activists is summarized by Laurence H. Tribe, who writes that "judicial rejection of the 'separate but equal' talisman seems to have been accompanied by a potentially troublesome lack

of sympathy for racial separateness as a possible expression of group solidarity." Indeed, it seems to be true that the expression of racial or ethnic group solidarity does require something like the old—and once justly decried—"separate but equal doctrine." Tribe's tergiversations indicate, however, that it is not yet entirely fashionable to speak openly about the desirability of returning to separate but equal. Attacks on the idea of a color-blind Constitution, on the other hand, are legion.

A curious feature of the *Brown* decision is that it did not make a comprehensive condemnation of racial classifications or entirely overrule the *Plessy* decision. Only racial classifications that were said to produce "feelings of inferiority" were deemed to violate Equal Protection, and from the psychological evidence adduced by the Court, this was "proven" to be the case only in the context of grammar school education. Presumably, racial segregation that did not stigmatize one race or ethnic group as inferior would survive the test adumbrated in *Brown*. Thus, *Brown* did not overrule all racial classifications—or treat them as suspect classifications—but left open the possibility that under certain circumstances racial classifications could be "benign" if the classifications were designed to produce racial class remedies rather than racial class injuries. Resort to the doctrine of strict scrutiny in the *Brown* case would probably have effectively foreclosed the future use of race as a legitimate classification.

Perhaps the best expression of the new understanding of "separate but equal" was made by Justice Harry A. Blackmun in his separate opinion in *Regents of University of California v. Bakke* (1977): "I suspect that it would be impossible to arrange an affirmative-action program in a racially neutral way and have it successful. ...In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently." Justice Blackmun could have used the word "separately" in lieu of "differently" without changing his meaning in the slightest. Indeed, it has been the advent of affirmative action that has generated the greatest controversy about race-consciousness and the Constitution. At its inception, the proponents of affirmative action assured a skeptical world that it was only a temporary measure to be employed in the service of equality of opportu-

nity. But now, some twenty-odd years after its appearance, affirmative action is looked upon unabashedly by its supporters as a means of securing racial class entitlements.

Inevitably, the test of racial class entitlements—and racial discrimination—is the concept of racial proportionality. This idea assumes that, absent discrimination, the races will freely arrange themselves in the various aspects of political and private life in exact racial proportionality and that when they do not, there is a *prima facie* evidence of discrimination (or underrepresentation) that eventually must be rectified by any number of coercive remedies. This situation, of course, presents the alarming spectacle of a nation one day looking upon all civil rights as nothing more than racial class entitlements. But any nation with the slightest concern for the lessons of history would never self-consciously allow itself to regard the rights of individuals as nothing more than the by-product of racial class interests. Even though we may be assured that the ultimate ends of such programs as affirmative action are "to get beyond racism," those who advocate such policies simply have not thought out the likely consequences, believing, no doubt, that a means can never become the end itself.

The constitutional doctrine that most contributes to race-consciousness is that of discrete and insular minority. The underlying premise of this doctrine is that there are certain racial and ethnic minorities that are permanently isolated from the majoritarian political process and therefore cannot vindicate their racial class interests by merely exercising the vote. The concept of the discrete and insular minority assumes that American politics has always been dominated by a monolithic majority that seeks only to aggrandize its own racial class interests at the expense of the various discrete and insular minorities. Thus, the moral authority of the majority—indeed, of majoritarian politics itself—must be questioned, if not undermined. In fact, some legal scholars argue that the only way that the rights of discrete and insular minorities can be absolutely guaranteed is in those instances where legislation disadvantages or injures the majority. Thus, one could argue that the Constitution not only permits affirmative action but requires it. It is only where the majority

suffers a positive disadvantage that one can be certain that discrete and insular minorities are not harmed by the operation of the majoritarian political process. Fortunately, the Supreme Court has never accepted this negative version of the categorical imperative.

A bare acquaintance with history shows the impossibility of such a simplistic view of American politics. Could such a monolithic majority bent on the exclusive aggrandizement of its own racial class interests approve the Declaration of Independence and the Constitution? Ratify the Bill of Rights? Fight the Civil War to overturn the *Dred Scott v. Sandford* (1857) decision? Ratify the Thirteenth Amendment, Fourteenth Amendment, and Fifteenth Amendment? Pass the Civil Rights Act of 1964 and the Voting Rights Act of 1965? These great events (and a host of others) in American constitutional history make it incredible that learned people—including the Justices of the Supreme Court—could believe that the concept of discrete and insular minorities was in any way an accurate reflection of American political life. American life is too subtle and complex to be understood exclusively in terms of racial class interests.

The Framers of the Constitution knew that class politics, in whatever guise it appeared, was incompatible with constitutional democracy. The whole thrust of James Madison's belief in the "capacity of mankind for self-government" was his conviction that under a properly constructed constitution, majorities could be rendered capable of ruling in the interest of the whole of society rather than in the interest of the part (i.e., in the interest of the majority). The structure of society itself, with its multiplicity of interests and accompanied by a constitutional structure informed by the separation of powers, held the prospect that majorities could act in a manner consistent "with the rules of justice and the rights of the minor party." Madison called these majorities *constitutional* majorities as distinguished from *numerical* majorities. Many legal scholars today, however, simply proclaim that every majority is ipso facto a special-interest group and that majorities cannot therefore be trusted to rule in the interest of the whole. Some even conclude that courts should be cast in the role of virtual representatives of discrete and insular minorities, because judges are isolated from the majoritarian political process and can therefore "rule" in

the interest of the whole of society. Others, however, have not forgotten such infamous decisions as *Dred Scott*, *Plessy v. Ferguson*, *Lochner v. New York* (1905), and *Korematsu v. United States* (1944) and are quick to recognize this scheme as a form of judicial oligarchy. Virtual representation is an idea that is incompatible with republican government.

It has become something of an orthodoxy among legal scholars to ridicule the moral imperative of racial neutrality as the driving force of the Constitution. They retort that race has always been a factor in American political life and it is simply unrealistic to think that it will not be so for the foreseeable future. Because race-consciousness will inevitably be part and parcel of constitutional calculations, it is more honest to advocate them openly than to seek a deceptive refuge in the ideal of a color-blind Constitution. It is true that America's constitutional past is all too replete with race-consciousness. After all, the Constitution itself gave support to slavery. The toleration of slavery in the Constitution was a product of political necessity. The Constitution itself-and thereby any prospects of ending slavery-would never have been accepted without compromise on the issue of slavery. But most of the Framers of the Constitution looked upon that compromise as a necessary (but temporary) departure from the principles of the regime that had been enunciated in the Declaration of Independence. The best they could do under the circumstances was to fix those principles in the Constitution so that the Constitution could one day provide the basis for emancipation. The American founding was incomplete, but the Constitution looked forward to its completion by putting, in Abraham Lincoln's words, "slavery on the ultimate road to extinction." Lincoln always interpreted the Constitution in light of the principles of the Declaration. In doing this, he was following the lead of the Framers themselves.

In 1857, Lincoln gave an account of the aspirations of the American polity and the role the Declaration played in fixing constitutional aspirations. He noted that the authors of the Declaration "did not mean to assert the obvious untruth, that all were then actually enjoying equality, nor yet, that they were about to confer it immediately upon them." In fact, Lincoln noted, they had no power to "confer such a boon," had they been

inclined to do so. Rather, "they meant simply to declare the *right*, so that the *enforcement* of it might follow as fast as circumstances should permit. They meant to set up a standard maxim for free society, which should be familiar to all, and revered by all, constantly looked to, constantly labored for, and even though never perfectly attained, constantly approximated, and thereby constantly spreading and deepening its influence, and augmenting the happiness and value of life to all people of all colors everywhere." With the Constitution viewed as the means of implementing the "standard maxims" of the Declaration, the nation has made tremendous progress since the Civil War and Reconstruction.

Yet, at almost the eleventh hour, liberal Constitutionalists want to abandon those principles that have been the source of progress. Surely the progress came too slowly and advanced by fits and starts, according to the political circumstances of the day. But no one can deny that progress occurred and that it resulted directly from our "ancient faith" that the Constitution should be race-neutral. Now we are told that progress in race relations has not gone far enough or fast enough and it is time to return to a race-conscious Constitution to implement a newer, more certain view of racial progress. The return to race-consciousness also means that sooner or later we will have to pronounce the principle of equality "an empty idea." The reason is simple: equality is a principle that is incompatible with group rights and preferential treatment. One prominent author has argued that because it cannot comprehend the "rights of race," "equality is an idea that should be banished from moral and legal discourse." In deed, group claims—including racial group claims—are not claims of equality, but claims of inequality, and they necessarily rest upon some notion of "separate but equal." Class claims deny the principle of equality because they ascribe to individuals class characteristics that are different-and necessarily unequal-from those of individual occupying other classes. If there were no inequalities implicit in class distinctions, such distinctions would be superfluous and there would be no need to substitute group rights for individual rights.

Almost the whole of American constitutional history has been a history of the nation's attempt to confine the genie of race by powerful

constitutional bonds; yet the most sophisticated constitutional scholars today advocate the release of the racial genie once again, this time to act as a benign, rather than destructive, force. This is dangerous advice because this time the genie will not be restrained by the moral principle that "all men are created equal."

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