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11 August 1992

Dear QAb-ce ,

CONSTITUTIONAL LITIGATION SEMINAR : FRIDAY 14 AUGUST

I confirm that this Seminar will be taking place at our offices from .9.00am.
Jack Greenbergâ\200\231s Seminar will focus on the following issues :-

1. The NAACP Legal Defence Fund litigation leading to Brown v Board of
Education ;

Standards of Constitutional Review ;
Constitutional interpretation ;
Discriminatory intent and effect ;
Statutory interpretation as influenced by the Constitution ;
Statistics as a means of proving discrimination.
Professor L Henkin will then respond and open up the debate generally.
I enclose the materials relevant to the Greenberg input.

We look forward to seeing you.
Yours sincerely,

WILLIAM KERFOOT

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Pretoria: H Vally (Director) D Gilfillan N C P Kimble N B Monama The Hon J J Trengrove
QC (Consultant)

LEGAL RESOURCES CENTRE

CONSTITUTIONAL LITIGATION SEMINAR

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tion for darker skinned Negroes, it could lead to subsequent cases in which the degree of Negro ancestry would be greater, and might make the Jim Crow laws impossibly difficult to administer. But the Supreme Court later gave short shrift to this argument.Â®Â® The suggestion to litigate on behalf of a fair-skinned defendant involved TourgÃ©e in a bit of organizational and personal disagreement which seems to appear with more than ordinary frequency in cases seeking to advance principles. Louis Martinet, Editor of the Crusader, wrote to him that there was some negative feeling among the darker members of the black community who â\200\234charged that the people who support our movement were nearly white or wanted to pass for white.â\200\235 Nevertheless, a case preceding Plessy went forward, with a light-skinned tester, Daniel F. Desdunes, who, on February 24, 1892, bought a ticket from New Orleans to Mobile, entered a white coach and was arrested. Desdunesâ\200\231 case presented the issues later decided in Plessy, including the claim of property right in a light complexion. TourgÃ©e'â\200\231s co-counsel, James C. Walker, also urged that they advocate a commerce clause theory, i.e., that the law was unconstitutional as regulation of interstate commerce. TourgÃ©e was dubious because he said he wanted a decision which would definitely end segregation. This contrasted with his proposal that they use a light-skinned defendant by which they might win on a

limited ground. Probably it does TourgÃ©e an injustice, but it is -

worth considering that although there were differences in the kinds of limitations, the critical distinction might be that the first idea was TourgÃ©e's, the second Walker's.

In any event, this disagreement was resolved by a decision of the Supreme Court of Louisiana which upheld an argument of the Pullman Company in another caseÂ® that the Jim Crow law was unconstitutional so far as it applied to interstate passengers. The Desdunes case died. This unexpected denouement of Desdunes has echoes in modern efforts where one quickly learns that principles rarely can be established in single cases because they so often may be washed out for all manner of reasons. TourgÃ©e then undertook to bring about a fresh case, Plessy v. Ferguson, dealing with an intrastate trip, brought against Homer Adolph

Plessy, a defendant of â\200\234seven-eights Caucasian and one-eight African blood.â\200\235 Plessy began the trip, was arrested, and the case proceeded to the United States Supreme Court.

Plessy, a constitutional disaster, remained the law for nearly sixty years It was the authority cited by lower federal and state courts to legitimize racial segregation in everything. It was not only a legal but a moral legitimization of Jim Crow. The only constructive achievement of the case was Justice Harlanâ\200\231s dissent, which hovered like a brooding omnipresence in the sky, to borrow Holmesâ\200\231 figure, an inspiration toa later age when the country was readier to accept TourgÃ©e's submissions.

Since TourgÃ©e had forebodings of what was to comeâ\200\224that he would lose and that change would be difficult, perhaps impossible â\200\224should he have proceeded nonetheless? He had clients who wanted to fight segregation in the courts. Apparently he made no effort to dissuade them, but if he had, probably he could not have succeeded in changing the minds of all of them. At the same time, as the washing out of the Desdunes case showed, there was other litigation presenting the same issues and possibly sooner or later the Supreme Court would have handed down a Plessy decision in

substance, even if not Plessy itself. We can only wonder whether TourgÃ©e was right or wrong in proceeding in the face of such inauspicious omens.

THREE MODERN LITIGATION CAMPAIGNS

The balance of this lecture will discuss a number of campaigns which have encouraged law making by the courts, and something about their strategy and inherent limitations. The cases are those which outlawed school segregation, brought a measure of fair treatment to welfare recipients, and sought to abolish the money bail system. I might have chosen others and they deserve analysis which might lead to somewhat different conclusions. But I have taken the easy way out by treating subjects of some familiarity. Subsequently, some thoughts will be offered on limits on encouraging law making by the courts and on the role of this kind of law making in a democracy.

The first sequence is the one that led from Plessy to Brown v. Board of Education.Â®* By the mid-19ooâ\200\231s the NAACP's legal program had begun.32 At first run by volunteers, it had no blueprint and merely responded to situations as they arose in, for example, jury discrimination, voting, and peonage cases. By 1929 the NAACP and its lawyers, working in a tradition of belief in education as the key to equality, began preparing blueprints specifically to end the outrageous discrepancies between black and white schooling? :

At first their goal was physical equality, not desegregation, perhaps because their reading of the cases was that the constitutionality of segregation was settled by Plessy v. Ferguson. Plessy was not a school case, but it rested in large part on widespread and express judicial acceptance of school segregation Â®! Indeed, following Plessy, and relying on it, the Supreme Court rejected challenges to segregated schools three times between 1899 and 1927. Cumming v. Richmond County Board of EducationÂ®Â® denied the application to close a white high school in a county that had none for Negroes, although the constitutionality of segregation was not properly in issue. Berea College v. Kentucky upheld that state's law requiring segregation in a private college as a regulation of corporations. Gong Lum v. RiceÂ®â\200\231 held that a Chinese child was not denied equal protection when classified and segregated with blacks. One might have expected some expression of doubt from such Justices as Holmes, Brandeis or Stone, who sat in Gong Lum, but Chief Justice Taft's opinion was for a unanimous court. Gong Lum also said that segregation in schools of blacks from whites was clearly constitutional, though that was not the issue. Even Justice Harlan, whose Plessy dissent was vindicated in Brown v. Board of Education, had gone to pains to point out in Cumming and Berea CollegeÂ® that he did not question the constitutionality of racial segregation in public schools.

At the same time, constitutional jurisprudence contained and developed authority in irreconcilable conflict with Plessy. Strau-

der v. West Virginia,* surviving as good law from 1880, held unconstitutional exclusion of Negroes from juries, citing the stigma which the exclusion inflicted. Enforcement of a municipal ordinance on its face neutral to discriminate against Chinese laundry operators was held a denial of equal protection in Yick Wo v. Hopkins. In 1917 Buchanan v. Warley, an early NAACP effort, struck down a racial zoning ordinance under the due process clause. There were other cases.*Â® Despite school segregation law there was real ambivalence in the law of race relations.

The NAACP's lawyersâ\200\231 organizational base and expertise were augmented in 1929 by a foundation grant for the purpose of attacking racial discrimination, particularly in education. The original plan of a study group of the foundation, the American Fund for Public Service, called for bringing cases to require equality in state and local allocations for segregated black and white public schools in every Southern state. The goal was more law enforcement than law making because the initial memorandum of strategy doubted that the constitutionality of segregation could be

attacked successfully. The stated aims were to make segregation too expensive to maintain, create precedents, expose the VICTONS-ness of racial discrimination, stir â\200\234the spirit of revoltâ\200\235 among Ne-grocs, and hasten the efforts of whites to end such injustices.**

But reconsidering this plan, a group of NAACP lawyers for whom Nathan Margold wrote an exhaustive analysis in the early 1930's, concluded that an effort to enforce separate-but-equal could not succeed because of the discretion accorded school ad-ministrators, and that equalized segregated schools would, in any event, slip rapidly back into inequality.*Â® Margold urged that segregation itself was â\200\234the very heart of the evils in education against which our campaign should be directed.â\200\235 This change in strategy was based in part on Margoldâ\200\231s analysis of the constitu-tional precedents. His strategy was to demonstrate that wherever segregation existed, so did inequality, and that, therefore, segre-gated schools were unequal under the reasoning of Yick Wo v. Hopkins.

As the effort got underway there was yet another change in di-rection. Charles Houston, William Hastie, and Thurgood Mar-

shall undertook to attack the most extreme caseâ\200\224that of denial of graduate and professional education to Negroes in southern states when it was furnished to whites.*Â® Yick Wo was not pushed to the fore; for these cases it wasnâ\200\231t necessary.*â\200\235 Desegregation was the most practicable relief. The cases were litigation campaign law making cases par excellence: the marginal consequences of one or two students entering a graduate school were not of sufficient immediate practical importance to warrant the effort; only long-term law making was.

The first decision was Pearson v. Murray* in which the Maryland Court of Appeals ordered the University of Maryland Law School to admit a black applicant because the state maintained only a law school for whites within the state. This was followed by Missouri ex rel Gaines v. CanadaÂ® in which the United States Supreme Court entered a similar order concerning the University of Missouri's law school. Both courts observed that ordering admission was within their remedial power, unlike ordering the construction of a separate black school which could be done only by the legislature.

After World War II the Supreme Court decided three important litigation campaign cases: Sipuel v. Oklahoma State Board of Regents;s! Sweatt v. Painters? and McLaurin v. Oklahoma." Sipuel held that legal education must be offered within the state to black citizens as soon as it is offered to whites. Oklahoma was not allowed time to build a new black law school. Sweatt carefully analyzed all the components of a legal education and held that the University of Texas Law School was superior to a newly established school for black students, not merely because of library, law review and other measurable facilities but because legal education includes association with one's classmates. All-black insti-

tutions isolated their students from the mainstream of the bar.

This was, of course, a ruling on segregation per se, though the Court insisted it was not questioning Plessy, thus leaving open the option to retreat in later cases.

, Even more far-reaching was the Courtâ\200\231s decision the same day in, McLaurin. The Sweatt record contained expert testimony of

educators and social scientists on the effects of segregation.Â® The McLaurin record contained only a few sentences, consisting of McLaurinâ\200\231s testimony, that the enforced separation within the school interfered with his studies.Â®Â® His education was otherwise in all measurable respects the same as white students; he had been required only to sit in a separate place, alongside whites in the classroom, cafeteria, and library. The issue was, therefore, nothing more or less than segregation per se, but the Court once more spoke in terms of equality, held separation to be unconstitutional inequality, and still refused to reconsider Plessy. By the time of Brown v. Board of Education, the precedents necessarily implied, but did not state, that segregation was unconstitutional, but the Court reserved the right to disavow the clear implications of its decisions.

Moreover, between Gaines and Brown, the Supreme Court decided racial discrimination cases other than those in education: the restrictive covenant,Â® white primary,Â® interstate travel cases,Â®Â® and HirabayashiÂ® and KorematsuÂ® involving curfew for and relocation of Japanese-Americans in World War II. These latter decisions while upholding restrictions based upon wartime

necessity, contained sweeping egalitarian dictum.

The Brown casesÂ® were a deliberate shift from the graduate to the elementary and high school level. They were tried on records that left all the options open, and came to the Supreme Court aided by the new precedents. The plaintiffs presented proof of tangible inequalities, which, they argued, required desegregation. Indeed, the Delaware courts, in one of the cases, awarded relief on this ground. Plaintiffs also put on expert testimony as in Sweatt showing that segregated education was inherently unequal and social scientific evidence directed to the harm done by segregation. They made legal arguments directed to the inherent unreasonableness of racial classification. But by the time of the final arguments in the Supreme Court the plaintiffs focused on the unlawfulness of segregation, essentially abandoning claims of inequality stemming from differences in physical facilities.

Surely this is no place to do more than summarize the Brown

opinion except in briefest form. It built upon the graduate and professional school precedents and drew upon the underlying purposes of the Fourteenth Amendment interpreted in the light of the needs and functions of society today. And, of course, the opinion distinguished or characterized as dictum what had been done in Plessy, Cumming, Berea College and Gong Lum. The opinion also rejected the social scientific conclusions of Plessy to the effect that if segregation inflicted a stigma that was only because Negroes thought so, responding with contemporary social scientific evidence, some of which was on the record, some of which was in the literature.

Brown and the cases preceding it are sometimes looked upon as a paradigm of law making in the courts and probably they have been the principal inspiration to others who seek change through litigation. Indeed, Brown showed that litigation campaigns could succeed. But they need not. It may be useful to look at the litigation leading to Brown and identify factors that contributed to the outcome.

The lawyers who brought the cases had adequate financial resources and an organizational base which could produce cases which presented the issues they wanted decided, where and when they wanted them. But this was far from automatic and not subject to tight control. Applicants had to appear and desire to go to the schools in question, but this sometimes could be encouraged and, more important, unpropitious cases could be turned down. No one, other than the NAACP and the NAACP Legal Defense Fund, was then interested in or financially able to bring such suits. In essence, there was a large measure of control, a substantial ability to influence the development and sequence of cases, which does not exist with many other efforts to make law in the courts today, as illustrated to a degree by the welfare rights cases.

The least complicated situations were brought to court first. In Gaines and Sipuel the records were simple. The injustice of excluding Gaines or Sipuel from the statesâ\200\231 law schools, while admitting whites, was manifest and compelling. Since Plessy was not precisely in point, and in the face of the gross unfairness in-

flicted on plaintiffs, the Court found it easier to ignore Plessy than follow it. The more difficult graduate and professional school issues found in Sweatt, which involved complex comparisons of law schools, and psychological, sociological, and educational factors, were not presented until the groundwork had been established in Gaines and Sipuel, and a general favorable legal ambience had been developed in other Fourteenth Amendment cases.

If sequence is important, if adverse precedent is to be eroded in small steps, perhaps based on records of great injustice, a degree of control can be critical. An adverse precedent may be qualified slightly to do justice in a limited case and several such decisions may leave the precedent with little or no force. But an inappropriate suit, brought by a litigant not part of the project, might well have detrimental effect. An example of deliberate timing has been described by Judge William H. Hastie, recounting his oral argument in Morgan v. Virginia (1946), which held Virginia's bus segregation law unconstitutional under the Commerce Clause. Justice Rutledge asked whether the Virginia law

was unconstitutional under the Fourteenth Amendment. â\200\230Then-lawyer Hastie replied that the constitutionality of segregation under the Fourteenth Amendment would be brought up on an adequate record some time in the next several years.Â®* He was not making the attack at that time.

Significantly, the school cases dealt with race, a subject with a special place in our history. Claims of injustice or deprivation which involve race, therefore, have a special persuasiveness. Other assertions of right, while often highly worthy, and perhaps otherwise compelling, do not start out with this imprimatur of history on their side. They must first prove themselves in a way that racial discrimination claimants need not.

Apart from the fact that the school case plaintiffs were making racial claims, they presented issues that courts are accustomed to adjudicate, questions of legal status. As we shall see in the welfare rights cascs there may be less inclination to decide favorably issues of distributive or social justice. And in the early days at least, the school cases were simple: either the plaintiff may be ex-

cluded or he may not. There were at first no questions of implementation or complex administration, taxation or appropriation, except in a secondary or remote way. As we shall see in the bail cases, the question of what is to be the alternative to the money bail system might have been a reason for the inconclusive result.

Political repercussions were minimal until after the Brown decision.Â®Â® The early graduate and professional cases arose in states of least potential resistance: Maryland, Missouri, North Carolina, Tennessee, Oklahoma and Texas. Indeed, not until well after Brown were cases brought to integrate higher education in Mississippi, Alabama, South Carolina and Georgia. The border state cases probably arose first, naturally, as it was the only Southern area in that early period where Negroes would hazard

â\200\234entry into a white institution. When James Meridith asked to be represented in his effort to integrate the University of Mississippi in 1961,% the lawyers looked long and hard at his request to make sure he knew what he was doing. And, of course, graduate and professional school desegregation aroused passions to a far lesser extent than would large-scale primary and secondary school desegregation involving great numbers of children.

But more than legal and practical judgments of counsel influenced the outcome. Just as Albion TourgÃ©e perceived that the tide of history was running against him in Plessy, it ran with the plaintiffs in the education cases, manifesting itself in a variety of ways. The Solicitor General of the United States filed briefs siding with the plaintiffs in many of the important racial discrimination cases before the Supreme Court from the mid 1940's until 1969.9 A blueprint of where the country should be going with regard to race was published by President Trumanâ\200\231s Committee on Civil Rights in 1948 urging much of the significant action to

be taken against racial discrimination in the next two decades.*Â®

It called for abolishing segregation in all aspects of American life, including education, as did President Truman's Committee on Higher Education.Â®â\200\235 This was the period following World War II in which the country had engaged in a war which, while many other things, was also a war against racism. The economic and social status of black Americans, their aspirations, and white

Americansâ\200\231 views on racial questions had changed markedly during the war.Â® Xe

The Supreme Court was a willing collaborator, not only the Warren Court, but its predecessors. Chief Justice Hughes wrote the opinion in Gaines. Chief Justice Vinson wrote the opinions in Sweatt and McLaurin and the Court agreed to review Brown while he still sat. In granting review, the Court deliberately selected five cases from a wide geographical area to consider the national implications of the issue. It reached down and took the District of Columbia school segregation case on its own initiative before judgment in the Court of Appeals.Â®Â® It accelerated the schedule of the Delaware school case,â\200\235 to assure its being heard with the others. The Court was not merely making a judgment among private litigants in discrete situations. Finally, the Court heard arguments over three years and formulated specific questions it wanted counsel to address. A wide range of amici filed briefs,â\200\235 and the Court itself invited amicus briefs from Attorneys

General of states which might be affected.â\200\235 The opinion of the Court in Brown was unanimous as it was in most subsequent school segregation cases.â\200\235 There was a current of history and the Court became a part of it.

We may venture a brief comparison with Plessy, before going on to other efforts. Albion TourgÃ©e had an organizational base and adequate control of how his cases developed. He proceeded with a plaintiff who had the characteristics he wanted. But the one thing he could not control, nor can any litigation campaigner, was the historical period. TourgÃ©e recognized this and spoke of an effort to overcome its effect by influencing public opinion. But this, too, was beyond his control. All the lawyer can realistically do is marshall the evidence of what the claims of history may be and present them to the court. But no matter how skillful the presentation, Plessy and Brown had dynamics of their own. TourgÃ©e would have won with Plessy in 1954. The lawyers who brought Brown would have lost in 18g6.

WELFARE RIGHTS

Between 1968 and 1973 the Supreme Court of the United States decided at least six important issues involving welfare, and

tection maximum family grant issuesÂ® but those did not come up until late in the campaign. Instead the first case to get to the Supreme Court was King v. Smith (1968),% involving the so-called â\200\234man in the house rule.â\200\235 Â® Under this rule a woman who cohabited with a man in her house, even if he visited only occasionally was deemed to have a substitute husband and the children a substitute father. As a consequence, aid to such families with dependent children was denied. This was a considerable injustice to the children, reflecting a desire to cut down the welfare rolls and censure the mother for her immorality.Â®Â® An equal protection argument was made pointing out the similar situation of children whose mother had a man in the house and those who did not, but

the Court failed to reach it and instead ruled in principal part

on statutory grounds which plaintiffs had not even briefed or argued.Â®Â®

The case was a victory, served notice that something was happening in the welfare area in the courts, but also that the Supreme Court was not interested in opening up the equal protection clause in the way plaintiffs urged. By choosing a narrower, somewhat ambiguous statutory ground, the Court left the initiative for developing the new public law very much in its own hands. Perhaps a signal to Congress was intended as well.

The next case Shapiro v. Thompson (1960)* was an equal protection ruling which held unconstitutional welfare residency Jaws. But it was of relatively low priority for the Center which had projected that these kinds of issues should come up later. The Center was caught off guard as a ground swell of litigation developed.Â®* Legal Services neighborhood offices probably stimulated so many residency restrictions cases because the issues were casily understood without mastery of the technical complexities of welfare law. The high volume occurred even though the welfare law testing memorandum discouraged early litigation of Shapiro issues because of their complexity and adverse precedent.*? But obviously the proposed strategy was wrong. The case was won. However, no broadly applicable equal protection jurisprudence was developed. The Court held that the residency laws

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were unconstitutional because they penalized those who exercised their constitutional right to travel from state to state. Chief Justice Warren, often called an archetypical activist, consistent with his preference for a statutory ruling expressed in King v. Smith, and Justice Black, dissented on statutory grounds.

In Goldberg v. Kelly (1970)* the Supreme Court required a trial-type hearing before termination of AFDC benefits. The due process hearing issue was not deemed ripe for litigation at the time of the writing of the welfare law testing memo, but by the time of King v. Smith this view had changed. In contrast to its earlier approach, the Supreme Court adopted substantially the due process arguments of the welfare rights lawyers. From the point of view of equal protection strategy, the fair hearing issue was a digression, although it was definitely an issue of importance that would further legal intervention in the welfare administration process. Under Goldberg the role of lawyers in the process assumed constitutional dimension.

From then on things went generally downhill in the Supreme Court. Dandridge v. Williams (1970)Â® challenged the Maryland maximum grant rule which placed an upper limit on the amount of AFDC grant regardless of the size of the family and its actual need. The Court held that the maximum grant rule had a reasonable basis and therefore did not offend the equal protection clause. Sparer, the author of the original blueprint, feels even today that if the Dandridge case had reached the Court first, it would have been won, but there was no way of getting it there when he wanted to.*Â®Moreover, he feels that a case from Maryland was a relatively bad case to bring up because the maximum grant was a relatively high $250 per month. A far better case would have been one from MississippiÂ®â\200\235 where the grant was only $108 and the state well known as racist. But the Maryland case was brought by lawyers who appeared to want nothing to do with the Center and after they had won in the trial court, the decision to go to the Supreme Court of the United States was in the hands of Maryland not the plaintiffs,

In 1971 Wyman v. JamesÂ®Â® challenged New York’s welfare

the Negro schools.

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The plaintiffs contend that segregated public schools are not "equalâ\204¢ and cannot be [***8] made "equal," and that hence they are deprived of the equal protection of the laws. Because of the obvious importance of the question presented, the Court took jurisdiction. n2 Argument was heard in the 1952 Term, and reargument was heard this Term on certain questions propounded by the Court. n3 Fon i

ce ee mmm mms... Footnotes- â\200\224 -

n2 344 U.S. 1, 141, 891.

n3 345 U.S. 972. The Attorney General of the United States participated both Terms as amicus curiae. ty :

iim Ci. ---- End Footnotes- â\200\224 â\200\224 = - a wi mpm Lr

[*489] Reargument was largely devoted to the circumstances surrounding the adoption of the Fourteenth Amendment in 1868. -It covered exhaustively consideration of the Amendment in Congress, ratification by the states, then existing practices in racial segregation, and the views of proponents and opponents of the Amendment. This discussion and our own investigation convince us that, although these sources cast some light, it [**689) is not enough to resolve the problem with which we are faced. At best, they are inconclusive. The most avid proponents of [***9] the post-War Amendments undoubtedly intended them to remove all legal distinctions among "all persons born or naturalized in the United States." Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished â\200\230them to have the most limited effect. What others in Congress and the state legislatures had in mind cannot be determined with any degree of certainty.

An additional reason for the inconclusive nature of the Amendment ’s history, with respect to segregated schools, is the status of public education at that time. n4 In the South, the movement toward free common schools, supported [*490) by general taxation, had not yet taken hold. Education of white children was largely in the hands of private groups. Education of Negroes was almost nonexistent, and practically all of the race were illiterate. In fact, any education of Negroes was forbidden by law in some states. Today, in contrast, many Negroes have achieved outstanding success in the arts and

sciences as well as in the business and professional world. It is true that public school education at the time of the Amendment had advanced further in the North, but the effect ˜[***10) of the Amendment on Northern States was generally ignored in the congressional debates. Even in the North, the conditions of public education did not approximate those existing today. The curriculum was usually rudimentary; ungraded schools were common in rural areas; the school term was but three months a year in many states; –and compulsory school attendance was virtually unknown. As a consequence, it is not surprising that there. should be so little in the history of the Fourteenth Amendment relating to its intended effect on public education.

nd For a general study of the development of public education prior to the Amendment, see Butts and Cremin, A History of Education in American Culture (1953), Pts. I, 11; Cubberley, Public Education in the United States (1934 ed.), cc. II-XII1. School practices current at the time of the adoption of the Fourteenth Amendment are described in Butts and Cremin, supra, at 269-275; Cubberley, supra, at 288-335, 408-431; Knight, Public Education in the South (1922), cc. VIII, IX. See also H. Ex. Doc. No. 315, 41st Cong., 2d Sess. (1871). Although the demand for free public schools followed substantially the same pattern in both the North and the South, the development in the South did not begin to gain momentum until about 1850, some twenty years after that in the North. The reasons for the somewhat slower development in the South (e. g., the rural character of the South and the different regional attitudes toward state assistance) are well explained in Cubberley, supra, at 408-423. In the country as a whole, but particularly in the South, the War virtually stopped all progress in public education. Id., at 427-428. The low status of Negro education in all sections of the country, beth before and immediately after the War, is described in Beale, A History of Freedom of Teaching in American Schools (1941), 112-132, 175-195. Compulsory schocl attendance laws were not generally adopted until after the ratification of the Fourteenth Amendment, and it was not until 1918 that such laws were in force in all the states. Cubberley, supra, at 563-565.

[*%**11)

In the first cases in this Court construing the Fourteenth Amendment, decid shortly after its adoption, the Court interpreted it as proscribing all state-imposed discriminations against the Negro race. n5 The doctrine of [(*491) "separate but [**690) equal" did not make its appearance in thi Court until 1896 in the case of Plessy v. Ferguson, supra, involving not education but transportation. n6Ã© American courts have since labored with the doctrine for over half a century. In this Court, there have been six cases involving the "separate but equal" doctrine in the field of public education In Cumming v. County Board of Education, 175 U.S. 528, and Gong Lum v. Rice, U.S. 78, the validity of the doctrine itself was not challenged. n8 In more recent cases, all on the graduate school [*492) level, inequality was found in that specific benefits enjoyed by white students were denied to Negro students of the same educational qualifications. Missouri ex rel. Gaines v. Canada, 305 U.S. 337; Sipuel v. Oklahoma, 332 U.S. 631; Sweatt v. Painter, 339 V.S.=620: ***12} McLaurin v. Oklahoma State Regents, 339 U.S. 637. In none of these cases was it necessary to re-examine the doctrine to grant relief to the Negro plaintiff. And in Sweatt v. Painter, supra, the Court expressly reserved decision on the question whether Plessy v. Ferguson should be held inapplicable to public education.

n5 Slaughter-House Cases, 16 Wall. 36, 67-72 (1873); Strauder v. West virginia, 100 U.S. 303, 307-308 (1880):

"It ordains that no State shall deprive any person of life, liberty, or property, without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. What is this but declaring that the law in the States shall be the same for the black as for the white; that

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347 U.S. 483, *492; 74 S. Ctl 686,
1954 U.S. LEXIS 2094, ***14; 98 L.-

[***15)

In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when Plessy v. Ferguson was written. W must consider public education in the light of its full development and its present place in American life throughout [*493) the Nation. Only in thi way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws. ~~... 05 SEE ee 3 2

Today, education is perhaps the most important function of state and local ; governments. Compulsory school attendance laws and the great expenditures for. \ education both demonstrate our recognition of the importance of education to our | democratic society. It is required in the performance of our most basic public i responsibilities, even service in the armed forces. It is the very foundation | of good citizenship. Today it is a principal instrument in awakening the child / to cultural values, in preparing him for later professional training, and in / helping him to adjust normally to his environment. In these days, it is . doubt ful that any child may reasonably be expected to succeed in life if he is / denied the opportunity of an education. Such an opportunity, [(***16] where / the state has undertaken to provide it, is a right which must be made available- to all on equal terms. we PEE eR Li x ;

. FAH i
We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilitiesâ\200\231 and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.

In Sweatt v. Painter, supra, in finding that a segregated law school for Negroes could not provide them equal educational opportunities, this Court relied in large part on "those qualities which are incapable of objective measurement but which make for greatness in a law school.â\200\235 In McLaurin v. Oklahoma State Regents, supra, the Court, in requiring that a Negro admitted to a white graduate school be treated like all other students, again resorted to intangible considerations: ". . . his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession.â\200\235 [*494) Such considerations apply with added force to children in grade and high schools. To separate them from others of [***17] similar age and qualifications solely because of. their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was well stated by a finding inthe Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs: et . Pinion pe :

"Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial(ly] integrated school system." nl0

[**692] Whatever may have been the extent of psychological knowledge at 2) time of Plessy v. Ferguson, this finding is amply supported by modern authority. nll Any language [*495] [***18] in Plessy v. Ferguson contrary to this finding is rejected.

nl0 A similar finding was made in the Delaware case: "I conclude from the testimony that in our Delaware society, State-imposed segregation in education itself results in the Negro children, as a class, receiving educational opportunities which are substantially inferior to those available to white children otherwise similarly situated." 87 A. 2d 862, 865.

nll K. B. Clark, Effect of Prejudice and Discrimination on Personality

Development (Midcentury White House Conference on Children and Youth, 1950); Witmer and Kotinsky, Personality in the Making (1952), c. VI; Deutscher and Chein, The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion, 26 J. Psychol. 259 (1948); Chein, What are the Psychological Effects of Segregation Under Conditions of Equal Facilities?, 3 Int. J. Opinion and At-itude Res. 229 (1949); Brameld, Educational Costs, in Discrimination and National Welfare (Maclver, ed., 1949), 44-4%; Frazier, The Negro in the United States (1949), 674-681. And see generally Myrdal, An American Dilemma (1944).

[x%x*19]

We conclude that in the field of public education the doctrine of "separate but equalÂ®â\204¢ has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation

complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. This dispositicn makes unnecessary any discussion whether such segregation also violates the Due Process Clause of the Fourteenth Amendment. nl2

nl2 See Bolling v. Sharpe, post, p. 497, concerning the Due Process Clause of the Fifth Amendment.

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Because these are class actions, because of the wide applicability of this decision, and because of the great variety of local conditions, the formulation of decrees in these cases presents prcblems of considerable complexity. On reargument, the consideration of appropriate relief was necessarily subordinated to the primary question -- the constitutionality of segregation in [***20] public education. We have now announced that such segregation is a denial of the equal protection of the laws. In order that we may have the full assistance of the parties in formulating decrees, the cases will be restored to the docket, and the parties are requested to present further argument on Questions 4 and 5 previously propounded by the Court for the reargument this Term. nl3 The Attorney General [*496) of the United States is again invited to

410 U.S. 113, *128; 93 S. Ct. 705,7%*7
1973 U.S. LEXIS 159, ***23; 35 L.Ed. 2d,
abortion legally in Texas and, consequently, the prospect of obtaining an illegal abortion there or of going outside Texas to some place where the procedure could be obtained legally and competently. ri tt

We thus have as plaintiffs a married couple who have, as their asserted immediate and present injury, only an alleged "detrimental effect upon [their] marital happiness" because they are forced to "the choice of refraining from normal sexual. [***24] relations or of endangering Mary Doe's health through a possible pregnancy.â\200\235 Their claim is that sometime in the future Mrs. Doe might become pregnant because of possible failure of contraceptive measures, and at that time in the future she might want an abortion that might then be illegal under the Texas statutes. vile, Ma AL

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This very phrasing of the Does' position reveals its speculative character. Their alleged injury rests on possible future contraceptive failure, possible future pregnancy, possible future unpreparedness for parenthood, and possible future impairment of health. Any one or more of these several possibilities may not take place and all may not combine. In the Doesâ\200\231 estimation, these possibilities might have some real or imagined impact upon their marital happiness. But we are not prepared to say that the bare allegation of so indirect an injury is sufficient to present an actual case or controversy. Younger v. Harris, 401 U.S., at 41–42; Golden v. zwickler, 394 U.S., at 109–110; Abele v. Markle, 452 F.2d, at 1124–1125; Crossen v. Breckenridge, 446 F.2d, at 839. The Does' [x**25] claim falls far short of those resolved otherwise in the cases that the Does urge upon us, namely, Investment Co. Institute v. Camp, 401 U.S. 617 (1971); Data Processing Service v. Camp, 397 U.S. 150 {**715) (1970); 12129) and Epperson v. Arkansas, 393 U.S. 97 (1968). See also Truax v. Raich, 239 U.S. 33 (1919). Ra

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The Does therefore are not appropriate plaintiffs in this litigation. Their complaint was properly dismissed by the District Court, and we affirm that

dismissal.
v

The principal thrust of appellant's attack on the Texas statutes is that they improperly invade a right, said to be possessed by the pregnant woman, to choose to terminate her pregnancy. Appellant would discover this right in the concept of personal "liberty" embodied in the Fourteenth Amendment's Due Process Clause; or in personal, marital, familial, and sexual privacy said to be protected by the Bill of Rights or its penumbras, see Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972); id., at 460 [***26) (WHITE, J., concurring in result); or among those rights reserved to the people by the Ninth Amendment, Griswold v. Connecticut, 381 U.S., at 486 (Goldberg, J., concurring). Before addressing this claim, we feel it desirable briefly to survey, in several aspects, the history of abortion, for such insight as that history may afford us, and then to examine the state purposes and interests behind the criminal abortion laws. 2 SH

VI
It perhaps is not generally appreciated that the restrictive criminal

abortion laws in effect in a majority of States today are of relatively recent vintage. Those laws, generally proscribing abortion or its attempt at any

It is with these interests, and the weight to be attached to them,
case is concerned. : ee

VIII
The Constitution does not explicitly mention any right of privacy. In
of decisions, however, going back perhaps as far as Union Pacific R. Co. 1
Botsford, 141 U.S. 250, 251 (1891), the Court has recognized that a right of
personal privacy, or a guarantee of certain areas or zones of privacy, does
exist under the Constitution. In varying contexts, the Court or individual
Justices have, indeed, found at least the roots of that right in the Fi
Amendment, Stanley v. Georgia, 394 U.S. 557, 564 (1969): in the Fourth â\200\230and Fif
th.
Amendments, Terry v. Ohio, 392 U.S. 1, 8–9 (1968), Katz v. United States, 389 &Â¢
U.S.7–347, 350 (1967), [***62) Boyd v. United States, 116 U.S. 616 (1886), se
Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting);
in the penumbras of the Bill of Rights, Griswold v. Connecticut, 381 v.85. a
484–485; in the Ninth Amendment, id., at 486 (Goldberg, J., concurring); or
the concept of liberty guaranteed by the first section of the Fourteenth _ Â¥% a,
Amendment, see Meyer v. Nebraska, 262 U.S. 390, 399 (1923). These decisions make
it clear that only personal rights that can be deemed Â»fundamentalÂ®â\204¢ or â\200
\234implicit –
in the concept of ordered liberty," Palko v. Connecticut, 302 U.S. 319, "325 Inn
(1937), are included in this guarantee of personal privacy. They also make it
clear that the right has some extension to activities relating to marriage, :
Loving v. virginia, 388 U.S. 1, 12 (1967): procreation, Skinner v. Oklahoma, 316
U.S. 535, 541–542 (1942); contraception, Eisenstadt v. Baird, 405 U.S., at nites
453–454; id., at 460, 463–465 [*153] (WHITE, (***63) J., concurring in
result); family relationships, Prince v. Massachusetts, 321 U.S. 158, 166 –
(1944); and child rearing and education, Pierce v. Society of [**727)
Sisters, 268 U.S. 510, 535 (1925), Meyer v. Nebraska, supra. :

This right of privacy, whether it be founded in the Fourteenth Amendment’s
concept of personal liberty and restrictions upon state action, as we feel it .
is, or, as the District Court determined, in the Ninth Amendment’s reservation :.-
of rights to the people, is broad enough to encompass a woman’s decision whether
or not to terminate her pregnancy. The detriment that the State would impose
upon the pregnant woman by denying this choice altogether is apparent. Specific

and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may.force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, =

associated with the unwanted child, and there is the problem of bringing a child into a family already unable, {Â»*284) psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and ET continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in ea

consultation.

On the basis of elements such as these, appellant and some amici argue that the woman’s right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alon chooses. With this we do not agree. Appellant’s arguments that Texas either has no valid interest at all in regulating the abortion decision, or no

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(Conn. 1972), â\200\230appeal docketed, â\200\230No.â\200\231 12
Ga. 1970), appealâ\200\231 decided today;â\200\235 pos â\200\231
â\200\234(ND I11.- 1971), â\200\230appeal â\200\230docketed, No.7
â\200\234+. (Kan, 1972); YWCA v. â\200\234Kugler,â\200\235
=e [%155] 310 F. Supp. 293 (ED_ Wis.â\200\231

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md Peopleâ\200\231 â\200\230v. Belous, ar â\200\234Cal. 2d 954,
â\200\234a 915 41970); State Barquet, 252 8

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F.Supp. 587 [**728) To ap
Louisiana State Board of Medical Examiners,
â\200\234appeal docketed, No. 70- 42; Corkey v.
(e227) -˜ appeal docketed,â\200\235 No: 71- 92;
Ohio 1970); Doe Vv. [Rampton (Utah 1971)
State, --Ind.
(Miss. 1972);

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Ro TRlar ion abn these rights may â\200\230be Ju ied on Vv
interest," Kramer v. Union Free School Dist â\200\234u’s,

Spapito, v. Apo 394 u. S, 618, 634 (1969)

398, 406 (1963), [***68) and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake. Griswold v. Connecticut, 381 U.S., at 485; Aptheker v. Secretary of State, 378 U.S. 500, 508 (1964); Cantwell v. Connecticut, 310 U.S. 296, 307–308 (1940); see [*156] Eisenstadt v. Baird, 405 U.S., at 460, 463–464 (WHITE, J., concurring in result).

In the recent abortion cases, cited above, courts have recognized these principles. Those striking down state laws have generally scrutinized the State's interests in protecting health and pctential life, and have concluded that neither interest justified broad limitations on the reasons for which a physician and his pregnant patient might decide that she should have an abortion in the early stages of pregnancy. Courts sustaining state laws have held that the State's determinations to protect health or prenatal life are dominant and constitutionally justifiable.

IX

The District Court held that the appellee failed to meet his burden of demonstrating that the Texas statute's infringement upon Roe's rights was Sow necessary [***69) to support a compelling state interest, and that, although the appellee presented "several compelling justifications for state presence in the area of abortions," the statutes outstripped these justifications and swept "far beyond any areas of compelling state interest.â\200\235 314 F.Supp., at 1222–1223. Appellant and appellee both contest that holding. Appellant, as has been indicated, claims an absolute right that bars any state imposition of criminal penalties in the area. Appellee argues that the State's determination to recognize and protect prenatal life from and after conception constitutes a compelling state interest. As noted above, we do not agree fully with either formulation.

A. The appellee and certain amici argue that the fetus is a â\200\234personâ\200\235 wi thin
the language and meaning of the Fourteenth Amendment. In support of this, they outline at length and in detail the well-known facts of fetal development. If this suggestion of personhood is established, the appellant's case, of course, collapses, [*157] for the fetus' right to life would then be guaranteed specifically by the Amendment. The appellant conceded as much on reargument. n51 On the other [***70] hand, the appellee conceded on reargument n52 that no case could be cited [**729] that holds that a fetus is a person within the meaning of the Fourteenth Amendment.

n51 Tr. of Oral Rearg. 20–21.

n52 Tr. of Oral Rearg. 24.

The Constitution does not define "person" in so many words. Section 1 of the Fourteenth Amendment contains three references to â\200\234person.â\200\235 The first, in
defining "citizens," speaks of "persons born or naturalized in the United States." The word also appears both in the Due Process Clause and in the Equal Protection Clause. "Person" is used in other places in the Constitution: in

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the listing of qualifications for Representatives and Senators, Art. I, 1. 2.,-Â¢C. 2, and | 3, cÂ¥. 3; in the Appcrtionment Clause, Art. I, 1 2, cl. 3; nS3 in the Migration and Importation provision, Art. I, | 9, cl. 1; in the Emolument Clause, Art. I, | 9, cl. 8; in the Electors provisicns, Art. II, | 1, cl. 2, and | the superseded cl. 3; in the provisicn outlining qualifications for the office = of President, Art. II, | [***71] 1, cl. 5; in the Extradition provisions,

Art. IV, | 2, cl. 2, and the superseded Fugitive Slave Clause 3; and in the

Fifth, Twelfth, and Twenty-second Amendments, as well as in Il 2 and 3 of the Fourteenth Amendment. But in nearly all these instances, the use of the word is such that it has application only postnatally. None indicates, with any : assurance, that it has any possible pre-natal application. n34

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n53 We are not aware that in the taking of any census under this clause, a fetus has ever been counted.

n54 when Texas urges that a fetus is entitled to Fourteenth Amendment protection as a person, it faces a dilemma. Neither in Texas nor in any other State are all abortions prchikited. Despite broad proscription, an exception always exists. The exception contained in Art. 1196, for an abortion procured or attempted by medical advice for the purpose of saving the life of the mother, is typical. But if the fetus is a perscn who is not to be deprived of life without due process of law, and if the mother's condition is the sole determinant, does not the Texas exception appear to pe out of line with the

Amendment's command?

There are other inconsistencies between Fourteenth Amendment status and the typical abortion statute. It has already been pointed out, n. 49, supra, that in Texas the woman is not a principal or ar accomplice with respect to an

abortion upon her. If the fetus is & person, why is the woman not a principal or an accomplice? Further, the penalty Zor criminal abortion specified by Art. 1195 is significantly less than the maximum penalty for murder prescribed by Art. 1257 of the Texas Penal Code. If the fetus is a person, may the penalties

be different?

i i --â\200\224â\200\224. .-- End Footnotes- = = = = =
[**272) [*158]) All this, together with our observation, supra, that throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they 2a:e today, persuades us that the word â\200\234person,â\200\235 as used in the Fourteenth Amendment, does not include the unb orn. nS55
This is in accord with the results reached in those few cases where the issue has been squarely presented. McGarvey Vv. Magee-Womens Hospital, 340 F.Supp. 751 (WD Pa. 1972); Byrn v. New York City Health Â§& Hespitals Corp., 31 N. Y. 2d 194, 286 N. E. 2d 887 (1972), appeal deccketed, No. 72-424; Abele v. Markle, 351 F.Supp. 224 (Conn. 1972), appeal docketed, No. 72-730. Cf. Cheaney v. State,

Ind., at , 285 N. E. 2d, at 270; Montana v. Rogers, 278 F.2d 68, 72 (CA7 1960), aff'd sub nom. Montana v. Kennedy, 366 U.S. 308 (1961): Keeler v. Superior Court, 2 Cal. 3d 619, 470 BP. 23 617 (1970); State v. Dickinson, 28 {*159) Ohio St. 2d 65, 275 N. E. 2d 599 (1971). Indeed, [***73) our decision in United States v. Vuitch, 402 U.S. 62 (1971), inferentially is to the same effect, for we there would not have indulged in statutory interpretation favorable to abortion in specified circumstances if the necessary consequence was the [*x*730]) termination of life entitled to Fourteenth Amendment

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the States of California, Oregon and Washing ney
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JUDGES: Stone, Roberts, Black, Reed, Frankfurter,
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OPINION: - {*238) = % 1**194) Â© MR. JUSTICE.
Court. . a

The petitioner, an [***3] _ American citizen Â£
convicted in a federal district court for rema n ;
a "Military Area," contrary to Civilian Exclusic
General [*216] of the Western Command, U.S. Army, .
May 9, 1942, all persons of Japanese ancestry should t 3
area. No question was raised as to petitioner's. loyalty to
The Circuit Court of Appeals affirmed, nl and the importanc
constitutional question involved caused us to grant certicrar:

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It should be noted, to begin with, that all legal restrictions which curtail

the civil rights of a single racial group are immediately suspect. That is no to say that all such restrictions are unconstitutional.Â® It is to say that

courts must subject them to the most rigid scrutiny.â\200\235 Pressing public necessity

may sometimes justify the existence of such re jctions; racial antagonism never can. : 2 SRhaAREEtesi A TL

In the instant case [***4] prosecution of the petit oner was begun by information charging violation of an Act of Congress, of March 21, 1942, 56 Stat. 173, which provides that 4 NE ES SE

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Al oF â\200\234any act in any military area or military zone prescribed, under-the authority of an Executive order of the President, by the Secretary of War, or by any military commander designated by the Secretary of War, contrary to the restrictions applicable to any such area or zone or contrary to the order of the Secretary of War or any such military commander, shall, if it appears that he knew or â\200\230should have known of the existence and extent of the restrictions or order and that his act was in violation thereof, be guilty of a misdemeanor and upon conviction shall be liable to a fine of not to exceed $ 5,000 or to imprisonment for not more than = one year, or both, for each offense.â\200\235 fi ECR ged or

" whoever shall enter, remain in, leave

Exclusion Order No. 34, which the petitioner knowingly and admittedly violated, was one of a number of military orders and proclamitions, all of which were substantially [*217) based upon Executive Order No. 9066, 7 Fed. Reg. 1407. That order, issued after we were at war with Japan, declared [***5)

that "the successful prosecution of the war requires every possible protection

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323 U.8. 214, *222: 65 3. Ct. 183, *%196; an)
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Blockburger v. United States, 284 U.S. 299, 304. There is no reason why

violations of these orders, insofar as they were promulgated pursuant to Congressional enactment, should not be treated as separate offenses.

The Endo case, post, p. 283, graphically illustrates [**197] the difference between the validity of an order to exclude and the validity of a detention order after exclusion has been effected.

Since the petitioner has not beer convicted of failing to report or to remain in an assembly or relocation center, we cannct in this case determine the validity of those separate provisicns of the order. It is sufficient here for us to pass upon the order which petitioner violated. To do more would be to go beyond the issues raised, and to decide momentous questions not contained within the framework of the pleadings or the evidence in this case. [***15] It will be time enough to decide the serious constitutional issues which petitioner seeks to raise when an assembly or relocation order is applied or is certain to be applied to him, and we have its terms befcre us.

Some of the members of the Court are of the view that evacuation and detention in an Assembly Center were inseparable. After May 3, 1942, the date of Exclusion [Â»223) Order No. 34, Korematsu was under compulsion to leave the area not as he would choose but via an Assembly Center. The Assembly Center was conceived as a part of the machinery for group evacuation. The power to exclude includes the power to do it by force if necessary. And any forcible measure must necessarily entail some degree of detention or restraint whatever method of removal is selected. But whichever view is taken, it results in holding that the order under which petitioner was convicted was valid.

It is said that we are dealing here with the case of imprisonment of a citizen in a concentration camp solely because of his ancestry, without evidenc or inquiry concerning his loyalty and good disposition towards the United

States. Our task would be simple, our duty clear, were this a case involving [***16] the imprisonment of a loyal citizen in a concentration camp because fof racial prejudice. Regardless of the true nature of the assembly and relocatign centers -- and we deem it unjustifiable to call them concentration camps with all the ugly connotations that term implies -- we are dealing specifically wi nothing but an exclusion order. To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. Korematsu was nct excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and finally, because Congress, reposing its confidence in this time of war in our military leaders -- as inevitably it must -- determined that they should have the power to do just this. There was evidence of disloyalty on the part [***17] of some, the military authorities considered that the need for [*224) action was great, and time was short.

We cannot -- by availing ourselves of the calm perspective of hindsight -- n say that at that time these actions were unjustified.

Affirmed.

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prohibition has not been extended to oleomarg
Go (eewx]l] in which vegetable fats or oils at
Fifth Amendment has no equal protection
applicable only to the states, does not compel,
"all like evils, or none. A legislature may
even though it has failed to strike at another
Dakota, 226 U.S. 157, 160; Miller v. Wilson,>23 wo
Geiger-Jones Co., 242 U. S. 23% 556; F rer

z [+152] Thi ne may assume ou Hi ou
"legislature can forestall attack upon the sti
which it enacts by applying opprobrious epi
a statute would deny due process which prec
proceedings of all facts which would show Â©
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But such we think is â\200\234not Wy purpose oÂ°
characterization of filled milk as injurious to heal

al dah WA upon the public. There is no nee sid
declaration of the legislative findings deemed to Su

taken as a constitutional exertion of the leg. tiv
judicial review, as do the reports of legisla
rationale of the legislation. Even in the abse ce of

facts supporting the legislative judgment â\200\230is x E
legislation affecting ordinary commercial transact ns is"7o
unconstitutional unless in the light of the facts x
assumed it is of such a character as to preclude :
upon some rational basis within the Foe and e
nd4 See Metropolitan Casualty [**784] Â©. Ims

n4 There may be narrower scope for operat on â\200\230of the iy
constitutionality when legislation appears ! onâ\200\231 E28 Beiyithin a
prohibition of the Constitution, such as those of the er
which are deemed equally specific when held to "be e erica n Se Rin the
Fourteenth. See Stromberg v. California, 2 2
Griffin, 303 U.S. 444, 452. :

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It is unnecessary to rain â\200\230now whether eg
political processes which can ordinarily be expected to brin â\200\230about repeal of
undesirable legislation, is to be subjected to more Â¢ 1
under the general prohibitions of the Fourteenth â\200\234Amendment 1
types of legislation. On restrictions upon the right to 70t :
Herndon, 273 U.S. 536; Nixon v. Condon, 286 U. nts upon the
dissemination of information, see Near v. _ Minnesota â\200\230ex rel.â\200\235 Olson,

697, 713–714, 718–720, 722; Grosjean V. American Press Co., 297 U.S. 233; Lovell v. Griffin, supra; on interferences with political organizations, see Stromberg v. California, supra, 369; Fiske v. Kansas, 274 U.S. 380; Whitney v. California, 274 U.S. 357, 373–378; Herndon v. Lowry, 301 U.S. 242; and see Holmes, J., in Gitlow v. New York, 268 U.S. 652, 673; as to prohibition of peaceable assembly, see De Jonge v. Oregon, 299 U.S. 353, 3865. :

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, Pierce v. Society of Sisters, 268 U.S. 510, or national, Meyer Vv. Nebraska, 262 U.S. 390; Bartels v. Iowa, 262 U.S. 404; Farrington v. Tokushige, 273 U.S. 484, or racial minorities, Nixon v. Herndon, supra; Nixon v. Ccndon, supra: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to _ protect minorities, and which may call for a correspondingly more searching judicial inquiry. Compare McCulloch v. Maryland, 4 Wheat. 316, 428; South Carolina v. Barnwell Bros., 303 U.S. 177, 184, n. 2, and cases cited.

[***13)

Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry, Borden’s Farm Products Co. v. Baldwin, 263 U.S. 194, and the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that these facts have ceased to exist.

Chast leton Corporation v. Sinclair, 264 U.S. Â£43. Similarly we recognize that the constitutionality of a statute, valid on its face, may be assailed by proof of facts tending to show that the statute 32s applied to a particular [*154) article is without support in reascn because the article, although within the prohibited class, is so different from others of the class as to be without the reason for the prohibition, Railroad Retirement Board v. Alton R. Co., 295 U.S. 330, 349, 351, 352; see Whitney v. California, 274 U.S. 357, 379; cf. Morf v. Bingaman, 298 U.S. 407, 413, though the effect of such proof depends on the relevant circumstances of each case, as for example the administrative difficulty [***14)] of excluding the article from the regulated class. Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 511–512; South Carolina v. Barnwell Bros., 303 U.S. 177, 192–193. But by their very nature such inquiries, where the legislative judgment is drawn in guestion, must be restricted to the issue whether any state of facts either known Or which could reasonably be assumed affords support for it. Here the demurrer challenges the validity of the statute on its face and it is evident from all the considerations presented to Congress, and those of which we may take judicial notice, that the question is at least debatable whether commerce in filled milk should be left unregulated, or in some measure restricted, or wholly prohibited. As that decision was for Congress, neither the finding of a court arrived at by weighing the evidence, nor the verdict of a jury can be [*%x785) substituted for it. Price v. Illinois, 238 U.S. 446, 452; Hebe Co. Vv. Shaw, supra, 303; Standard Oil Co. v. Marysville, 279 U.S. 582, 584; South Carolina v. Barnwell Bros., Inc., supra, 191, citing Worcester County Trust Co. v. Riley, 302 U.S. 292, 299.

The prohibition {***15) of shirment in interstate commerce of appellee’s product, as described in the indictment, is a constitutional exercise of the

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years being considered only under the general a
a 468 out of 500 score in 1973, he was rejected si

scores less than 470 were being accepted aft
was filed late in the year, had been process
special admission slots were still unfill
and though he had a total score of 549 Â© â\202¬
neither year was his name placed on the discretiona
years special applicants were admitted with si
respondent’s. After his second rejection,â\200\235
court for mandatory, injunctive, and declara
to Davis, alleging that the special admissio
exclude him on the basis of his race i

of the Fourteenth Amendment, a provision of
601 of Title VI of the Civil Rights Act of
that no person shall on the ground of race-
participating in any program receiving fede

cross-claimed for a declaration that its specia
The trial court found that the special progra ;
because minority applicants in that program we don
and 16 places in the class of 100 were reserve them
petitioner could not take race into account -i dre
program was held to violate the Federal and Sta
Respondent ’s admission was not ordered, however
have been admitted but for the special program.
applying a strict-scrutiny standard, concluded tha
program was not the least intrusive means of achievir
admittedly compelling state [***5] Â° interests of

profession and increasing the number of doctors _w C no}
patients. Without passing on the state constitution) : tat *

grounds the court held that petitioner’s special ns
Equal Protection Clause. Since petitioner coul
demonstrating that respondent, absent the speci
admitted, the court ordered his admission to D

Held: The judgment below is affirmed inso ar 3
admission to Davis and invalidates petitioner’s: spe
is reversed insofar as it prohibits petitioner from
a factor in its future admissions decisions.
MR. JUSTICE POWELL concluded: ~~ -
1. Title VI proscribes only those racial
the Equal Protection Clause if employed by a
281-287. roi ln

ns that would violate
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â\200\234agencies. Pp.

rently suspect and

1 of achieving a :
onsideration of race g
petitioner’s special

1s like respondent,

2. Racial and ethnic classifications of any So
call for the most exacting judicial scrutiny
diverse student body is sufficiently compelling to jus
in admissions decisions [***6] under some cir
admissions program, which forecloses consideration to per
is unnecessary to the achievement of this compelling goal
under the Equal Protection Clause. Pp. 287-320

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3. Since petitioner could not satisfy its burden of proving that respondent would not have been admitted even if there had been no special admissions ; : program, he must be admitted. P. 320. ta hr

MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN concluded: x :

1. Title VI proscribes only those racial classifications that would violate the Equal Protection Clause if employed by a State or its agencies. Pp. : 328-355.

2. Racial classifications call for strict judicial scrutiny. Nonetheless, the purpose of overcoming substantial, chronic minority underrepresentation in the medical profession is sufficiently important to justify petitioner's : remedial use of race. Thus, the judgment below must be reversed in that it prohibits race from being used as a factor in university admissions. Pp.

355-379.

MR. JUSTICE STEVENS, joined by THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE REHNQUIST, being of the {x*=*7) view that whether race can ever be a factor in an admissions policy is not an issue here; that Title VI applies; and that respondent was excluded from Davis in violation of Title VI, concurs in the Court's judgment insofar as it affirms the judgment of the court below ordering respondent admitted to Davis. Pp. 408-421.

COUNSEL: Archibald Cox argued the cause for petitioner. With him on the briefs were Paul J. Mishkin, Jack B. Owens, and Donald L. Reidhaar.

Reynold H. Colvin argued the cause and filed briefs for respondent.

Solicitor General McCree argued the cause for the United States as amicus curiae. With him on the briefs were Attcrney General Bell, Assistant Attorney General Days, Deputy Solicitor General Wallace, Brian K. Landsberg, Jessica Dunsay Silver, Miriam R. Eisenstein, and Vincent F. O'Rourke. *

* Briefs of amici curiae urging reversal were filed by Slade Gorton, Attorney General, and James B. Wilson, Senior Assistant Attorney General, for the State . of Washington et al.; by E. Richard Larson, Joel M. Gora, Charles C. Marson, sanford Jay Rosen, Fred Okrand, Norman Dorsen, Ruth Bader Ginsburg, and Frank Askin for the American Civil Liberties Unicn et al.; by Edgar S. Cahn, Jean Camper Cahn, and Robert S. Catz for the Antioch School of Law; by William Jack Chow for the Asian American Bar Assn. of the Greater Bay Area; by A. Kenneth Pye, Robert B. McKay, David E. Feller, and Ernest Gellhorn for the Association of American Law Schools; by John Holt Myers for the Association of American Medical Colleges; by Jerome B. Falk and Peter Roos for the Bar Assn. of San Francisco et al.; by Ephraim Margolin for the Black Law Students Assn. at the University of California, Berkeley School of Law; by John T. Baker for the Black Law Students Union of Yale University Law School; by Annamay T. Sheppard and Jonathan M. Hyman for the Board of Governors of Rutgers, State University of New Jersey, et al.; by Robert J. Willey for the Cleveland State University Chapter of the Black American Law Students Assn.; by John Mason Harding, Albert J. Rosenthal, Daniel Steiner, Iris Brest, James Vv. Siena, Louis H. Pollak, and Michael I. Sovern for Columbia University et al.; by Herbert O. Reid for Howard University; by Harry B. Reese and L. Orin Slagle for the Law School Admission

â\200\230Christ Himself. r Feat ton sarantees.
6553. n24 oRâ\200\235 Ro ete) Sy Bs :

wii ’n23 See, e.g. id. at 6052 (remarks o
Sen. Eastland); 5612 (remarks of Sen. Ervin),
1632 (remarks of Rep. Dowdy); 1619 (

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Â© n24 see also id., at 7057, 13333 (remarks
Sen. Pastore); 5606–5607 (remarks of Sen. Javi
(remarks of Sen. Humphrey). = .. ˜ pe

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In view of the clear legislative intent, Tit
only those racial classifications that would
Protection Clause or the Fifth Amendment. Â° =
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Petitioner does not deny that decisions base
faculties and administrations of state universit

Fourteenth Amendment. See, e. g., Missouri ex rel 305: U.S.
337 (1938); Sipuel v. Board of Regents, 332 U. Py â\200\234v. Painter,
339 U.S. 629 (1950); McLaurin v. Oklahoma Stat eg 37 (1950).

For his part, respondent does not argue that a 1. ra

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tates,

classifications are per se invalid. See, e.â\200\235
320 U.S. 81 (1943); Korematsu v. United States 52] Lee v. 5
Washington, 390 U.S. –333, 334 [**2747] (1968 ac! n, and STEWART,

JJ., concurring); United Jewish Organizations Â¥.: 144 (1977). The
parties do disagree as to the level of judicial be applied to the ˜
special admissions program. Petitioner argues :
applying strict scrutiny, (***36) as this inexact

applied in our cases. That level of review, pe er asserts, hould be
reserved for classifications that disadvantage discre e %

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minorities.â\200\235 See United States v. Carolene Product 04 U.S 14, 152 n. 4
(1938) . Respondent, on the other hand, contends : s rnia court

correctly rejected the notion that the degree of.
particular racial or ethnic classification hinge

and insular minority and duly recognized tha t â\202¬ ghts lished [by the
Fourteenth Amendment] are personal rights." SI 2Y VV... : o 1g. 22

(1948) . : emia Sots

En route to this crucial battle over the scope of judicial review, n25 the
parties fight a sharp preliminary action over the c terization of the
special admissions program. Petitioner prefers to view it as establishing a
"goal" of minority representation in the Me # 1. Respondent, echoing
the courts below, labels it a racial quota. is :

a ew a lie – – –Footnotes

n2%5 That issue has generated a considerable amount of scholarly controversy. See, â\202¬. 9. gly, The constitutionality of Reverse Racial piscrimination, 41 U. chi. L. Rev. 723 (1974) Â¢ Greenawalt, Judicial scrutiny of â\200\234Benignâ\200\235 Ra cial
preference in raw School Admissions, 7Â¢ Colum. L. Rev. 559 (1975): Kaplan, Equal Justice in an Unequal world: Equality Â£or the Negro. 61 Nw. U. L. Rev. 363 (1966); Karst & Horowitz, Affirmative acticn and Equal protection, 60 va. L. rev. 95Â° (1974); O'Neil, Racial preference and Higher Education: The larger context, 60 va. L. Rev. 92% (1974): posner, The pefunis Case and the Constitutionality of preferential Treatment Â© Rev. 1; Redish, preferential Law School Admis Clause: An Analysis of the Competing Arguments,

sandalow, Racial preferences in Higher Education: political Responsibility and the Judicial role, 42 U. chi. L. Rev. â\202¬53 (1975); sedler, Racial preference, Reality and the Constitution: Bakke V. Regents of the University of california, 17 SantÃ© Clara L. Rev. 329 (1977): Seecurger. A Heuristic Argument Against preferential Admissions, 39 U. Pitt. L. Rev. 285 (1977). [***37)

Â¢ Racial Minorities, 1974 Sup. Ct
sions and the Equal protection
22 UCLA L. Rev. 343 (1974):

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ritioner gefines wquota" aS a reguirement which must pe met but can never ke 2% ceded, regardless of the quality 2f the minority applicants. petiticner declares that there is Â°Â° weloorâ\204¢ under the total number of minority students admitted; completely unqualified c-dents will not be admitted simply to meet 2 nquota." Neither is there a weeiling," since an unlimited number could pe admitted through the general admissions process. On this pasis the special admissicns program does not meet petitioner's definition of a quota.

The court pelow found ~~ and petitioner does not deny ~T that white applicants could not compete for the 16 places reserved solely for the special admissions program. 38 Cal. 34, at 44, S533 F. 24, at 1159. poth courts below characterized this as 2a "quota" system.

[*289) This semantic distincticn 1S weside the point: The special admissions program 3s undeniably 2 classification pased on race and ethnic background. To the extent that there existed 2 pool of at least minimally

qualified minority applicants to Â£i11 the 16 special admissions {***38] seats, white applicants could compete only for 84 seats in the entering class, rather than the 100 cpen to minority applicants. whether this j1imitation is described as 2 guota oT 2 gcal, j= is & line arawn on the pasis of race and ethnic status. nz?

n27 Moreover, the University's special aimissions program involves 2a

purpcsefuls acknowledged use of racial criteria. This is not 3 situation in

which the classification on its face is zs2islly neutral, but has a disproportionate racial impact. In that si-uation, plaintiff must establish an intent tO discriminate. Arlington Heights V-. Metropolitan Housing Dev. COorp.s

429 U.S. 282, 264-265 (1977): Washington Vv. Davis, 426 U.S. 229, 242 (1976): see =

Yick Wo Vv. Hopkins, 118 U.S. 356 (188%).

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The guarantees of the Fourteenth xtend to all persons.
language (**2748) is explicit: "No State shallâ\200\231iZi7":˜deny to any person
within its jurisdiction the equal protection of the laws.? It is settled
[***39] beyond question that the "rights created by the first section of the
Fourteenth Amendment are, by its terms, guaranteed to the individual. The
rights established are personal rights,Â® Shelley v. Kraemer, supra, at 22.
Accord, Missouri ex rel. Gaines Vv. Canada, supra, at 351; McCabe v. Atchison, T.
&Â¢ S. F. R. Co., 235 U.S. 151, 161–162 (1914). â\200\230The guarantee of equal protect
ion
cannot mean one thing when applied to one individual and something else when
[*290]) applied to a person of another color. : If both are not accorded the
same protection, then it is not equal. edad

Nevertheless, petitioner argues that the court below erred in applying strict
scrutiny to the special admissions program because white males, such as
respondent, are not a "discrete and insular minority" requiring extraordinary
protection from the majoritarian political process. â\200\224Carolene Products Co.,
supra, at 152–153, n. 4. This rationale, however, has never been invoked in our
decisions as a prerequisite to subjecting racial or ethnic distinctions to
strict scrutiny. Nor has this Court held that discreteness [***40] and
insularity constitute necessary preconditions to a holding that a particular
classification is invidious. n28 See, e. g., Skinner v. Oklahoma ex rel.
Williamson, 316 U.S. 535, 541 (1942): Carrington v. Rash, 380 U.S. 89, 94–97
(1965) . These characteristics may be relevant in deciding whether or not to add
new types of classifications to the list of â\200\234suspectâ\204¢ categories or whethe
r a
particular classification survives close examination. See, e. g., Massachusetts
Board of Retirement v. Murgia, 427 U.S. 307, 313 (1976) (age); San Antonio
Independent School Dist. Vv. Rodriguez, 411 U.S. 1, 28 (1973) (wealth): Graham v.
Richardson, 403 U.S. 365, 372 (1971) (aliens). Racial and ethnic :
classifications, however, are subject to stringent examination without regard to
these additional characteristics. _We declared as much in the first cases
explicitly to recognize racial distinctions as suspect: . 7. :

"Distinctions between citizens solely because of their ancestry are by their
very nature odious to a free people [*291] whose institutions are founded
upon _ the doctrine of [x*%41]) equality." Hirabayashi, 320 v.s., at 100.

Â» [All] legal restrictions which curtail the civil rights of a single racial
group are immediately suspect. That is not to say that all such restrictions
are unconstitutional. It is to say that courts must subject them to the most
rigid scrutiny.â\200\235 Korematsu, 323 U.S., at 216. An Gs :

The Court has never questioned the validity of those pronouncements. Racial and
ethnic distinctions of any sort are inherently suspect and thus call for the
most exacting judicial examination. a he]

Footnotes- =

n28 After Carolene Products, the first specific reference in our decisions to
the elements of "discreteness and insularity" appears in Minersville School
District v. Gobitis, 310 U.S. 586, 606 (1940) (Stone, J., dissenting). The next
does not appear until 1970. Oregon Vv. Mitchell, 400 U.S. 112, 295 n. 14
(STEWART, J., concurring in part and dissenting in part). These elements have
been relied upon in recognizing a suspect class in only one group of cases,
those involving aliens. E. g., Graham v. Richardson, 403 U.S. 365, 372

438 U.S. 265, *302; 98
1978 U.S. LEX1S Â§, **

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Nor is petitioner’s view as to the ap
that r==x2755%) â\200\230gender-based classific
of scrutiny. E. g., Califano v. webster
Boren, 42% U.S. 190, 211 n. (1976) (PCWE
distinc:ticns are less likely to create Â©
problems present in preferential program
With respect to gender there are only tw
incidence cf the burdens imposed by pref
There are no rival groups which can clai
preferential treatment. Classwide quest
injury and groups which fairly can be bu
reviewing courts. See, e. g., Califano
(1977); weinberger v. Wiesenfeld, 420 b.
these szme questions in the context cf r
far more complex and [***62] intrac:a
classifications. More importantly, the
inheren-.v odious stems from a lengthy &
classifications do not share. In sum, t
classification as inherently suspect cor
classifications for the purpcse cf equal

Peti-icner also cites Lau v. Nickels,
proposition that discrimination favoring

receives iudicial approval without the &
nsuspect" classifications. In lau, we h
Francisco school system to provide
students of oriental ancestry who
Title VI of the Civil Rights Act Â©
regula ns promulgated thereunder. no
instruction where inability to understan
ancestry from participation in education

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rlicable standard supported by the fact
aticns are not subjected to this level
430 U.S. 313, 316-317 (1977): Craig v.
, J., concurring). Gender-based
nalytical and practical [*303]
emised on racial or ethnic criteria.
ssible classifications. The

ential classifications is clear.

that they, too, are entitled to

ns as to the group suffering previous
dened are relatively manageable for
Goldfarb, 430 U.S. 199, 212-217

536, 645 (1975). The resolution of
cial and ethnic preferences presents

eÂ¢ problems than gender-based
rception of racial classifications as
˜ragic history that gender-based
Court has never viewed such
comparable to racial or ethnic
otection analysis.

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.S. 563 (1974), in support of the

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nglish instruction for some 1,800
ish amounted to a violation of

â\200\231 S. C. | 20004, and the

se regulations required remedial

d tnglish excluded children of foreign
al programs. 414 U.S., at 568.

ents in Lau were denied "a meaningful

ional program,â\200\235 ibid., we remanded for

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[**%53) Because we found that the stud
opportunity to participate in the educat
the fashioning of a remedial order.
[=3Â¢4] Lau provides little suprcrt

rested sclely on the statute, which had
adminis-rative agency to reach education
subjecting individuals to discrimination
state-:imccsed standards there is nc egus
students with the same facilities, textb
student: who do not understand English a
meaningful education." Id., at 566. More
result in the denial of the relevant ben

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No other student was

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438 U.S. 265, *304; 98 S.
1978 U.S. LEXIS 5, *++64

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1977),Â° indicates a =
benefit certain |

In a similar vein, n42 petitioner contends that.o
Jewish [**2756] Organizations v. Carey, 430 U
willingness to approve racial classifications desi :
minorities, without denominating the classification *suspect .â\200\235 The State of New York had redrawn its reapportionment plan to meet objections of the Department of Justice under | 5 of the Voting Rights Act of 1965, 42 U. S. C. | 1973Â¢c (1970 ed., Supp. V). Specifically, voting districts were redrawn to enhance the electoral power [*305] of certain "nonwhite" voters found to have been the victims of unlawful â\200\234dilutionâ\200\235 under_the original reapportionment
plan. United Jewish Organizations, like Lau, properly is viewed as a case in which the remedy for an administrative finding of discrimination encompassed measures to improve the previously disadvantaged group's ability to participate, without excluding individuals belonging to any other group from enjoyment of the relevant opportunity -- meaningful participation in the electoral process. or

ww ie wi. . -- Footnotes-

n42 Petitioner also cites our decision in Morto ca.
(1974), for the proposition that the State may prefer members of traditionally disadvantaged groups. In Mancari, we approved a hiring preference for qualified Indians in the Bureau of Indian Affairs of the Department of the Interior (BIA). We observed in that case, however, that the legal status of the BIA is sui generis. 1Id., at 554. Indeed, we found that the preference was not racial at all, but "an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to . . . groups. . . whose lives and activities are governed by the BIA in a unique fashion.â\200\235 Ibid.

nv. Mancari, 417 U.S. 535

[%**65)

In this case, unlike Lau and United Jewish Organizations, there has been no determination by the legislature or a responsible administrative agency that the University engaged in a discriminatory practice requiring remedial efforts. Moreover, the operation of petitioner’s special admissions program is quite different from the remedial measures approved in those cases. – It prefers the designated minority groups at the expense of other individuals who are totally foreclosed from competition for the 16 special admissions seats in every Medical School class. Because of that foreclosure, Some individuals are excluded from enjoyment of a state–provided benefit –=– admission to the Medical School –– they otherwise would receive. When a classification denies an individual on opportunities or benefits enjoyed by others solely because of his race or ethnic background, it must be regarded as suspect. E. g â\200\234* McLaurin v. Oklahoma State Regents, 339 U.S., at 641–642. Le dn Arn

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We have held that in "order to justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial, and that (**+66) its use of the classification is â\200\230necessary . . . to the accomplishment’ of its purpose or the safeguarding of its interest." In re Griffiths, 413 U.S. 717, 721–722 (1973) (footnotes omitted); Loving v. Virginia, 388 U.S., at 11; Mclaughlin v. Florida, 379 U.S. 184, 196 (1964). The special admissions [*306] =˜ program purports to serve the

purposes of: (i) "reducing the historic deficit of traditionally disfavored

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} 43 U.S. Sez, Â¥3I5%y S$. Ct. 2733, *27156; ")
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minorities in medical schocls and in rhe medical profession,â\200\235 Brief for Petitioner 32; (ii) countering the effacts nt societal discrimination; n43 (iii) increasing {**2757] the numcer of chysicians who will practice in communities currently underserved: and {iv y obtaining the educational benefits that f.cw from an ethnically diverse student body. It is necessary to decide which, if any, of these purposes ie subhstantial encugh to support the use of a suspect classification.

nd: A number of distinct sukgoals seen advanced as falling under the rubric of "compensation fcr past i .zzizn." For example, it is said that preferences for Negrc applicants may rsat2 for harm done them personally, or serve to place them at econcmic levels they might have attained but for discrimination against their forebezr Greenawalt, supra n. 25, at 581–586. Another view of the "compen nsaticnâ\200\235 gc s that it serves as a form of reparz=icn by the "majority" to 2 wir izes group as a whole. B. Bittker, The Case {–r Black Reparations (1873). ˜ iu fication for racial or ethnic prefer=nce has been subjected to much ics E. g., Greenawalt, supra n. 25, at 358i; Posner, supra =–. 2%, aT = 33. Finally, it has been arguez that ethnic preferences Wooo EnSEtS roup by providing examples of succes: whom other members of the GÂ¢It late, thereby advancing the group’s interest and society’s intzrs aging new generations to overcc–e the barriers and frustrations t +. Redish, supra n. 25, at 391. For purpeses of analysis these eC grs 4 not be considered separately.

Racial classifications in adm i:rn8 zTonzgivs could serve a fifth purpose,

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"creferenceâ\200\235 at all. Nothing

in this record, however, Su t y of the quantitative factors considered by the Medical Sci 1 -ally biased or that petitioner's special admissions program wÃ©s for ˜ ccrrect for any such biases. Furthermore, if race or ethnic Zac cre used solely to arrive at an

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unbiased prediction of academic su reservation of fixed numbers of

seats would be inexplicable.

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facially in zz e group for no reason other than i race cr eth Â£2 own sake. This the Constitution forbids 7 11; Mclaughlin v. Florida, supra,

5.0 1378.8. 483 (1954).

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The State certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified iscrimination. The line of school desegregation cases, commencing with Brown, attests to the importance of this state goal and the commitment of the judiciary

to affirm all lawful means toward its attainment. In the school cases, the States were required by court order to redress the wrongs worked by specific instances of racial discrimination. That goal was far more focused than the remedying of the effects of "societal discrimination,â\200\235 [***68] an amorphous concept of injury that may be ageless in its reach into the past.

We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations. See, e. g., Teamsters V. United States, 431 U.S. 324, 367-376 (1977): United Jewish Organizations, 430 U.S., at 155-156; South Carolina Vv. Katzenbach, 383 U.S. 301, 308 (1966). After such findings have been made, the governmental interest in preferring members of the injured groups at the expense of others is substantial, since the legal rights of the victims must be vindicated. In such a case, the [*308) extent of the injury and the consequent remedy will have been judicially, legislatively, or administratively defined. Also, the remedial action usually remains subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the penefit. Without such findings of constitutional or statutory violations, nd4 [x*x*69] it cannot be (*309] said that [**2758]) the government has any greater interest in helping one individual than in refraining from harming another. Thus, the government has no compelling justification for inflicting such harm.

n44 MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN misconceive the scope of this Court’s holdings under Title VII when they suggest that ndisparate impactâ\200\235 alone is sufficient to establish a violation of that statute and, by analogy, other civil rights measures. See post, at 363-366, and n. 42. That this was not the meaning of Title VII was made quite clear in the seminal decision in this area, Griggs v. Duke Power CO. 401 U.S. 424 (1971):

"Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. what. is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other

impermissible classification." Id., at 431 (emphasis added).

Thus, disparate impact is a basis for relief under Title VII only if the practice in question is not founded on "business necessity," ibid., or lacks "a manifest relationship to the employment in question,â\200\235 id., at 432. See also McDonnell Douglas Corp. Vv. Green, 411 U.S. 792, 802-803, 805-806 (1973). Nothing in this record -- as opposed to some of the general literature cited by MR.

JUSTICE BRENNAN, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN -- even remotely suggests that the disparate impact of the general admissions program at Davis Medical School, resulting primarily from the sort of disparate test scores and grades set forth in n. 7, supra, is without educational justification.

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nSS This statement appears in the Appendix to the Brief for Columbia University, Harvard University, Stanford University, and the University of Pennsylvania, as Amici Curiae. emma Eh

For the past 30 years Harvard College has received each year applications for admission that greatly exceed the number of places in the freshman class. The number of applicants who are deemed to be not "qualified" is comparatively small. The vast majority of applicants demonstrate through test scores, high school records and teachersâ\200\231 recommendations that they have the academic abilit y
to do adequate work at Harvard, and perhaps to do it with distinction. Faced with the dilemma of choosing among a large number of "qualified" candidates, the Committee on Admissions could use the single criterion of scholarly excellence and attempt to determine who among the candidates were likely to perform best academically. But for the past 30 years the Committee ([***89] on Admissions has never adopted this approach. The belief has been that if scholarly excellence were the sole or even predominant criterion, Harvard College would lose a great deal of its vitality and intellectual excellence and that the quality of the educational 12322) experience offered to all students would suffer. Final Report of W. J. Bender, Chairman of the Admission and Scholarship Committee and Dean of Admissions and Financial Aid, pp. 20 et seq. (Cambridge, 1960). Consequently, after selecting those students whose intellectual pctential will seem extraordinary tc the faculty -- perhaps 150 or so out of an entering class of over 1,100 -- the Committee seeks --

variety in making its choices. This has seemed important . . . in part because jr adds a critical ingredient to the effectiveness of the educational experience {in Harvard College]. . . . The effectiveness of our students' educational experience has seemed to the Committee to be affected as importantly by a wide variety of interests, talents, backgrounds and career goals as it is by a fine faculty and our libraries, laboratories and housing arrangements. (Dean of Admissions Fred L. Glimp, Final [***90] Report to the Faculty of Arts and Sciences, 65 Official Register of Harvard University No. 25, 93, 104-105 (1968) (emphasis supplied). : :

The belief that diversity adds an essential ingredient to the educational process has long been a tenet of Harvard College admissions. Fifteen or twenty years ago, however, diversity meant students from California, New York, and Massachusetts; city dwellers and farm boys: violinists, painters and football players; biologists, historians and classicists: potential stockbrokers, academics and politicians. The result [**2765] was that very few ethnic or racial minorities attended Harvard College. In recent years Harvard College has expanded the concept of diversity to include students from disadvantaged economic, racial and ethnic groups. Harvard College now recruits not only Californians or Louisianans but also blacks and Chicanos and other minority students. Contemporary conditions in the United States mean that if Harvard College is to continue to offer a first-rate education to its students, Âf*323) minority representation in the undergraduate body cannot be ignored by the Committee on Admissions. :

438 U.S. 265, 323; 98 S. Ct. 2733, Aâ\200\231
1978 U.S. LEXIS 5, *++90; ST LIEd.

In practice, this new definition of diversity -[*2*91] â\200\230iâ\200\231has meant tha t race
has been a factor in some admission decisions. When the Committee on Admissions reviews the large middle group of applicants who are â\200\234wadmissibleâ\200\235 and deemed
capable of doing good work in their courses, the race of an applicant may tip the balance in his favor just as gecgraphic origin oraâ\200\231 life spent on a farm ma y
tip the balance in other candidates' cases. A farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer. â\200\234similarly, a black student can usually bring something that a white person â\200\230cannot offer. The quality of the educational experience of all the students in Harvard College depends in part on these differences in the background and outlook that students bring with them. a J

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In Harvard College admissions the Committee has not â\200\230set target-quotas for the number of blacks, or of musicians, football players, physicists or Californians to be admitted in a given year. At the same time the Committee is aware that if Harvard College is to provide a truly {heterogeneous] environment that reflects the rich diversity of the United States, it cannot be provided without some attention to numbers. It would not make sense, [***92) for example, to have 10 or 20 students out of 1,100 whose homes are west of the Mississippi. Comparably, 10 or 20 black students could not begin to bring to their classmates and to each other the variety of points of view, backgrounds and experiences of blacks in the United States. Their small numbers might â\200\230also create a sense of isolation among the black students themselves and thus make it more difficult for them to develop and achieve their potential. Consequently, when making its decisions, the Committee or Admissions is aware that there is some relationship between numbers and achieving the benefits to be derived from a diverse student body, and between numbers and providing a reasonable environment for those students admitted. But [*324]) that awareness does not mean that the Committee sets a minimum number of blacks or of people from west of the Mississippi who are to be admitted. It means only that in choosing among thousands of applicants who are not only "admissible" academically but have other strong qualities, the Committee, with a number of criteria in mind, pays some attention to distribution among many types and categories of students.

The further refinements [(***93] sometimes required help to illustrate the kind of significance attached to race. The Admissions Committee, with only a few places left to Â£ill, might find itself forced to choose between A, the child of a successful black physician in an academic community with promise of superior academic performance, and B, a black who grew up in an inner-city ghetto of semi-literate parents whose academic achievement was lower but who had demonstrated energy and leadership as well as an apparently-abiding interest in black power. If a good number of black students much like A but few like B had

already been admitted, the Committee might prefer B; and vice versa. If C, a white student with extracrdinary artistic talent, were also seeking ore of the remaining places, his unigue quality might give him an edge over both A and B. Thus, the critical criteria are often individual qualities or experience not dependent upon race but scmetimes associated with it.

CONCURBY: BRENNAN (In Part); WHITE (In Part); MARSHALL (In Part); BLACKMUN (In Part); STEVENS (In Part)

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for reality rebukes us that race has too often been used by those who would stigmatize and oppress minorities. Ye: we cannot -- and, as we shall demonstrate, need nct under our Cons sisutiecn cr Title VI, which merely extends the cons=mraints of the Fourteenth Arendmans to private parties who receive federal funds -- let color blindness ct myopia which masks [***100] the reality that many "created equal" have Desn treated within our lifetimes as infericr both by the law and by the: ilzw citizens.

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is no private right of action un

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In our view, Title VI prchibits onal of racial criteria that would violate -he Fourteenth Amendment : on : [**2768) State or its agencies; it does not bar the pre : of racial minorities as a means of remedying past societal e extent that such action

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The assertion of human equality is closely associated with the proposition that differences in color or creed, birth or status, are neither significant nor relevant to the way in which persons should be treated. â\200\234Nonetheless, the position that such factors must be "constitutionally an irrelevance,â\200\235 Edwards v .
California, 314 U.S. 160, 185 (1941) (Jackson, J., concurring), summed up by the shorthand phrase " [our] [***142] Constitution is color-blind," Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting), has never been adopted by this Court as the proper meaning of the Equal Protection Clause. Indeed, [*356) we have expressly rejected this proposition on a number of occasions. A â\200\234Siphon

Our cases have always implied that an "overriding st tutory purpose," McLaughlin v. Florida, 379 U.S. 184, 192 (1964), could be found that would justify racial classifications. See, e. g., ibid.; Loving v. virginia, 388 U.S. 1, 11 (1967); Korematsu Vv. United States, 323 U.S. 214, 216 (1944); Hirabayashi v. United States, 320 U.S. 81, 100-101 (1943). More recently, in McDaniel v. Barresi, 402 U.S. 39 (1971), this Court unanimously reversed the Georgia Supreme Court which had held that a desegregation plan voluntarily adopted by a local school board, which assigned students on the basis of race, was per se invalid because it was not colorblind. And in North Carolina Board of Education v. Swann we held, again unanimously, that a statute mandating colorblind [x*x*143] school-assignment plans could not stand "against the background of segregation,â\200\235 since such a limit on remedies would "render illusory the promise of Brown. [I].â\204¢ 402 U.S., at 45-46. an

We conclude, therefore, that racial classifications are not per se invalid under the Fourteenth Amendment. Accordingly, we turn to the problem of : articulating what our role should be in reviewing state action that expressly classifies by race. killa

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Respondent argues that racial classifications are always suspect and, consequently, that this Court should weigh the importance of the objectives served by Davis' special admissions program to see if they are compelling. In addition, he asserts that this Court must inquire whether, in its judgment, there are alternatives to racial classifications which would suit Davisâ\200\231 purposes. Petitioner, on the other hand, states that our proper role is simply to accept petitioner's determination that the racial [%*2782) classifications used by its program are reasonably related to what it tells us are its ktenign [*357] purposes. We reject petitioner's view, but, because our pricr cases are in many respects inapposite to that [**=144]) before us now, we find it necessary to define with precision the meaning of that inexact term, "strict scrutiny.â\200\235 vs :

Unquestionably we have held that a government practice or statute which restricts "fundamental rights" or which contains "suspect classificationsâ\200\235 is t o
be subjected to "strict scrutinyâ\200\235 and can be justified only if it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available. n30 See, Â©. G., San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 16-17 (1973); Dunn v. Blumstein, 405 U.S. 330 (1972) . But no fundamental right is involved here. See San Antonio, supra, at

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shield [*359) which protects against any inquiry into the â\200\230actual purposes

underlying a statutory scheme.'â\200\235 Califano v. Webster, 430 U.S.:313, 317 (1977), quoting Weinberger v. Wiesenfeld, 420 U.S. 636, 648 (1975). Instead, a number of considerations -- developed in gender-discrimination cases but which carry even more force when applied to racial classifications -- â\200\230lead us to conclude that racial classifications designed to further remedial purposes "'must serve important governmental objectives and must be substantially related to achievement of those objectives.'â\200\235 Califano v. Webster, â\200\234supra, at 317, quoting
Craig v. Boren, 429 U.S. 190, 197 (1976). R35 AL gran. mars SE

ee. Footnotes- - =

n34 Paradoxically, petitioner's argument is supported by the cases generally thought to establish the mstrict scrutinyâ\200\235 standard in race cases, Hirabayashi v. United States, 320 U.S. 81 (1943), and Korematsu Vv. United States, 323 U.S. 214 (1944). In Hirabayashi, for example, the Court, responding to a claim that a racial classification was rational, sustained a racial classification solely on the basis of a conclusion in the double negative that it could not say that facts which might have been available "could afford no ground for differentiating citizens of Japanese ancestry from other groups in the United States." 320 U.S., at 101. A similar mode of analysis was followed in Korematsu, see 323 U.S., at 224, even though the Court stated there that racial classifications were Â» immediately suspectâ\200\235 and should be subject to "the most rigid scrutiny.â\200\235 id., at 2186. [***148] : :

n35 We disagree with our Brother POWELL's suggestion, ante, at 303, that the presence of â\200\234rival groups which can claim that they, too, are entitled to preferential treatmentâ\200\235 distinguishes the gender cases Or is relevant to the question of scope of judicial review of race classifications. We are not asked to determine whether groups other than those favored by the pavis program should similarly be favored. All we are asked to do is to pronounce the constitutionality of what Davis has done. SEH,

But, were we asked to decide whether any given rival group -- German-Americans for example -- must constitutionally be accorded preferential treatment, we do have a wprincipled basis,â\200\235 ante, at 296, for deciding this question, one that is well established in our cases: The Davis program expressly sets out four classes which receive preferred status. Ante, at 274. The program clearly distinguishes whites, but one cannot reason from this a conclusion that German-Americans, as a national group, are singled out for invidious treatment. And even if the Davis program had a differential impact on German-Americans, they would have no constitutional claim unless they could

prove that Davis intended invidiously to discriminate against German-Americans. See Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 264-265 (1977) ; Washington v. Davis, 426 U.S. 229, 238-241 (1976). If this could not be shown, then "the principle that calls for the closest scrutiny of distinctions in laws denying fundamental rights . . . is inapplicable,â\200\235 Katzenbach v. Morgan ,
384 U.S. 641, 657 (1966), and the only question is whether it was rational for Davis to conclude that the groups it preferred had a greater claim to compensation than the groups it excluded. See ibid.; San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 38-39 (1973) (applying Katzenbach test to state action intended to remove discrimination in educational opportunity).

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Thus, claims of rival groups, although they may create thorny political problems, create relatively simple problems for the courts.

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{*3â\202¬0; First, race, like, vased classifications too often [has] been inexcusably i ed to st starts and stigmatize politically powerless segments of scciety." Kahn v. Shevin, 416 7.5. 351, 357 (1974) (dissenting opinion). While a carefully tailcoreZ statute designed to remedy past discrimination could avoid these vices, see Califano v. Webster, supra: Schlesinger v. Ballard, 419 U.S. 46% (197%): Xahn v. Shevin, supra, we nonetheless have recognized that the line between honest and thoughtful appraisal cof the effects of past discriminaticn and paternalistic stereotyping is not sc clear and that a statute cased on the latter is patently capable of stigmatizing all women with a badge cf inferiority. CE. Schlesinger v. Ballard, supra, at S0&; UJO, supra, at 11%, ar.d n. 3 lopinicn concurring in part): Califano v. [**2784] Goldfarb, 430 U.S. 1993, 223 (1977) (STEVENS, J., concurring in judgment). See od Stanton vv. Stanton, 421 U.S. 7, 14–15 (1978). State programs designed ostensibly Ime IgE} =o amelicrate the effects of past racial discrimination cbviously crezz= the same hazard of stigma, since they may promote racial separatism and reinforce the views of those who believe that members of racial minorities are inherently incapable of succeeding on their own. Sees USO, supra, at 172 (epinicn concurring in part); ante, at 298 (opinion of POWELL, J.).

Second, race, like gender and illegitimacy, see Weber v. Aetna Casualty & Surety Co., 4C6 U.S. 164 (1972), is an irmuzizle characteristic which its possessors are powerless to escape <r et zcidz. While a classification is not per se invalid because it divides clzsses cn the basis of an immutable characteristic, see supra, at 355–33%, it is nevertheless true that such divisions are contrary to our deep zalieIl that "legal burders should bear some relationship to individual responsibility or [*361) wrongdoing," Weber, supra, at 175; Frontiero v. Richardszn, 411 7.3. 677, 686 (1973) (opinion of BRENNAN, WHITE, and MARSHALL, JJ.), and that :cvancement sanctioned, sponsored, or approved by the State should idezlly be tased {*=2151) on individual merit or achievement, or at the least on factors within the control of an individual. See UJO, 430 U.S., at 173 (cpinion concurring in part): Kotch v. Board cf River Port Pilct Comm’rs, 333 1.3. 52, S66 (1947) (Rutledge, J.,

dissenting).

Because this principle is so deer ct=d it might be supposed that it would be concideres in the legislative pr:zcess and weighed against the benefits of programs preferring individuals beczuse of their race. But this is not necessarily so: The "natural cense .c2 =f our gcverning processes [may well be] tha: the most â\200\230discrete and insu.zr! cf writes . . . will be called upon to bear the immediate, direct costs of Zen discrimination.â\204¢ UJO, supra, at 174 age (opinicn concurring in part). Meorec: + is clear from our cases that there Faris are limits beyond which majorities maz: go when they classify on the basis of immutable characteristics. See, e. rer, supra. Thus, even if the concern for individualism is weighed by the : cal process, that weighing cannot waive the personal rights of individ: under the Fourteenth Amendment. [***152] See Lucas v. Colorado Gern=rzl issemdly, 377 U.S. 713, 736 (1964).

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established for ostensibly penign purpcse can be misused, causing effects not unlike those created by invidious classif +ions, it is inappropriate to inquire only whether there is any conceivatie pasis that might sustain such a classification. Instead, tO justify such a classification an important and articulated purpose for its use must be shown. In addition, any statute must be stricken that stigmatizes any group or that singles out those least well

represented in the political process ro bear the orunt of a benign program.

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Thus, Our review under the Fourteenth amencrent should be [+362] strict = not wiggrict' in theory and fatal in face," 3 pecause it js stigma that causes fatality ~~ put strict and searching nonetheiess.

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original panel i â\200\231d 1286. The court, however,
makes the fol the issues raised either
originally or

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In judging huma conduct, in:
concepts, and their existence us:zall
As stated in the original opini:cn
evidence which establishes bad Â£
the town of Shaw and its public
clearly =stablish conduct which

pose are elusive subjective
rred only from proven facts.
sre us does not contain direct

<i.. .r any evil motive on the part of

OTB
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In order to prevail in a case of not necessary to prove
intent, motive or purpose to discri rt of city officials. Ve
feel that the law on this point is ual protection of the lawsâ\200\231
means mcre than merely the absence action designed to
discriminate; I=23173) we 0 ize that the arbitrary quality
cf thoughtlessness can be as diss: to private rights and to
public interest as the perversity me’." (Emphasis supplied.)
Norwalk CCRE v. Norwalk Ss ootenn 1968, 385 F.2d 920, 931.See
also Kennedy Park Homes Associatic f Lackawanna, New York (2
Cir. 1875) 436 F.24 108, 114, cer: n. 4 . 1019, 91 S.Ct. 1236, 28
L.ed.2Â¢-54Â¢ (1371) and United 8caz8f 2x . Bgalzs v, Wiman, S Cir. 1962, 304
F.24 53 ar 65

Morec-ver, in our judgment the facts z 23 squarely and certainly support
the reascnable and logical inference t! there was here neglect involving clear

overtones of racial discriminaticn
of the town of Shaw resulting in =
intenticral and purposeful disregar
laws. See Yick Wo v. Hopkins, 11%
Loving v. Virginia, 388 U.S. 1, 10

inistration of governmental affairs
’s which characterize an

inciple of equal protection of the
3.Ct. 1064, 30 L.Ed. 220 (1886);
17, 18 L.Ed.2dÂ°1010 11966);

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Snowden v. Hughes, 321 U.S. 1, 8, 64 S.Ct. 397, 88 L.Ed. 497; Kennedy Park Homes \
Asscciation, Inc. v. City of Lackawanna, supra; Rodriguez v. Brown, 5 Cir. 1970, 5
429 F.2d 269, 273; Norwalk CORE v. Norwalk Redevelopment Agency, supra 395 F.2d \
at page 931. |

Federal Courts are reluctant to enter the field of local government operations. The conduct of municipal affairs is "an extremely awkward vehicle to manage." It is apparent from our original opinion, and we repeat here, that we do not imply or suggest that every disparity of services between citizens of a town or city creates a right of access to the federal courts for redress. We deal only with the town of Shaw, Mississippi, and the facts as developed in this record.

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We have carefully reviewed the record here, and it appears that various perscns in the class of plaintiffs sought relief as to some of the services in question from the municipal government prior to filing suit. Although the district court found to the contrary, we do not think that finding can stand as to all of the services in view of the evidence on this point in the record.There can, therefore, be no question about the claim here being ripe for presentation to the United States Courts under the provisions of 42 U.S.C. | 1983 and 28 U.S.C. | 1343. Whatever reguirements may exist as to the need of a plaintiff to demonstrate that there is such "finality" to the deprivatien of which he complains as to make the cause of action "ripe" for the bringing of a federal law suit (cf. discussion in Stevenson v. Bcard of Education of Wheeler County, Georgia, 5 Cir. 1970, 426 F.2d 1154, cert. den. 400 U.S. 957, 91 S.Ct. 388, 23 L.Ed.2d 265; and Hall v. Garson, 5 Cir. 1970, 430 F.2d 430, 436), no such problem exists here. :

Thus, this posture of the case obviates the necessity of our attempting to articulate a generally applicable principle of "finality" or "ripeness" beyond what has already been said in the cited cases. For us to do so in view of the many different kinds of "civil rights" actions that are comprehended under Section 1983, would not only be extremely difficult, but, as to other fact situations and types of actions, any statement by us would amount merely to dictum and would be purely advisory. We reiterate what we have previously said – that before any case can be considered by a federal court under Section 1983 the forbidden deprivation must be complete and final. Otherwise, the courts would merely be advancing advisory opinions, which they may not do under Article 3, Section 2 of the Constitution. =f

Applying the foregoing standards, it is our opinion that the case under consideration is the type of case in which federal jurisdiction should be exercised.Having reached that conclusion all that [*1174] remains is to choose an appropriate remedy and to frame the appropriate relief. nl

nl. Without attempting to determine to what extent Section 1983 and its enforcing Section 1343 are available only when the "right or immunity is one of personal liberty, not dependent for its existence upon the infringement of property rights", Hague v. CIO, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423 (concurring opinion of Mr. Justice Stone) and see Garren v. Winston-Salem, 4th Cir. 1971, 439 F.2d 140, we conclude that this is not a "property rights" case. See Hall v. Garson, 5 Cir. 1971, 430 F.2d 430 and Sniadach v. Family Finance Corporation, 1969, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349.

cy Here the original panel directed defendants to submit a plan to eliminate the disparities to the district court. This was a sound approach under the facts of this case. This is not tc say, cf course, that in another case involving deprivation of rights under Section 1283 reguirement of the submission of a plan by the defendant governmental authcrity would be the most appropriate remedy. In some situations, presenting a le issue, the case may be finally disposed of on appeal. In others the case . be remanded to the district court, after 3 determination of the rights rarzies, for the purpose of permitting the triall court to exers 11 equitable discretion in the first instance. Here, however, the received extended attention in the @district ccur: 1) possible fz ailable to the court. Also, according tc statements at the tire z gurent, a bi-racial committee has been appcinted ty the municipal governing crities to advise with the mayor and genase} regarding city services A black citizen had been elected to the cts, taken t the uld seem to indicate the
hereund 1 authorities will formulate a
ritie ated, the plan will, of course,
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and rerarnded ff:

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further proceedings not

1 fully agree with Judge Tutt.e's Ij fcr <he panel and favcr adopting it as the opinion of the en karnc Ccur: Altncuch I agree with the result reached by the Court en banc, 1 disagree with some :f whe statements contained in the opinion by the Court en banc A

vail in a case of this type it

A. Eres, "Wis SIZEsT LI 3
is not y cant, mitive Tr purpose to discriminate on the part
of city cfficials.â\204¢ This 1 accept as an acc statement of the law. The
opinion Jes on to state, hcwever, "Mcrecwver, our judgment the facts before i
us squarely and certainly suppcrt the reascnable and logical inference that
there was here neglect involving clsar over:icnes of racial discrimination in the
administration of governmental affairs ci the town of Shaw resulting in the same
evils which characterize an interticra rnd purposeful disregard of the
principle of equal proregtion Â©f = E This statement is ambigucus. It ;
should nc: be read to imp.y thas z1:n in this case was based even in
part or proof of motive, purpcese, ,z2nz. To imply that proof of motive,
purpose, or. intent is necessary : gkb.iszn 3 tasis for relief in a case such
as this is +c missvaze the ziesr rizusus law on the subject. : See Palmer
Â¥..Thoppscn, â\200\2341371, 423 0.8. 2.17%, Â§.7t. 1940, 1945, 29 L.Ed.2d 438, 445;
Griffin v. County School Board cf Frince Edward County, 1964, 377 U.S. 218, 84
S.Ct, 1224, 32 L.23.0d 2581 Gomiliice wv. Lighcfoot, 1960, 364 U.5..333, 81'S.Ce.
125, S L.Ed.2d 110; NAACP w. But: ,. 371 U.S. 4158, 83s.Ct. 328, '91L.Ed.
{#1175 24 405: Brown wv. Bd, of zz, 19%4, 347 U.S. 483, 74 S.Ct. 686,
98 L.Ed. 873; Brown v. Bd. of Eguc I5e=, 349 U.S. 294, 75 S.Ct. 333, 99

L.Ed. 1083. ni

nl. This. is not to say that 2, purpose or intent may not
reinferce a finding of â\200\230racial di ic r serve as a basis for such a
finding See Hall v. St. Helena Pzri.: =rzo) Board, EB.D.La.l1981, 197 F.Supp.

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649, aff'd per curiam 368 U.S. 515, 82 S.Ct. 529, 7 L.Ed.2d 521 (1965); Davis v. Schnell, S.D.Ala.1949, 81 F.Supp. 872, aff'd per curiam 336 U.S. 933, 69 S.Ct. 749, 93 L.Ed. 1093; Poindexter v. La. Financial Assistance Comm., E.D.La.1967, 275 F.Supp. 833, aff'd per curiam 389 U.S. 571, 88 S.Ct. 693, 19 L.Ed.2d 780 (1968); Hobson v. Hansen, D.D.C.1967, 269 F.Supp. 401 aff'd sub nom, Smuck v. Hobson, 1969, 132 U.S.App.D.C. 372, 408 F.2d 175; Johnson v. Branch, 4 Cir. 1966, 364 F.2d 177; Chambers v. Hendersonville City Bd. of Educ., 4 Cir. 1966, 364 F.2d 189; Downs v. Bd. of Education, 10 Cir. 1964, 336 F.2d 988; Taylor v. Bd. of Education, 2 Cir. 1961, 294 F.2d 36; Brest, Palmer v. Thompson: An approacch to the Problem of Unconstitutional Legislative Motivation, 1971 S.Ct. Rev. 95 (1971); Ely, Legislative and Administrative Motivation in Constitutional Law, 79 Yale L.J. 1205 (1970); Note Legislative Purpose and Federal Constitutional Adjudication, 83 Harv.L.Rev. 1887 (1970); Comment, the Constitutionality of Sex Separation in School Desegregation Plans, 37 U.Chi.L.Rev. 296 (1970).

and we repeat here, that we do not imply or suggest that every disparity of services between citizens of a town or city creates a right of access to the federal courts for redress. We deal only with the town of Shaw, Mississippi, and the facts as developed in this record." I agree that not every failure to provide equal municipal services will result in a cause of action under section 1983 in federal court. I do not agree that what was said in the panel opinion and what we say here is confined to the facts of this case. The town of Shaw is not the proverbial "red-haired, one-eyed man with a limp." By our decision in | this case, we recognize the right of every citizen regardless of race to equal municipal services. The line will, of course, have to be drawn between those

disparities which create a right of action in federal court and those which do not. Case by case development will define the contours of a federal cause of action; this case is not the vehicle for precise definition.

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B. Second, the opinion states, "It is apparent from our original opinion,

C. The doctrine of "ripeness" is a component of the "cases" and "controversies" requirement of Article III, Section 2 and is essentially a problem of pre-maturity. The Supreme Court has said:

The power of courts, and ultimately of this Court to pass upon the constitutionality of acts of Congress arises only when the interests of litigants require the use of this judicial authority for their protection against actual interference. A hypothetical threat is not enough. ... It would not accord with judicial responsibility to adjudge, in a matter involving constitutionality, between the freedom of the individual and the requirements of public order except when definite rights appear upon the one side and definite prejudicial interferences upon the other.

United Public Workers of America v. Mitchell, 1946, 330 U.s. 75, 89-90, 67 S.Ct. 556, 564, 91 L.Ed. 754, 767. See also Adler v. Bd. of Education, 342 U.S. 485, 72 S.Ct. 380, 96 L.EA. 517; Pce v. Ullman, 1961, 367 U.S. 497, 81 S.Ct. 1752, 6 L.Ed.2d 989; Lathrop v. Donohue, 1961, 367 U.S. 820, 81 S.Ct. 1826, 6 L.Ed.2d 1191; Communist Party v. Subversive Activities Control Bd., 1961, 367 U.S. 1, 81 S.Ct. 1357, 6 L.Ed.2d 625; Bantam Books, Inc. v. Sullivan, 1963, 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed.2d 584; Railroad Transfer Service, Inc. v. Chicago, 1967, 386 U.S. 351, 87 S.Ct. 1095, 18 L.Ed.2d 143; Currie, Federal Courts 14-17, 46-50 (1968); Bickel, The Least Dangerous Branch 71, 111-198 (1962) ; [*1176] 3 Davis on Administrative Law Treatise 116-208 (1958).

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426 U.S. 229, *239; 96 S. Ct. 2040, **2047; 4
1976 U.S. LEXIS 154, *=**15; 48 L. Ed. 2d 597
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nlC Although Title VII standards have dcminated this case, the statute was not applicable to federal employees when the complaint was filed: and although the 197. amendments extending the Title tc reach Government employees were adoptez pricr to the District Court's iudgment, the complaint was not amended to state : c.aim under that Title, ncr did the case thereafter proceed as a Title VII cas= Respcndents' mction for partia mary judgment, filed after the 1972 amendments, rested solely on constit: 1 grounds; and the Court of Appeals ruled that the motion shouid have granted.
At the coral argument before this Court, Â«when respondents' counsel was asked whether "this is just a purely Title VII case as it comes to us from the Court of Appeals without any constitutional cvertcnes," counsel responded: "My trouble honest.Â» with that proposition is thsz prccedural requirements to get into court under T:-le VII, and this case has nct met them." Tr. of Oral Arg. 66.
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{ J)
The central purpose of the Egual Frotecticn Clause of the Fourteenth Amendrznt is the prevention of official conduct discriminating on the basis of race. It is also true that the Due s Tlzuse of the Fifth Amendment contains an equal protection COmpcrh kiting the United States from invidicusly discriminating betwesn ls or groups. Bolling v. Sharpe, 347 U.S. 497 (1954). But our cases --=raced the proposition that a law or other official act, without reg her it reflects a racially discriminatory purpose, is unconst clely because it has a racially disprcpcrtionate impact. :
Almost 100 years ago, Strauder v. WET virginia, 100 U.S. 303: (1880), established that the exclusion of Negrces from grand and petit juries in criminal proceedings violated the Equal Prciection Clause, but the fact that a i particular jury or a series of juries dces act statistically reflect the racial : composition of the community does not in itzelf make out an invidious discrimination forbidden by the Clause. "A purpose to discriminate must be present which may be proven by systematic exclusion of eligible jurymen of the proscrired race or by [***17: 382 sicatior of the law to such an i exten: a3 to show intenticnal 3 n Akins v. Texas, 325 U.S. 3938, 403-404 (1945S). A defendant in is entitled "to require that the State nc: deliberately and system 0 members of his race the right to participate as Jurors i the sf justice." Alexander v. ouis? , 405. 9.8. 625, 828-%: sc Carter v. Jury Comm'n, 396 c.8. 335-337, 339 oy 23311 wv, Texas, 339 U.S. 282, 287-2 {15350}; Patton v. Mississl 463, 468-469 (1947).
The rule is the same in other con Waighe v. Rockefeller, 376 U.S. 52 (1964), RRS a New York congressics ionment statute against claims that district lines had been raciall ARR The challenged districts were made up predominantly of whites or of minority races, and their [**2042) boundaries were irregularly -rzwn The challengers did not prevail because they failed to prove that the .izw 72rX Legislature "was either

motivated by racial considerations or in fact drew the districts on racial lines"; the plaintiffs had not shown that the statute "was the [***18]

product of a state contrivance to segregate on the basis of race or place of origin." 1d., at 56, 58. The dissenters were in agreement that the issue was whether the "boundaries... were purposefully drawn on racial lines.â\204¢ 1d., at 67.

The school desegregation cases have also adhered to the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose. That there are both predominantly black and predominantly white schools in a community is not alone violative of the Equal Protection Clause. The essential element of de jure segregation is "a current condition of segregation resulting from intentional state action.â\200\235 Keyes v. School Dist. No. 1, 413 U.S. 189, 205 (1973). "The differentiating factor between de jure segregation and so-called de facto segregation... is purpose or intent to segregate." I1d., at 208. See also id., at 199, 211, 213. The Court has also recently rejected allegations of racial discrimination based sclely on the statistically disproportionate racial impact of various provisions of the Social Security Act [***19] because "(tlhe acceptance of appellantsâ\200\231 {*241) constitutional theory would render suspect each difference in treatment among the grant classes, however lacking in racial motivation and however otherwise rational the treatment might be." Jefferson v. Hackney, 406 U.S. 535, 548 (1972). And compare Hunter v. Erickson, 393 U.S. 385 (1969), with James Vv. valtierra, 402 U.S. 137 (1371).

This is not to say that the necessary discriminatory racial purpose must be express or appear on the face of the statute, or that a law’s disproportionate impact is irrelevant in cases involving Constitution-based claims of racial discrimination. A statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate on the basis of race. Yick Wo v. Hopkins, 118 U.S. 356 (1886). It is also clear from the cases dealing with racial discrimination in the selection of juries that the systematic exclusion of Negroes is itself such an "unequal application of the law... as to show intentional discrimination.â\204¢ Akins v. Texas, supra, at 404. Smith v. Texas, 311 U.S. 128 (1940); Pierre v. Louisiana, 306 U.S. 354 (1939); Neal [***20] Ve Delaware, 103 U.S. 370 (1881). A prima facie case of discriminatory purpose may be proved as well by the absence of Negroes on a particular jury combined with the failure of the jury commissioners to be informed of eligible Negro jurors in a community, Hill v. Texas, 316 U.S. 400, 404 (1942), or with racially nonneutral selection procedures, Alexander v. ouisiana, supra., Avery Vv. Georgia, 345 U.S. $59 (1953); Whitus v. .Gecrgia, 385 U.S. 545 (1967). With a prima facie case made out, "the burden of proof shifts to the State to rebut the presumption of unconstitutional action by showing that permissible racially neutral selection criteria and procedures have produced the monochromatic result.â\200\235 Alexander, supra, at 632. See also Turner v. Fouche, 396 U.S. 346, 361 (1970) ; Eubanks v. Louisiana, 356 U.S. 584, 587 (1958).

[*242] Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including [**2049] the fact, if it is true, that the law bears more heavily on one race than another. It is also not infrequently true that the discriminatory impact =- in the jury cases for example, [***21] the total or seriously disproportionate exclusion of Negroes from jury venires - may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds. Nevertheless, we have not held

* that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule, McLaughlin v. Florida, 379 U.S. 184 (1964), that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations.

There are some indications to the contrary in our cases. In Palmer v. Thompson, 403 U.S. 217 (1971), the city of Jackson, Miss., following a court decree to this effect, desegregated all of its public facilities save five _ swimming pools which had been operated by the city and which, following the decree, [x**22] were closed by ordinance pursuant to a determination by the city council that closure was necessary to preserve peace and order and that integrated pools could not be economically operated. Accepting the finding that the pools were closed to avoid violence and economic loss, this Court rejected the argument that the abandonment of this service was inconsistent with the outstanding desegregation decree and that the otherwise seemingly permissible ends served by the ordinance could be impeached by demonstrating that [*243) racially invidious motivations had prompted the city council's action. The holding was that the city was not overtly or covertly operating segregated pools and was extending identical treatment to both whites and Negroes. The opinion warned against grounding decision on legislative purpose or motivation, thereby lending support for the proposition that the operative effect of the law rather than its purpose is the paramount factor. But the holding of the case was that the legitimate purposes of the ordinance – to preserve peace and avoid deficits – were not open to impeachment by evidence that the councilmen were actually motivated by racial considerations. {*%%23) Whatever dicta the opinion may contain, the decision did not involve, much less invalidate, a statute or ordinance having neutral purposes but disproportionate racial consequences.

Wright v. Council of City of Emporia, 407 U.S. 451 (1972), also indicates that in proper circumstances, the racial impact of a law, rather than its discriminatory purpose, is the critical factor. That case involved the division of a school district. The issue was whether the division was consistent with an outstanding order of a federal court to desegregate the dual school system found to have existed in the area. The constitutional predicate for the District Court's invalidation of the divided district was "the enforcement until 1969 of racial segregation in a public school system of which Emporia had always been a part." Id., at 459. There was thus no need to find "an independent constitutional violation." Ibid. Citing Palmer v. Thompson, we agreed with the District Court that the division of the district had the effect of interfering with the federal decree and should be set aside.

That neither Palmer nor Wright was understood to have changed the prevailing rule [***24] is apparent from Keyes v. School Dist. No. 1, supra, where the principal issue [*244)] in litigation was whether and to what extent there had been purposeful discrimination resulting in a partially or wholly segregated school system. Nor did other later cases, Alexander v. Louisiana, supra, and Jefferson v. Hackney, supra, indicate that either [**2050) Palmer or Wright had worked a fundamental change in equal protection law. nll

4, **x*24; 48 L. Ed. 2d 597

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nll To the extent that Falm sug Ss a generally applicable proposition

that legislative purpose is Seder in constitutional adjudication, our prior

cases - as indicated in the text - 3a tc the contrary; and very shortly after

Palmer, all Merbers of the Court maicrity in that case joined the Court's opinicn in Lemcn v. Kurtzman, 402 U.S. â\202¬02 (1971), which dealt with the issue of
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public g schools znd which announced, as the Court had
several m before, e validizy cf public aid to church-related schools
includes close inquiry into the purpose of the challenged statute.

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n, however, various Courts of Appeals

Both Ctefcre and after Palmer v. Thompscen,
have held in several contexts, inclu g public employment, that the
substantially disproportionate rac: act Â¢f a statute or official practice
standing alone and without regard tc d rimiratory purpose, suffices to prove
racial di riminarion violating Â«he ETgual Frotection Clause absent some
Justific on going, substantially teyond what would be necessary to validate
most other legislative classifications nid The [*245] cases impressively
demons- rate that there is another side t> the issue; but, with all due respect,
to the =xtent that those cases rested >n cr expressed the view that proof of
discriminatory racial purpose is unne ary in making out an egual protection

violation, we are in disagreement.

nl2 Cases dealing with publi erployT nclude: Chance v. Board of
Examiners, 4%8 F. 2d 1167, 1176-1177 z 2); Castro v. Beecher, 459 F. 2d
725, 732-733 (CAl 1972); Bridgeport v. Bridgeport Civil Service
Comm'n, 482 F. 2d 1333, 1337 (CA2 1973); Harper Vv. Mayor of Baltimore, 359 F.
Supp. 1187, 1200 (Md.), aff'd in pertinent part sub nom. Harper v. Kloster, 486
Po. 28 1134 (CA4 1973); Douglas v. Hampton, 168 U.S. App. D.C. 62, 67, 512 F. 2d
976, 981 (1975); but cf. Tyler v. Vickery, 317 F. 2d 1089, 1096-1097 (CAS 19795),
cert. pending, No. 75-1026. There are also District Court cases: Wade v.

Mississippi Cooperative Extension Serv., I7c F. Supp. 126, 143 (ND Miss. 1974); Arnalid wv. Ballard, 390 F. Supp. 723, 73%, TIT {ND Chic 1975); United States v. City of Chicago, 385 F. Supp. 844, 232 (NZ Ill. 1974); Fowler v. Schwarzwalder, 351 F. Supp. 721, 724 (Minn. 1972), rev'd on other grounds, 498 F. 2d 143 (CAS 1974)

In other contexts there are Norwalx Â© wv. Ncrwalk Redevelopment Agency, 395 F. 2d 320 (CA2 1568) (urban renewal}; Kennelly Park Homes Assn. v. City of Lackawanna, 436 F. 2d 108, 114 (CxZ 1270), cert denied, 401 U.S. 1010 (1971) (zoning); Southern Alameda Spanish 3pezking Organization v. Union City, 424 F. 2d 291 (CARO 1970) (dictum) (zoning); Mstirspclitan H. D. Corp. Vv. Village of Arling=on Heights, S517 F. 2d 403 (CaTy, sert. granted, 423 U.S. 1030 (19735) (zoning); Gautreaux v. Romney, 448 7. 2d 731, 738 (CA7 1971) (dictum) (public housing); Crow v. Brown, 332 F. Surc. 222, 391 (ND Ga. 1971), aff'd, 457 F. 2d 788 (C25 1972) (public housing); Hawxinz v. Town of Shaw, 437 F. 2d 1286 (CAS

1971), aff'd on rehearing en banc, dÂ¢l 7. 23 1171 (1972) (municipal services).

244; 96 Â§. Ct. 2040, *+2050; Gy.
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nl The respondents urge that the Circuit Court sustained their demurrers on the ground that the suit could not be maintained against the Brotherhood, an unincorporated association, since by Alabama statute such an association cannot be sued unless the action lies against all its members individually, and on several other state-law grounds. They argue accordingly that the judgment of affirmance of the state Supreme Court may be rested on an adequate non-federal ground. As that court specifically rested its decision on the sole ground that the Railway Labor Act places no duty upon the Brotherhood to protect petitioner and other Negro firemen from the alleged discriminatory treatment, the judgment rests wholly on a federal ground, to which we confine our review. Grayson v. Harris, 267 U.S. 352, 358; International Steel Co. v. National Surety Co., 297 U.S. 657, 666; Indiana ex rel. Anderson v. Brand, 303 U.S. 95, 98, 99 and cases

[***12)

If, as the state court has held, the Act confers this power on the bargaining representative of a craft or class of employees without any commensurate statutory duty toward its menbers, gonslitiiisnal Questions sila. For the representative is clothed with power not unlike that of a legislature which is subject to constitutional limitations on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates and which is also under an affirmative constitutional duty equally to protect those rights. If the Railway Labor Act purports to impose on petitioner and the other Negro members of the craft the legal duty to comply with the terms of a contract whereby the representative has discriminatorily restricted their employment for the benefit and advantage of the Brotherhood's own members, we [*199] must decide the constitutional questions which petitioner raises in his pleading.-

But we think that Congress, in enacting the Railway Labor Act and authorizing a labor union, chosen by a majority of a craft, to represent the craft, did not intend to confer plenary power upon the union to sacrifice, for the benefit of its members, rights of the minority [***13] of the craft, without imposing on it any duty to protect the minority. Since petitioner and the other Negro members of the craft are not members of the Brotherhood or eligible for membership, the authority to act for them is derived not from their action or consent but wholly from the command of the Act. Section 2, Fourth provides: "Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. . . ."â\204¢ Under Il 2, Sixth and Seventh, when the representative bargains for a change of working conditions, the latter section specifies that they are the working conditions of employees "as a class." Section 1, Sixth of the Act defines "representative" as meaning "Any person or . . . labor union . . . designated either by a carrier or group of carriers or by its or their employees, to act for it or them." The use of the word "representative," as thus defined and in all the contexts in which it is found, plainly implies that the representative is to act on behalf of all the {***14) employees which, by virtue of the statute, it undertakes to represent.

By the terms of the Act, | 2, Fourth, the employees are permitted to act â\200\234throughâ\200\235 their representative, and it represents them "for the purpose s of" the
Act. Sections 2, Third, Fourth, Ninth. [**231] The purposes of the Act

65 8. Ct..226, *=2331;

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244, ***16; 89 L. Ed. 173

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1944 U.S. LEXIS

The Act has been similarly dD by the Emergency Board referred to in
General Committee v. Southern Pacific Co., 320 U.S. 338, 340, 342-343 n. It
1 â\200\234en rough representatives chosen by a

declared in 1937: "when a craft or c.ass
majority, negotiates a contract with a ier, all members of the craft or
t ntract, regardless of their

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class share in the rights secured by the co
affiliations with any organization cf emplcyees . . . The representatives of
the maiority represent the whcle crait or class in the making of an agreement
for tts benefit of all. . . ."
ities a mT me Â«End FOOLASIEE˜ =e om = mE imp mise
[*x%x*171

Unless the labor union representing a craft owes some duty to represent
non-union members of the craft, at least to the extent of not discriminating
against them as such in the contracts whiiich it makes as their representative,
the mincrity would be left with no means of protecting their interests or,
indeed, thelr right to earn a livelircod by pursuing the occupation in which
they are empl Jove (x202} while {*%232) the majority of the craft
chooses the srgaining representative, when chosen it represents, as the Act by
its terms makes plain, the craft or class, and not the majority. The fair
interpretation of the statutory language is that the organizaticn chosen to
represent a craft is to represent all its memters, the majority as well as the
minorizy, and it is to act for and not against those whom it represents. n3 It
is a principle of general applicaticn that the exercise of a granted power to
act in teralf of others involves the assumpticn toward them of a duty to
exercise the power in their interest and benalf, and that such a grant of power
will not be deemed to dispense with 211 duty tcward those for whom it is
exercised unless so expressed.
am am | ew ne ee i Ge we i i ww PEOEROEEE = ww. a mi TR

n3 Ccrmpare the House Som rz on he N. L. R. A. (H. Rep. No. 1147,
74th Cong., lst Sess., pp. 20- izating that although the principle of
majority rule "written into re statute Docks by Congress in the Railway Labor
Act of 1934" was to be applicable to the bargaining unit under the N. L. R. A.,
the employer was required to give "esgually advantageous terms to nonmembers of
the labor organization negotiating the agreement.â\200\235 See also the Senate Committe
e
Report on the N. L. R. A. to the seme effect. S. Rep. No. 573, 74th Cong., 1st

Sess., p. 13.

We -nink that the Railway Labor s upon the statutory representative
of a craft at least as exacting a d ctect equally the interests of the
members of the craft as the Constit: s=s upon a legislature to give
equa. prctection to the interests &f for whom it legislates. Congress has
seen fit to clothe the bargaining z= ative with powers comparable to those
possessed by a legislative body beth tc create and restrict the rights of those
whom it represents, cf. J. I. Case Cc. v. Labor Board, supra, 335, but it has
also imposed on the representative a correspon ding duty. We hold that the

language of the Act to which we have referred, read in the light of the purposes of the Act, expresses the aim of Cinzrz=ss to impose on the bargaining representative of a craft (*x203] sr :lass of employees the duty to

exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them.

This does not mean that the statutory representative of a craft is barred from making contracts which may have unfavorable effects on some of the members of the craft represented. Variations in the terms of the [***19] contract based on differences relevant to the authorized purposes of the contract in conditions to which they are to be applied, such as differences in seniority, the type of work performed, the competence and skill with which it is performed, are within the scope of the bargaining representation of a craft, all of whose

- members are not identical in their interest or merit. Cf. Carmichael v.

Southern Coal Co., 301 U.S. 495, 509-510, 512 and cases cited; Washington v. Superior Court, 289 U.S. 361, 366; Metropolitan Casualty Co. v. Brownell, 294 U.S. 580, S583. Without attempting to mark the allowable limits of differences in the terms of contracts based on differences of conditions to which they apply, it is enough for present purposes to say that the statutory power to represent a craft and to make contracts as to wages, hours and werking conditions does not include the authority to make among members of the craft discriminations not based on such relevant differences. Here the discriminations based on race ! alone are obviously irrelevant and invidious. Congress plainly did not undertake to authorize (***20] the bargaining representative to make such discriminations. Cf. Yick We v. Hopkins, 118 U.S. 356; Yu Cong Eng v. Trinidad, 271 U.S. 500; Missouri ex rel. Gaines v. Canada, 305 U.S. 337; Hill v. Texas, 316 U.S. 400.

The representative which thus discriminates may be enjoined from so doing, and its members may be enjoined from taking the benefit of such discriminatory action. No more is the Railroad bound by or entitled to take the benefit of a contract which the bargaining representative [*204] is prohibited by the statute from making. In both cases the right asserted, which is derived from the duty imposed by the statute on the bargaining representative, is a federal right implied from the statute and the policy which it has adopted. It is the federal [**233) statute which condemns as unlawful the Brotherhood's conduct. "The extent and nature of the legal consequences of this condemnation, though left by the statute to judicial determination, are nevertheless to be derived from it and the federal policy which it has adopted.â\200\235 Deitrick v. Greaney, 309 U.S. 190, 200-201; [***21] Board of County Commissioners v. United States, 308 U.S. 343; Sola Electric Co. v. Jefferson Co., 317, 0.8..173; 176-7; cf. Clearfield Trust Co. v. United States, 318 U.S. 363.

So long as a labor union assumes to act as the statutory representative of a craft, it cannot rightly refuse to perform the duty, which is inseparable from the power of representation conferred upon it, to represent the entire membership of the craft. While the statute does not deny to such a bargaining labor organization the right to determine eligibility to its membership, it does require the union, in collective bargaining and in making contracts with the carrier, to represent non-union or minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith. Wherever necessary to that end, the union is required to consider requests of nonunion members of the craft and expressions of their views with respect to collective bargaining with the employer and to give to them notice of and opportunity for hearing upon its proposed action.

unions from voluntarily agreeing upon bona fide affirmative action plans that gccord. {***14]) racial preferences in the manner and for the purpose provided in the Kaiser-USWA plan. That question was {*20%) expressly left open in McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 281 n. 8 (1976), which

held, in a case not involving affirmative action, that Title VII protects whites as well as blacks from certain forms cf racial discrimination.

Respondent argues that Congress intended in Title VII to prohibit all race-ccrnscious affirmative action plans. Respondent's argument rests upon a literal interpretation of || 703 (a) and (d) of the Act. Those sections make it unlawful to "discriminate . . . because of . . . race" in hiring and in the selection of apprentices for training programs. Since, the argument runs,

McDonald v. Santa Fe Trail Transp. Co., supra, settled that Title VII forbids discrimination against whites as well as blacks, and since the Kaiser-USWA affirmative action plan operates to discriminate against white employees solely because they are white, it follows that the Kaiser-USWA plan violates Title VII.

Resp:ndent's argument is nct we fcrce. But it overlooks the significance of the fact that x3 the Kaiser-USWA plan is an affirmative action o.an vcluntarily adepted ov private parties to eliminate traditional patterr.s of racial segregation In this context respondent's reliance upon a literal construction of Il 7C3 (a) and (d) and upen McDonald is misplaced. See McDonald v. Santa Fe Trail Transp. Co., supra, at 281 n. 8. It is a "familiar rule, that a thing may be within the letter >f the statute and yet not within the statute, because nct within its spirit, ocr within the intention of its makers." Holy Trinity Church v United States, 143 U.S. 457, 459 (1892). The prohibiticn against racial discrimination in I] 703 (a) and (d) of Title V must therefore be read against the background of the legislative history of Title VII and the historical context Ircr sh the Act arose. See Train v. Coloradc Public Interest Research Grcu U.S. 1, 10 (1976); National Woodwork Mfrs. Assn. v. NLRB, 386 U.S. (1967); United States v. American Trucking Assns., 310 U.S. 3:Z= (1940) . Examination of those sources makes [*202] clear {(***i8 an interpretation of the sections that forbade all race-conscious affirm ion would "bring about an end completely at variance with the purpcs < statuteâ\200\235 and must be rejected. United States v. Public Utilities Comm'n, 345 U.S. 295, 315 (1953). See Johansen

v. United States, 343 U.S. 427, 431 (19:52); Lengshoremen Vv. Juneau Spruce Corp., 342 U.S. 237, 243 (1952); Texas & Pacific R. Co. v. Abilene Cotton 0il Co., 204 U.S. 4256 (1307).

Congress' primary concern in enacting the prohibition against racial discrimination [x*x2727]) in Title VII of the Civil Rights Act of 1964 was with "the plight of the Negro in our eccno 10 Ceng. Rec. 6548 (1964) (remarxs of Sen. Humphrey). Before 1584, vs were largely relegated to unskilled and semi-skilled jobs." Ibid. | = of Sen. Humphrey); id., at 7204 (remarks of Sen. Clark); id., at 7378-7 (remarks of Sen. Kennedy). Becaus= of automation the number of such JcoLs was rapidly decreasing. See id., at 654Â¢ (remarks of Sen. Humphrey); id., at 7204 (remarks of Sen. Clark). As a

consegusnce, "the relative [***17] position of the Negro worker [was] steadily worsening. In 1947 the nonwhite unemployment rate was only 64 percent

higher than the white rate; in 1962 it was 124 percent higher." Id., at 6547 (remarks of Sen. Humphrey). See alsc i4., at 7204 (remarks of Sen. Clark). Congress considered this a serious sccizl problem. As Senator Clark told the Senate: E

"Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area."

Section 703 (j) speaks to substantive liability under Title VII, but it does not preclude courts from considering racial imbalance as evidence of a Title VII violation. See Teamsters v. United States, 431 U.S. 324, 339-340, n. 20 (1977). Remedies for substantive violations are governed by | 706 (q), 42 UO. 8. C.' | 2000e-5 (g).

[(xx*x23]

The reasons for this choice are evident from the legislative record. Title VII could not have been enacted into law without substantial support from legislators in both Houses who traditionally resisted federal regulation of private business. Those legislators demanded as a price for their support that "management prerogatives, and union freedoms . . . be left undisturbed [*x*2729] to the greatest extent possible.â\200\235 H. R. Rep. No. 914, 88th Cong.; 1st sess., pt. 2, Pp. 29 (1963). Section 703 (j) was proposed by Senator Dirksen to allay any fears that the Act might be interpreted in such a way as to upset this compromise. The section was designed to prevent | 703 of Title VII from being interpreted in such a way as to lead to undue "Federal Government interference with private businesses because of some Federal employee's ideas about racial balance or racial imbalance." 110 Cong. Rec. 14314 (1964) (remarks of Sen. Miller). nÃ© See also id., at 9881 (remarks of. [(*207} Sen. Allott); id., at 10520 (remarks of Sen. Carlson); id., at 11471 (remarks of Sen. Javits); id., at 12817 (remarks of Sen. Dirksen). Clearly, a prohibition against all voluntary, race-conscious, [***24) affirmative action efforts would disserve these ends. Such a prohibition would augment. the powers of the Federal Government and diminish traditional management prerogatives while at the same time impeding attainment of the ultimate statutory goals. In view of this legislative history and in view of Congress' desire to avoid undue federal regulation of private businesses, use of the word "require" rather than the phrase "require or permitâ\200\235
in | 703 (j) fortifies the conclusion that Congress did not intend to limit traditional business freedom to such a degree as to prohibit all voluntary, race-conscious affirmative action. n7

nÃ© Title VI of the Civil Rights Act of 1964, considered in University of California Regents v. Bakke, 438 U.S. 265 (1978), contains no provision comparable to | 703 (Jj). This is because Title VI was an exercise of federal power over a matter in which the Federal Government was already directly

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involved: the prohibitions against race-based conduct contained in Title VI governed "|[programs] or [activities] receiving Federal financial assistance." 42 U. S. C. | 2000d. Congress was legislating to assure federal funds would not be used in an improper manner. Title VII, by contrast, was enacted pursuant to the commerce power to regulate purely private decisionmaking and was not intended to incorporate and particularize the commands of the Fifth and Fourteenth Amendments. Title VII and Title VI, therefore, cannot be read in pari materia. See 110 Cong. Rec. 8315 (1964) (remarks of Sen. Cooper). See also id., at 11615 (remarks of Sen. Cooper). [***25]

n7 Respondent argues that our construction of | 703 conflicts with various remarks in the legislative record. See, e. g., 110 Cong. Rec. 7213 (1964) (Sens. Clark and Case); id., at 7218 (Sens. Clark and Case); id., at 6549 (Sen. Humphrey); id., at 8921 (Sen. Williams). We do not agree. In Senator Humphrey's words, these comments were intended as assurances that Title VII would not allow establishment of systems "to maintain racial balance in employment." Id., at 11848 (emphasis added). They were not addressed to temporary, voluntary, affirmative action measures undertaken to eliminate manifest racial imbalance in traditionally segregated job categories. Moreover, the comments referred to by respondent all preceded the adoption of | 703 (jJ), 42 U. S. C. | 2000e-2 (j). After | 703 (j) was adopted, congressional comments were all to the effect that employers would not be required to institute preferential quotas to avoid Title VII liability, see, e. g., 110 Cong. Rec. 12819 (1964) (remarks of Sen. Dirksen); id., at 13079-13080 (remarks of Sen. Clark); id., at 15876 (remarks of Rep. Lindsay). There was no suggestion after the adoption of | 703 (Jj) that wholly voluntary, race-conscious, affirmative action efforts would in themselves constitute a violation of Title VII. On the contrary, as Representative MacGregor told the House shortly before the final vote on Title VII: $

"Important as the scope and extent of this bill is, it is also vitally important that all Americans understand what this bill does not cover. .

"Your mail and mine, your contacts and mine with our constituents, indicates a great degree of misunderstanding about this bill. People complain about . . preferential treatment or quotas in employment. There is a mistaken belief that Congress is legislating in these areas in this bill. When we drafted this bill we excluded these issues largely because the problems raised by these controversial questions are more properly handled at a governmental level closer to the American people and by communities and individuals themselves." 110 Cong. Rec. 15893 (1964).

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[*208) We therefore hold that Title VII's prohibition in || 703 (a) and (d) against racial discrimination does not condemn all private, voluntary, race-conscious affirmative action plans.

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We need not today define in detail the line of demarcation between

permissible [**2730]) and impermissible affirmative action plans. It suffices to hold that the challenged Kaiser-USWA affirmative action plan falls

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McCLESKEY wv. KEMP, SUPERINTENDENT, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER 2

No. 84-6811
SUPREME COURT OF THE UNITED STATES

481 U.S. 279; 107 S. Ct. 1756; 1987 U.S. LEXIS 1817; 95 L. Ed. 2d 262; 55 U.S.L.W. 4537

October 15, 1986, Argued
April 22, 1987, Decided

PRIOR HISTORY: {ar*i}
CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT.
DISPOSITION: 753 F.2d 877, affirmed.

SYLLABUS: In 1978, petitioner, a black man, was convicted in a Georgia trial court of armed robbery and murder, arising from the killing of a white police officer during the robbery of a store. Pursuant to Georgia statutes, the jury at the penalty hearing considered the mitigating and aggravating circumstances of petitioner's conduct and recommended the death penalty on the murder charge. The trial court followed the recommendation, and the Georgia Supreme Court affirmed. After unsuccessfully seeking postconviction relief in state courts, petitioner sought habeas corpus relief in Federal District Court. His petition included a claim that the Georgia capital sentencing process was administered in a racially discriminatory manner in violation of the Eighth and Fourteenth. Amendments. In support of the claim, petitioner proffered a statistical study (the Baldus study) that purports to show a disparity in the imposition of the death sentence in Georgia based on the murder victim's race and, to a lesser extent, the defendant's race. The study is based on over 2,000 murder cases ja*x2] that occurred in Georgia during the 1970's, and involves data relating to the victim's race, the defendant's race, and the various combinations of such persons' races. The study indicates that black defendants who killed white victims have the greatest likelihood of receiving the death penalty. Rejecting petitioner's constitutional claims, the court denied his petition insofar as it was based on the Baldus study, and the Court of Appeals affirmed the District Court's decision on this issue. It assumed the validity of the Baldus study but found the statistics insufficient to demonstrate unconstitutional discrimination in the Fourteenth Amendment context or to show irrationality, arbitrariness, and capriciousness under Eighth Amendment analysis.

Held:

1. The Baldus study does not establish that the administration of the Georgia capital punishment system violates the Equal Protection Clause. Pp. 291-299.

(a) To prevail under that Clause, petitioner must prove that the decisionmakers in his case acted with discriminatory purpose. Petitioner offered no evidence specific to his own case that would support an inference that racial considerations played a part in his sentence, [***3] and the Baldus study is insufficient to support an inference that any of the

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decisionmakers in his case acted with discriminatory purpose. This Court has accepted statistics as proof of intent to discriminate in the context of a State's selection of the jury venire and in the context of statutory violations under Title VII of the Civil Rights Act of 1964. However, the nature of the capital sentencing decision and the relationship of the statistics to that decision are fundamentally different from the corresponding elements in the venire-selection or Title VII cases. Fetitioner's statistical proffer must be viewed in the context of his challenge to decisions at the heart of the State's criminal justice system. Because discretion is essential to the criminal justice process, exceptionally clear proof is required before this Court will infer that the discretion has been abused. Fp. 292-297.

(b) There is no merit to petitioner's argument that the Baldus study proves that the State has violated the Equal Protection Clause by adopting the capital punishment statute and allowing it to remain in force despite its allegedly discriminatory application. For this claim to prevail, petitioner [***4] would have to prove that the Georgia Legislature enacted or maintained the death penalty statute because of an anticipated racially discriminatory effect. There is no evidence that the legislature either enacted the statute to further a racially discriminatory purpose, Or maintained the statute because of the racially disproportionate impact suggested ty the Baldus study. Pp. 297-299.

2. Petitioner's argument that the Baldus study demonstrates that the Georgia capital sentencing system violates the Eighth Amendment's prohibition of cruel and unusual punishment must be analyzed in the light of this Court's prior decisions under that Amendment. Decisions since Furman v. Georgia, 408 U.S. 238, have identified a constitutionally permissible range of discretion in imposing the death penalty. First, there is a required threshold below which the death penalty cannot be imposed, and the State must establish rational criteria that narrow the decisionmaker's judgment as to whether the circumstances of a particular defendant's case meet the threshold. Second, States cannot limit the sentencer's ccnsideration of any relevant circumstance that could cause it to [***5] dez.ine to impose the death penalty. In this respect, the State cannot channel the sentencer's discretion, but must allow it to consider any relevant information offered by the defendant. Pp. 299-306.

3. The Baldus study does not demcnstrate that the Georgia capital sentencing system violates the Eighth Amendment. Pp. 306-313.

(a) Petitioner cannot successfully argue that the sentence in his case is disprcportionate to the sentences in other murder cases. On the one hand, he cannot base a constitutional claim on an argument that his case differs from other cases in which defendants did receive the death penalty. The Georgia Supreme Ccurt found that his death sentence was not disproportionate to other death sentences imposed in the State. On the other hand, absent a showing that the Georgia capital punishment system operates in an arbitrary and capricious manner, petitioner cannot prove a censtituticnal violation by demonstrating that other defendants who may be similarly situated did not receive the death penalty. The opportunities for discretionary leniency under state law do not render the capital sentences imposed arbitrary and capricious. Because petitioner's [**x*6] sentence was imposed under Georgia sentencing procedures that focus discretion "on the particularized nature of the crime and the particularized characteristics of the individual defendant," it may be presumed that his death sentence was not "wantonly and freakishly" imposed, and thus

that the sentence is not disproportionate within any recognized meaning under the Eighth Amendment. Gregg Vv. Georgia, 428 u.s. 153, 206, 207. Pp. 306-308.

(b) There is no merit to the contention that the Baldus study shows that Georgia's capital punishment system is arbitrary and capricious in application. The statistics do not prove that race enters into any capital sentencing decisions or that race was a factor in petitioner's case. â\200\234The likelihood of racial prejudice allegedly shown by the study does not constitute the constitutional measure of an unacceptable risk of racial prejudice. The inherent lack of predictability of jury decisions does not justify their condemnation. On the contrary, it is the jury's function to make the difficult and uniquely human judgments that defy codification and that build discretion, equity, and flexibility into the legal system. [***7] -Pp. 308-312.

(c) At most, the Baldus study indicates a discrepancy that appears to correlate with race, but this discrepancy does not constitute a major systemic defect. Any mode for determining guilt or punishment has its weaknesses and the potential for misuse. Despite such imperfections, constitutional guarantees are met when the mode for determining guilt or punishment has been surrounded with safeguards to make it as fair as possible. Pp. 312-313.

4. Petitioner's claim, taken to its logical conclusion, throws into serious question the principles that underlie the entire criminal justice system. His claim easily could be extended to apply to other types of penalties and to claims based on unexplained discrepancies correlating to membership in other minority groups and even to gender. The Constitution does not require that a State eliminate any demonstrable disparity that correlates with a potentially irrelevant factor in order to operate a criminal justice system that includes capital punishment. Petitioner's arguments are best presented to the : legislative bodies, not the courts. Pp. 314-319.

COUNSEL: John Charles Boger argued the cause for petitioner. With him on the briefs [***8] were Julius L. Chambers, James M. Nabrit III, Vivian Berger, Robert H. Stroup, Timothy K. Ford, and Anthony G. Amsterdam.

Mary Beth Westmoreland, Assistant Attorney General of Georgia, argued the cause for respondent. With her on the brief were Michael J. Bowers, Attorney General, Marion O. Gordon, First Assistant Attorney General, and William B. Hill, Jr., Senior Assistant Attorney General. *

* Briefs of amici curiae urging reversal were filed for the Congressional Black Caucus et al. by Seth P. Waxman, Harold R. Tyler, Jr., James Robertson, Norman Redlich, William L. Robinson, and Grover Hankins; and for the International Human Rights Law Group by Ralph G. Steinhardt.

Briefs of amici curiae urging affirmance were filed for the State of California et al. by Ira Reiner, Harry B. Sondheim, John K. Van de Kamp, Attorney General, Michael C. Wellington, Supervising Deputy Attorney General, and Susan Lee Frierson, Deputy Attorney General; and for the Washington Legal Foundation et al. by Daniel J. Popeo and George C. Smith.

Martin F. Richman filed a brief for Dr. Franklin M. Fisher et al. as amici curiae. *

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429 U.S. 252, #265; 97 S. Ct. S555, **563;
1977 U.S. LEXIS 28, ***24; 50 L. Ed. 2d 450

[***25)

Davis does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the " dominant" or "primary" one. nll In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality. But racial discrimination is not just another competing consideration. When there is a proof that a discriminatory purpose [*266] has been a motivating factor in the decision, this judicial deference is no longer justified. nl2

nll In McGinnis v. Royster, 410 U.S. 263, 276-2717 (1973), in a somewhat different context, we observed:

"The search for legislative purpose is often elusive enough, Palmer v. Thompson, 403 U.S. 217 (1971), without a requirement that primacy be ascertained. Legislation is frequently multipurposed: the removal of even a â\200\230subordinateâ\200\231 purpose may shift altogether the consensus of legislative judgment
supporting the statute."

nl2 For a scholarly discussion of legislative motivation, see Brest, Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive, 1971 Sup. Ct. Rev. 95, 116-118.

[***26]

Determining [**564) whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. The impact of the official action -- whether it "bears more heavily on one race than another," Washington v. Davis, supra, at 242 - may provide an important starting point. Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. Yick Wo v. Hopkins, 118 U.S. 356 (1886); Guinn v. United States, 238 U.S. 347 (1915); Lane v. Wilson, 307 U.S. 268 (1939); Gomillion v. Lightfoot, 364 U.S. 339 (1960). The evidentiary inquiry is then relatively easy. nl3 But such cases are rare. Absent a pattern as stark as that in Gomillion or Yick Wo, impact alone is not determinative, nl4 and the Court must look to other evidence. nlS

â\200\234n13 Several of our jury-select
the nature of the jury-selection task,
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41970} ; Sims v. Georgia, 389 u.s. - 403. 0

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Nation’s population. Jeffersonv. Hackney, 206 U.S

(1972); see also
Washington v. Davis, supra, at 248. .

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[*267) The historical background of the decisi is one evidentiary source,
particularly if it reveals a series of official action: â\200\230taken for invidious
purposes. See Lane v. Wilson, supra; Griffin v. Sc ol" â\200\230Board, 377. 0.5. 218
(1964); Davis v. Schnell, 81 F. Supp. 872 (SD Ala.) fÂ£’d per curiam, 336 U.S.
933 (1949); cf. Keyes v. School Dist. No. 1, Denver â\200\230Colo. â\200\230supra, at 2
07. The
specific sequence of events leading up to the challenged decision also may shed
some light on the decisionmaker’s purposes. Reitman_ Vv. Mulkey, 387 U.S. 369,
373-376 (1967); Grosjean v. American Press Co., 297 U.S. 233, 250 (1936). For
example, if the property involved here always had been zoned R-5 but suddenly
was changed to R-3 when the town learned of MHDC’s plans â\200\230to erect integrated
housing, nl6 we would have a far different case. - Departures â\200\234from â\200\230th
e normal
procedural sequence also might afford evidence that improper â\200\230purposes are
playing a role. Substantive departures too may be relevant,â\200\235 â\200\230particula
rly if the
factors usually considered important _ [**565] â\200\230by the Saditionnsker strongly
favor a decision contrary to the one reached. m7,

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nlÃ© See, e.g., Progress Development or wv. â\200\230Mitchell, 286 F. 2d 222 (CA7

1961) (park board allegedly condemned plaintiffsâ\200\231. land for _a park upon learni
ng
that the homes plaintiffs were erecting there would be sold under a marketing
plan designed to assure integration); Kennedy Park Homes Assn. - ly, City of
Lackawanna, 436 F. 2d 108 (CA2 1970), cert. denied, 401 U. Â§..1010 (1971) (town
declared moratorium on new subdivisions and rezoned area â\200\230for parkland shortly
after learning of plaintiffs' plans to build low-income â\200\230housing) To the extent
*
that the decision in Kennedy Park Homes rested solely on â\200\230aâ\200\231finding of
discriminatory impact, we have indicated our di sagresnisni, i Nashington v. Davis,
supra, at 244-245. Hirata

nl7 See Dailey v. City of Lawton, 425 F. 2d 1037 (CA10 1970). The plaintiffs
in Dailey planned to build low-income housing on Lhe â\200\230site of a former school

that they had purchased. The city refused to rezone the land from PF, its public facilities classification, to R-4, high-density residential. All the surrounding area was zoned R-4, and bcth the present and the former planning director for the city testified that there was no reason "from a zoning standpoint" why the land should not be classified R-4. Based on this and other evidence, the Court of Appeals ruled that "the record sustains the [District Court's) holding of racial motivation and of arbitrary and unreasonable action.â\200\235
1d., at 1040.

{*x=*28] -

[*268) The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports. In some extraordinary instances the members might be called to the stand at trial to testify concerning the purpose of the official action, although even then such testimony frequently will be barred by privilege. See Tenney Vv. Brandhove, 341 U.S. 367 (1951); United States v. Nixon, 418 U.S. 683, 705 (1974); 8 J. Wigmore, Evidence | 2371 (McNaughton rev. ed. 1961). nl8

nl8 This Court has recognized, ever since Fletcher v. Peck, 6 Cranch 87, 130-131 (1810), that judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government. Placing a decisionmaker on the stand is therefore "usually to be avoided." Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 420 (1971). The problems involved have prompted a good deal of scholarly commentary. See Tussman & TenBroek, The Equal Protection of the Laws, 37 Calif. L. Rev. 341, 356-361 (1949); A. Bickel, The Least Dangerous Branch 208-221 (1962); Ely, legislative and Administrative Motivation in Constitutional law, 79 Yale L.J. 1205 (1970); Brest, supra, n. 12.

[***29)

The foregoing summary identifies, without purporting to be exhaustive, subjects of proper inquiry in determining whether racially discriminatory intent existed. With these in mind, we now address the case before us.

Iv

This case was tried in the District Court and reviewed in the Court of Appeals before our decision in Washington v. Davis, supra. The respondents proceeded on the erroneous theory that the Village's refusal to rezone carried a racially discriminatory effect and was, without more, unconstitutional. But both courts below understood that at least part of their function was to examine the purpose underlying the decision. [*269] In making its findings on this issue, the District Court noted that some of the opponents of Lincoln Green who spoke at the various hearings might have been motivated by opposition to

429 U.S. 282, %270; 97
1977 â\200\2301.8. LEXIS 28, #***3

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n20 Respondents complain that the Distr:
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case, even if such an inquiry into mot:
See n. 18, supra. Respondents were allowsl
at trial, to question Board members fully

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insistence that it was effect and nct
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In sum, the evidence dces not w : srrusnin) ent findings cf
both courts below. Respondents SImEly ied v thei den of proving
that discriminatory purpcse was & mot wvatl & yr to thy i ge's decision.
n21 {2271} This conclusion ends tn natiturionel Angus The Court of
Appeals' further finding that the Vi deci 2 ie: discriminatcery
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racially discriminatory purpose wou. : 2s: lv have required invalidation
of the challenged decision. Such p wid, â\200\230how , have shifted to the
village the burden of estatlishing !

even had the impermissible purpose

established, the complaining party

attribute the injury complained of

purpose. In such circumstances, there would be
interference with the challenged decision. But
to make the required threshold showing. See Mt.

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. Doyle, post, p. 2-7

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Respondents' complaint alsc alleged that the usal to rezone violated the
q.

Fair Housing Act, 42 U.S.C. | 3601 et se inue to urge here that =z
zoning decision made by a public body may, and that petitioners' action did,
violate | 3604 or | 3617. The Court of Appeals, however, proceeding in a
somewhat (unorthodox) fashion, did not decide the statutory question. We remand
the case for further [**567) consideration of respondents' statutory claims.

Reversed and remanded.

ta 413 U.S. 189, #200; 93 S. Ct. 2686, **2693; 5%
y 1973 U.S. LEXIS 43, ***18; 37 L. Ed. 2d 548

i Thus, the above-mentioned schools included:
Elementary 25.36% of all Negro elementary pupils
Junior High 68.99% of all Negro junior high pupils
Senior High 42.55% of all Negro senior high pupils
Total 37.69% of all Negro pupils [***19]

. nll Our Brother REHNQUIST argues in dissent that Brown v. Board of Education Â© did not impose an "affirmative duty to integrate" the schools of a dual school system but was only a "prohibition against discrimination" "in the sense that the assignment of a child to a particular school is not made to depend on his race . . . ." Infra, at 258. That is the interpretation of Brown expressed 18 years ago by a three-judge court in Briggs v. Elliott, 132 F.Supp. 776, 777 (1955) : "The Constitution, in other words, does not require integration. It merely forbids discrimination.â\200\235 But Green v. County School Board, 391 U.S. 430, 437-438 (1968), rejected that interpretation insofar as Green expressly held that "School boards . . . operating state-compelled dual systems were nevertheless clearly charged [by Brown II] with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." Green remains the governing principle. Alexander v. Holmes County Board of Education, 396 U.S. 19 (1969); Swann v. Charlotte-Mecklenburg Board of Education, 402.U.8. 1, 15 11971). See also Kelley v. Metropolitan County Board of Education, 317 F.Supp. 980, 984 . (1970) .

[***20)

{$201} [%*2694) This is not a case, however, where a statutory dual system has ever existed. Nevertheless, where plaintiffs prove that the school authorities have carried out a systematic program of segregation affecting a substantial portion of the students, schools, teachers, and facilities within

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the school system, it is only common sense to conclude that there exists a predicate for a finding of the existence of a dual school system. Several considerations support this conclusion. First, it is obvious that a practice of concentrating Negroes in certain schools by structuring attendance zones or

˜ designating "feeder" schools on the basis of race has the reciprocal effect of {7Â° keeping other nearby schools predominantly white. nl2 Similarly, the practice of ˜˜˜ building a school -- such as the Barrett Elementary School in this case -- to a â\200\234. certain size and in a certain location, "with conscious knowledge that it wo uld
Fir [%202) be a segregated school," 303 F.Supp., at 285, has a substantial

= reciprocal effect on the racial composition of other nearby schools. So also, the use of mobile classrooms, the drafting of student transfer policies, the transportation of [***21] students, and the assignment of faculty and staff,, on racially identifiable bases, have the clear effect of earmarking schools according to their racial composition, and this, in turn, together with the elements of student assignment and school construction, may have a profound reciprocal effect on the racial composition of residential neighborhoods within a metropolitan area, thereby causing further racial concentration within the schools. We recognized this in Swann when we said:

413 U.S. 189, #202; 82 Â£. 7:8, **2694;
1973 U.S. LEXIS 43, ***2.; 7 ’.. Ed. 2d 5482

"They [school authorities] must decide Queers. 7 7 lccation and capacity in A light of population growth, finances, lanz ˜.. .=˜ site availability, thrcugh an almost endless list of factors tc be 2 Tne result of this will be a decision which, when combined with cn – encther of student assignment, will determine the racial – 2f –he student body in each school in the system. Over the long ˜–rreguences of the choices will be far reaching. People gravitate tc > zagilities, just as schools are located in response to the needs of peorls. To– i–zation of schools may thus influence the patterns of residential deve. sn Tf & metropolitan {rx 023 \ area and have important impact on CCmptsit :nner–city neighborhoods. –

"In the past, choices in this respec: –z used as a potent weapon for [**2695) creating or maintaining & state–s= ˜ed school system. In addition to the classic pattern of building Â¢ s specifically intended for Negro or white students, school authcrities have s:cmstimes, since Brown, lcsed schools 12203) which appeared likely tc beccrme racially m mixed through changes in neighborhood residential patterns. Ti! was scmetimes accompanied by building new schools in the areas of white 8: gunpansicr farthest from Negro population centers in order tc& mains gparation of the races with a minimum departure from the fcrmel princi: ghborheed zoning.’ Such a policy does more than simply influence ths composition of the student body of a new school. It may well promote 24d residential patter ns fe which, when combined with ’neighborhocd zoning urther lock the schocl system into the mold of separation of the race zr. & proper showing a district court may consider this in fashioning "402 n.5., at 20–21.
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nl2 As a former School Board Presid –:fi2d for the respondents put it: "Once you change the boundary of a it is affecting all the

schools . . . ." Testimony of Mrs. Loi
App. 951a–952a.

on cross–examinati ion.

Similarly, Judge Wisdom has recently stated:

Infection at one school infects all schocls. Tc take the most simple example, in a two school system, all blacks a2: cne school =s all or almost all whites at the other." United States v. Texas E on Agency, 467 F.2d 84S 52 (Ths 1972).
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In short, common sense dictates th& COnIlusich Th racially

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question of fact to be resolved by the trial gr

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such cases must be rare. In the absence cf such
state-imposed segregation in a substantial porticn

suffice to support a finding by the trial court of the existence of a dual system. Of course, where that finding is made, as in cases involving statutory dual systems, the school authorities have an affirmative duty "to effectuate a transition to a racially nondiscriminatory school system." Brown II, supra, at 301.

(204) On remand, therefore, the District Court should decide in the first instance whether respondent School Board's deliberate racial segregation policy with respect [***24] to the Park Hill schools constitutes the entire Denver school system a dual school system. We observe that on the record now before us there is indication that Denver is not a school district which might be divided into separate, identifiable and unrelated units. The District Court stated, in its summary of findings as to the Park Hill schools, that there was "a high degree of interrelationship among these schools, so that any action by the Board affecting the racial compesition of one would almost certainly have an effect on the others." 303 F.Supp., at 294. And there was cogent evidence that the ultimate effect of the Board's actions in Park Hill was not limited to that area: the three 1969 resolutions designed to desegregate the Park Hill schools changed the attendance patterns of at least 29 schools attended by almost one-third of the pupils in the Denver schcol system. nl3 This suggests that the official segregation in Park Hill affected the racial compcsition of schools throughout the district.

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nl3 See the chart in 445 F.2d, at 1008-1009, which indicates that 31,767 pupils attended the schools affected by the resolutions.

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on the other hand, although the District Court did not state this, or indeed any, reason why the Park Hill finding was disregarded when attention was turned to the core city schools -- beyond saying that the Park Hill and core city areas were in its view "different" -- the areas, although adjacent to each other, are separated by Colorado Boulevard, a six-lane highway. From the record, it is difficult to assess the actual significance of Colcrado Boulevard to the Denver school system. The Boulevard runs the length of the school district, but at [*205]) least two elementary schools, Teller and Steck, have attendance [**2696) zones which cross the Boulevard. Moreover, the District Court, although referring to the Boulevard as â\200\234a natural dividing line," 303 F.Supp., at 282, did not feel constrained to limit its consideration of de jure segregation in the Park Hill area to those schools east of the Boulevard. The court found that by building Barrett Elementary School west of the Boulevard and by establishing the Boulevard as the eastern boundary of the Barrett attendance zone, the Board was able to maintain for a number of years the Anglo character of the [**%28) Park Hill schools. This suggests that Colorado Boulevard is not to be regarded as the type of barrier that of itself could confine the impact of the Board's actions to an identifiable area of the school district, perhaps because a major highway is generally not such an effective buffer between adjoining areas. Cf. Davis v. Board of School Commissioners of Mobile County, 402 U.S. 33 (1971). But this is a factual question for resolution by the District Court on remand. In any event, inquiry whether the District Court and the Court of Appeals applied the correct legal standards in addressing

41% U.5. 1, M7; 93 Â§. 09. 327%, *Â»%1288;
1973 U.S. LEXIS S81, *Â»**2Â¢- 31 L. Ed. 20816
lw ww en wm ew GPOEEAS le = ew le ee Ae
n39 E.g., Police Dept. cf Chicags v. Miri< . <.% U.S. 82 (1972); Dunn wv. Blumstein, 405 U.S. 330 (1972); Shapirc ~v. T..:u;::n, 395% U.S. 618 (196%).

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it rationally furthers some legitimate,
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n40 E.g., Graham v. Richardson, 4C3 U.Z2. <I {1871}; Loving v. Virginia, 3Â£& U.S. 1 (1967); Mclaughlin v. Florida, 37% U.E. 134 (10864). .
ndl See Dunn v. Blumstein, supra, at 343. and the cases collected therein.
n42 Brief for Appellants 11.
we Ee a dn pe bee Be co ERS TLOIRITASA 0 Â® (ml wl mle ef They eli Shee fe le
n43 Ibid.
n44 Tr. of Oral Arg. 3; Reply Brief fcr Arrel.iantis 2
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This, then, establishes the framework for cur znzlysis. We must decide, first, whether the Texas system of financinc public education cperates tc the disadvantage [***27] of some suspect clatcs or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny. If so, the judgment of toe District Court should be affirmed. If not, the Texas scheme must still ke mined to determine whether

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The District Court's opinion does not
the constitutional questions posed by Ã©r
school financing. In concluding that str
[*18) that court relied on decisions dezlil
equal treatment in the criminal trial and ap
disapproving wealth restrictions on the righ
District Court concluded, established wealth
Finding that the local property tax system discriminated on the basis of wealth, it regarded those precedents as goatroliing. + then reasoned, based on decisions [***28] of this Court affirming the undeniable importance of

ne novelty and complexity Â¢
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education n47, that there is a fundamental right to education and that, absent some compelling state justification, the Texas system could not stand.

n45 E.g., Griffin v. Illinois, 351 U.S. 12 (1956); Douglas v. California, 372 353 (1963).

n46 Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); McDonald v. Board of Election Comm'rs, 394 U.S. 802 (1969); Bullock v. Carter, 405 U.S. (1972); Goosby v. Osser, 409 U.S. 512 (1973).

nd47 See cases cited in text, infra, at 29–30.

We are unable to agree that this case, which in significant aspects is sui generis, may be so neatly fitted into the conventional [***29] mesaic of constitutional analysis under the Equal Protection Clause. Indeed, for the several reasons that follow, we find neither the suspect–classification nor the fundamental–interest analysis persuasive.

A

The wealth discrimination discovered by the District Court in this {**1289) case, and by several other courts that have recently struck down school–financing laws in other States n48, is quite unlike any of the forms of wealth discrimination [*19] heretofore reviewed by this Court. Rather than focusing on the unique features of the alleged discrimination, the courts in these cases have virtually assumed their findings of a suspect classification through a simplistic process of analysis: since, under the traditional systems of financing public schocls, some poorer people receive less expensive educations than other more affluent people, these systems discriminate on the basis of wealth. This approach largely ignores the hard threshold questions, including whether it makes a difference for purposes of consideration under the Constitution that the class of disadvantaged "poor" cannot be identified or defined in customary equal protection terms, and whether the relative -- rather {x2230) than absolute -- nature of the asserted deprivation is of significant consequence. Before a State's laws and the justifications for the classifications they create are subjected to strict judicial scrutiny, we

411 U.S. 1, *19:
1973 U.S. LEXIS 91,

think these threshold considerations must
were in the court below.

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n48 Serranc v. Priest, 5 Cal. 3d Sg4,
Hatfield, 334 F. Supp. 870 (Minn. 1971):
223, 287 A. 2d 187 (1972); Milliken v.

rehearing granted, Jan. 1973.

The case comes to us with no definitivw
or delineation of the disfavored class.
opinion and of appellees' complaint,
suggests, however, at least three ways
might be described. The Texas system
discriminating (1) against "poor" pe
some identifiable level of poverty
"indigent," n49 or [*20] (2) ag
others n50, or (3) against all tho

incomes, happen to reside in relatively
must be to ascertain whether, in face,
discriminate on any of these possinte
{**1290) classification may be regz

n49 In their complaint, appellees purp
persons who are "poor" and who reside in

. . . property.â\200\235 Third Amended Complaint
defined the term "poor" with reference to an
impecunity. See text, infra, at 22-23. Sees
of Oral Arg. 20-21.

n50 Appellees' proof at trial focused
incomes between residents of wesithy &nc
apparently, to show that there exist
family income and educational item
District Court may have been relying on this
based on family wealth.

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24 457 (1972),

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alsc Brief for Appellees 1, 3; Tr.

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infra, at 25–27. The
notion of relative discrimination

Citing appellees' statistical proof, the court

emphasized that "those districts most rich in property also have the highest

median family income . . .
." 337 F. Supp., at 282.

while the poor precperty districts are poor in income

n51 At oral argument and in their brief, appellees suggest that description of the personal status of the residents in districts that spend less on education is not critical to their case. In their view, the Texas system is impermissibly discriminatory even if relatively poor districts do not contain poor people. Brief for Appellees 43-44; Tr. of Oral Arg. 20-21. There are indications in the District Court opinion that it adopted this theory of district discrimination. The opinion repeatedly emphasizes the comparative financial status of districts and early in the opinion it describes appelleesâ\200\231 class as being composed of "all . . . children throughout Texas who live in school districts with low property valuations." 337 F. Supp., at 281.

The precedents of this Court provide the proper starting pcint. The individuals, or groups of individuals, who constituted the class discriminated against in our prior cases shared two distinguishing characteristics: because of their impecunity they were completely unable [***33] to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit. In Griffin v. Illinois, [*21] 351 U.S. 12 (1956), and its progeny, n52 the Court invalidated state laws that prevented an indigent criminal defendant from acquiring a transcript, or an adequate substitute for a transcript, for use at several stages of the trial and appeal process. The payment requirements in each case were found to occasion de facto discrimination against those who, because of their indigency, were totally unable to pay for transcripts. And the Court in each case emphasized that no constitutional violation would have been shown if the State had provided some nadequate substitute" for a full stenographic transcript. Britt v. North Carolina, 404 U.S. 226, 228 (1971); Gardner v. California, 393 U.S. 367 (1969); Draper v. Washington, 372 U.S. 487 (1963); Eskridge v. Washington Prison Board, 357 U.S. 214 (1958).

n52 Mayer v. City of Chicago, 404 U.S. 189 (1971); williams v. Oklahoma City, 395 U.S. 458 (1969); Gardner v. California, 393 U.S. 367 (1969); Roberts v. LaVallee, 389 U.S. 40 (1967); Long v. District Court of Iowa, 385 U.S. 192 (1966) ; Draper v. Washington, 372 U.S. 487 (1963); Eskridge v. Washington Prison Board, 357 U.S. 214 (1958).

[**x*34)

Likewise, in Douglas v. California, 372 U.S. 353 (1963), a decision establishing an indigent defendant’s right to court-appointed counsel on

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1973 U.S. LEXIS 91, =
direct appeal, the Court dealt only wi
counsel from their own resources and w
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insurmountable. Nor does it deal with
counsel acquired by the less wealthy.

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Williams v. Illinois, 399 U.S. 23%
(1971), struck down criminal penalties
simply because [*22] of their
disadvantaged class was composed only
the demanded sum. Those cases do nct
protection is denied to persons with re.
fines impose heavier burdens. The Court
structured to reflect each person's abil:
disproportionate burdens. Sentencing jul
consider the defendant's ability tc pay,
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Finally, in Bullock v. Carter, 40%
Texas filing-fee requirement for prim
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least one case, as high as Â§ 8,900,
who were unable to pay the required
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n53 Note, A Statistical Analysis of the School Finance Decisions: On Winning Battles and Losing Wars, 81 Yale L.J. 1303, 1328–1329 (1972).

n54 Id., at 1324 and n.

n55 â\200\2301d., â\200\230at 1328,

Second, neither appellees nor the District Court addressed the fact that, unlike each of the foregoing cases, lack of personal resources has not occasioned an absolute deprivation of the desired benefit. The argument here is not that the children in districts having relatively low assessable property values are receiving no public education; rather, it is that they are receiving a poorer quality education than that available to children ir districts having more assessable wealth. Apart from the unsettled and disputed question whether the quality [***38) of education may be determined by the amount of money [*24)] expended for it n56, a sufficient answer to appellees' argument is that, at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages. n57 Nor, indeed, in view of {221292} the infinite variables affecting the educational process, can any system assure equal quality of education except in the most relative sense. Texas asserts that the Minimum Foundation Program provides an "adequate" education for all children in the State. By providing 12 years of free public-school education, and by assuring teachers, books, transportation, and operating funds, the Texas Legislature has endeavored to "guarantee, for the welfare of the state as a whole, that all people shall have at least an adequate program of education. This is what is meant by 'A Minimum Foundation Program of Education.'â\200\235 nS58 The State repeatedly asserted in its briefs in this Court tha
t
it has fulfilled this desire and that it now assures "every child in every school district an adequate education.â\204¢ nS59 No proof was offered at trial persuasively discrediting or refuting the State's assertion.

n56 Each of appellees' possible theories of wealth discrimination is founded on the assumption that the quality of education varies directly with the amount of funds expended on it and that, therefore, the difference in quality between two schools can be determined simplistically by looking at the difference in per-pupil expenditures. This is a matter of considerable dispute among educators and commentators. See nn. 86 and 101, infra.

fundamental right, in the sense that it is eÂ¢--nz the rights and liberties protected by the Constitution -- which hes : coinzumed the attention of courts and commentators in recent years nÃ©s.

n6Ã©7 E.g., Harper v. Virginia BC. cf Eleztizne, 383 U.S. â\202¬63 (1966); United States v. Kras, 409 U.S. 434 (1973). Sse Mr. â\200\234VCTICE MARSHALL'S dissenting opinion, post, at 121.

nÃ©8 See Serrano v. Priest, supra; Van IusariI Vv. Hatfield, supra; Robinscn v. Cahill, 118 N.J. Super. 223, 287 A. 23 187 {.%72); Ccorns, Ciune & Sugarman, supra, n. 13, at 339-393; Goldstein, supre, rn. 38, at 534-341; Vieira, Unecgual Educational Expenditures: Some Minority Views cr Serranc V. Friest, 37 Mo. lL. Rev. 617, 618-624 (1972); Comment, Esiucatizrnzl Financing, Egual Protection of the Laws, and the Supreme Court, 9C Mich. IL. Fav. 1324, 1338-1342 (1372); Notre, The Public School Financing Cases: Interdisirict Inequalities and Wealth Discrimination, 14 Ariz. L. Rev. 8Â§, 120-1248 (1972)

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[**1295) In Brown v. Board of Education, 347 U.S. 483 (1554), a unanimous Court recognized that "education is perhaps the most important function of sta: and local governments." Id., at 463. %Wnat wz: szid there in the context of racial discrimination has lost none cf its vizality with the passage of time: S"Compulsory school attendance laws and the great expenditures for education both demonstrate our {*30) recogniticr of tne importance of education to cur democratic society. It is required in the periormance of our mest basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in

helping him to adjust normally to his envircrment. In these days, it is

doubt ful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an educaticn. Such an oppcrtunity, where the state has undertaken to provide it, is & rignt whlIh must Le made avallable tec all on equal terms." Ibid.I

This theme, expressing an abiding respsct for the vital role of education in & free society, [***49) may be found in numercus opinicns ef Justices of this Court writing both befcre and after Erown wes decided. Wiszonsin v. Yoder, 408 U.S. 205, 213 (BURGER, C.J.), 237, 23-238 (WHITE, J.) (15872): Abington Schoo. Dist. v. Schempp, 374 U.S. 203, 230 (1563) (BRENNAN, J.); McCollum v. Board of Education, 333 U.S. 203, 212 (1948) (Mr. Jus-ice Frankfurter); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 11923): Interstate Consolidated Street R. Co. Vv. Massachusetts, 207 U.S. 79 (1997).

Nothing this Court holds today in any way detracts from our historic dedication to public education. We are in complete agreement with the conclusion of the three-judge panel below that "the grave sigrificance of

education both to the individual and to our society" cannot be doubted. n69 But the importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause. Mr. Justice 1*31) Harlan, dissenting from the Court's application of strict scrutiny to a law impinging upon the right of interstate travel, admonished that "[v]irtually every state statute affects {***50] important rights." Shapiro v. Thompson, 394 U.S., at 655, 661. In his view, if the degree of judicial scrutiny of state legislation fluctuated depending on a majority's view of the importance of the interest affected, we would have gone "far toward making this Court a 'super-legislature.'" Ibid. We would, indeed, then be assuming a legislative role and one for which the Court lacks both authority and competence. But MR. JUSTICE STEWART'S response in Shapiro to Mr. Justice Harlan's concern correctly articulates the limits of the fundamental-rights rationale employed in the Court's equal protection decisions: S

"The Court today does not â\200\230pick out particular human activities, characterize them as "fundamental," and give them added protection ...' To the contrary, the Court simply recognizes, as it must, an established constitutional right, and gives to that right no less protection than the Constitution itself demands." Id., at 642. (Emphasis in original.)I

n69 337 F. Supp.,

MR. [**1296]) JUSTICE STEWART'S statement [***51] serves to underline what the opinion of the Court in Shapiro makes clear. In subjecting to strict judicial scrutiny state welfare eligibility statutes that imposed a one-year durational residency requirement as a precondition to receiving AFDC benefits, the Court explained: S"(I)n moving from State to State . . . appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional.â\200\235 Id., at 634. (Emphasis in original.)l [*32] The right to interstate travel had long been recognized as a right of constitutional significance, n70 and the Court's decision, therefore, did not require an ad hoc determination as to the social or economic importance of that right n71.

n70 E.g., United States v. Guest, 383 U.S. 745, 757-759 (1966); Oregon Vv. Mitchell, 400 U.S. 112, 229, 237-238 (1970) (opinion of BRENNAN, WHITE, and MARSHALL, JJ.).

411 U.S. 1, *34; 83 3. 3298, *2320%;
1973 U.S. LEXIS 91, ***8%8; 3Â¢ L. Ed. 2d 16

End Footnctes

n75 In Mosley , the Court struck down 2 TrnicZac antipicketing ordinance tha: exempted labor picketing from its prohibiticnc. he ordinance was held invalid under the Equal Protection Clause after suris ing iv to careful scrutiny and finding that the ordinance was not narrowly 3Iawi. The stricter standard of review was appropriately applied since iirance was one "affecting First Amendment interests." Id. , at 101.

- -End Footnct
[***56)

-Footnotes˜-

n76 Skinner applied the standard cf c.css utiny tc a state law permitting forced sterilization of "habitual criminals. rplicit in the Court's opinion is the recognition that the right of procreazizn i â\204¢ the rights of perscnal privacy protected under the Constitution. .. Rade ,-410.U.S. 113, 182

(1973).

End Foctnc.es-

{*35) Education, of course, is nc:
protection under our Federal Constitution.
it is implicitly so protected. As we have Â© ig he undisputed importance of

education will not alone cause this Court t: Zerg from the usual standard for reviewing a State's social and economic legislation. It is appelleesâ\200\231 contention, however, that education i distinguishable from other services and benefits provided by the State because it bears a peculiarly close relationship to other rights and liberties acccrded protection under the Constitution. Specifically, they insist that education is itself a fundamental personal right because [***57] it is ess=ntial to the effective exercise of First Amendment freedoms and to intelligent: utilizazior of the right to vote.

In asserting a nexus between speech and education, arpellees urge that the right to speak is meaningless unless the speaker is capable of articulating his thoughts intelligently and persuasively. The "marketplace of ideas" is an empty forum for those lacking basic communicative tocls. Likewise, they argue that the corollary right to receive informatior n77 beccmes little more than a hollow privilege when the recipient has not been taught to read, assimilate, and utilize available knowledge.

Footnotres- -
n77 See, e.g., Red Lion Broadcasting Co. wv. FCC, 395 U.S. 367, 389-390

(1969); Stanley v. Georgia, 394 U.S. 557, 564 (1969); Lamont v. Postmaster General , 381 U.S. 301, 306-307 (1965).

411 U.S. 1,.*35; 93 S. Ct. 1278, **129%;
1973 U.S. LEXIS 91, ***57; 36 L. Ed. 2d 16

End Footnotes-

A similar line of reasoning is pursued with respect to the right to vote. Exercise of the franchise, it is contended, cannot be divorced from the educational Foundation [*36] of the voter. The electoral process, {***53) if reality is to conform to the democratic ideal, depends on an informed electorate: a voter cannot cast his ballot intelligently unless his reading skills and thought processes have been adequately developed.

n78 Since the right to vote, per se , is not a constitutionally protected right, we assume that appelleesâ\200\231 references to that right are simply shorthand references to the protected right, implicit in our constitutional system, to participate in state elections on an equal basis with other qualified voters whenever the State has adopted an elective process for determining who will represent any segment of the State’s population. See n. 74, supra

We need not dispute any of these propositions. The Court has long afforded zealous protection against unjustifiable gcvernmental interference with the individual’s rights to speak and to vote. Yet we have never presumed tO possess either the ability or the authority to guarantee to the citizenry the most effective speech or the most informed electoral choice. [**=*59] That these may be desirable goals of a system of freedom of expression and of a representative form of government is not to be doubted. n79 These are indeed goals to be pursued by a people whose thoughts and beliefs are freed from governmental interference. But they are not values to be implemented by judicial intrusion into otherwise legitimate state activities.

n79 The States have often pursued their entirely legitimate interest in assuring "intelligent exercise of the franchise," Katzenbach v. Morgan , 384 U.S. 641, 655 (1966), through such devices as literacy tests and age restrictions on the right to vote. See ibid.; Oregon Vv. Mitchell , 400 U.S. 112 (1970) . And, where those restrictions have been found to promote intelligent use of the ballot without discriminating against those racial and ethnic minorities previously deprived of an equal educational opportunity, this Court has upheld their use. Compare Lassiter v. Northampton County Bd. of Elections , 360 U.S. 45 (1959), with Oregon v. Mitchell, supra , at 133 (Black, J.), 135, 144-147 (DOUGLAS), 152, 216-217 (Harlan), 229, 231-236 (BRENNAN, WHITE, and MARSHALL, JJ.), 281, 282-284 (STEWART, J.), and Gaston County v. United States , 395 U.S. 285 (1969).

[***60]

411 U.8. 3, *36; 938. Ct. 1178, **129%8; al
1973 U.S. LEXIS 91, =*=**6C; 36 L. Ed. 2d 16

Even if it were conceded that some identi
constitutionally protected prerequisite to t m \
right, we have no indication that the presen is of educational expenditure
1*37)} [**1299) in Texas provide an ecucztion that falls short. Whatever
merit appellees' argument might have if a St 's financing system occasioned an
absolute denial of educational opportunities ny of its children, that
argument provides no basis for finding an in ence with fundamental rights
where only relative differences in spending are involved and where -- as
is true in the present case - no charge fair
fails to provide each child with an opportunity acquire the basic minimal
skills necessary for the enjoyment of the righ Â£ speech and of full
participation in the political process. -

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Furthermore, the logical limitations on appellees' nexus theory are difficulr
to perceive. How, for instance, is education to be distinguished from the
significant personal interests in the basics of decent food and shelter?
Empirical examination might well buttress ar assumption that the ill-fed,
ill-clothed, and ill-housed [***61] are among the most ineffective
participants in the political process, and that they derive the least enjoyment
from the benefits of the First Amendment n&l. If so, appelleesâ\200\231 thesis would
cast serious doubt on the authority cof Dandridge v. williams, supra , and
Lindsey v. Normet, supra .

n80 See Schoettle, The Equal Protecti ause in Public Education, 71 Col.
L. Rev. 1355, 1389-1390 (1971); Vieir py n. 68, at 622-623; Comment,
Tenant Interest Representation: Proposal a National Tenants' Association, 47
Tex. L. Rev. 1160, 1172-1173, n. tl

End Foctnoses˜ ˜-

We have carefully considered each of the arguments supportive of the District
Court's finding that education is a fundamental right or liberty and have found
those arguments unpersuasive. In one further respect we find this a
particularly inappropriate case in which tc subject state action to strict
judicial scrutiny. The present case, in arcther basic sense, is significantly
different from any of the cases in whicr the Court has {*38) applied strict
j**262) scrutiny to state or federal legislation touching upon
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constitutionally protected rights. Each of our prior cases involved legislation
which "deprived," "infringed," or "interferes" with the free exercise of some
such fundamental personal right cr liberty. See Skinner v. Oklahoma, supra , at
536; Shapiro v. Thompson, supra , at 634; Dunn v. Blumstein, supra , at 338-343.
A critical distinction between those cases anc the one now before us lies in
what Texas is endeavoring to do with respec: to education. MR. JUSTICE BRENNAN,
writing for the Court in Katzenbach v. Morga: , 384 U.S. 641 (1966), expresses
well the salient point n81: S"This is not a complaint that Congress . . . has
unconstitutionally denied or diluted anyone's right to vote but rather that
Congress violated the Constitution by not extending the relief effected [to
others similarly situated] . . .

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" [The federal law in question] does not restrict or deny the franchise but in \

411 U.S. 1, *38; 93 S. Ct. 1278, **1299;
1973 U.S. LEXIS 91, **#62; 36 L. Ed. 2d 16

effect extends the franchise to persons who otherwise would be denied it by

state law. . . . We need only decide whether the challenged limitation on the

relief effected . . . was permissible. In deciding that question, the principle that [***63) calls for the closest scrutiny of distinctions in laws denying

fundamental rights . . . [**1300] is [{*39] inapplicable; for the

distinction challenged by appellees is presented only as a limitation on a reform measure aimed at eliminating an existing barrier to the exercise of the franchise. Rather, in deciding the constitutional propriety of the limitations in such a reform measure we are guided by the familiar principles that a â\200\230statute is not invalid under the Constitution because it might have gone farther than it did,' . . . that a legislature need not 'strike at all evils at the same time,' . . . and that 'reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind ...'" 1d. , at 656-657. (Emphasis in original.)I

The Texas system of school financing is not unlike the federal legislation involved in Katzenbach in this regard. Every step leading to the establishment of the system Texas utilizes today - including the decisions permitting localities to tax and expend locally, and creating and continuously expanding state aid - was implemented in an effort to extend public education and to improve its quality. n82 [***64] Of course, every reform that benefits some more than others may be criticized for what it fails to accomplish. But we think it plain that, in substance, the thrust of the Texas system is affirmative and reformatory and, therefore, should be scrutinized under judicial principles sensitive to the nature of the State's efforts and to the rights reserved to the States under the Constitution. n83

n81 Katzenbach v. Morgan involved a challenge by registered voters in New York City to a provision of the Voting Rights Act of 1965 that prohibited enforcement of a state law calling for English literacy tests for voting. The law was suspended as to residents from Puerto Rico who had completed at least six years of education at an "American-flagÂ®â\200\235 school in that country even thou gh
the language of instruction was other than English. This Court upheld the questioned provision of the 1965 Act over the claim that it discriminated against those with a sixth-grade education obtained in non-English-speaking schools other than the ones designated by the federal legislation.

n82 Cf. Meyer v. Nebraska , 262 U.S. 390 (1923): Pierce v. Society of Sisters, 268 U.S. 510 (1925); Hargrave v. Kirk , 313 F. Supp. 944 (MD Fla. 1970), vacated, 401 U.S. 476 (1971).

n83 See Schilb v. Kuebel , 404 U.S. 357 (1971); McDonald v. Board of Election Comm'rs , 394 U.S. 802 (1969). .

Equal Protection Clause affirmatively supports the application of the

˜˜ Texas provides for the education of its children. We have here nothing less

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411 U.S. 1, *39; 93 S. Ct. 1278, **1300: nr
1973 U.S. LEXIS 91, **#*65; 36 L. Ed. 2d 16 :

It should be clear, for the reasons stated above and in accord with the prior decisions of this Court, that this is not a case in which the challenged state action must be subjected to the searching judicial scrutiny reserved for laws that create suspect classifications or impinge upon constitutionally protected rights. :

: We need not rest our decision, however, solely on the inappropriateness of the strict-scrutiny test. A century of Supreme Court adjudication under the

. traditional standard of review, which requires only that the State’s system be â\200\234shown to bear some rational relationship to legitimate state purposes. This case represents far [***66) more than a challenge to the manner in which

than a direct attack on the way in which Texas has chosen to raise and disburse state and local tax revenues. We are asked to condemn the State’s judgment in â\200\234conferring on political subdivisions the power to tax local property to supply revenues for local interests. In so doing, appellees would have the Court intrude in an area in which it has traditionally deferred to state legislatures.

n84 This Court has often admonished against such interferences with the State’s fiscal policies under the Equal Protection Clause: S

â\200\234The broad discretion as to classification possessed by a legislature in the

field of taxation has long been recognized. . . . [The] passage [**1301]

of time has only served to underscore the wisdom of that recognition of the large area of discretion which is needed by a legislature in formulating sound tax policies. ˜˜ ([*41] ˜˜ ...It has . . . been pointed out that in taxation, even more than in other fields, legislatures possess the greatest freedom in classification. Since the members of a legislature necessarily enjoy a familiarity with local conditions [***67) which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. ..." Madden v. Kentucky , 309 U.S. 83, 5 87–88 (1940).I HL

ee also Lehnhausen v. Lake Shore Auto Parts Co. , 410 U.S. – (1973); Wisconsin v. J.C. Penney Co. , 311 U.S. 435, 445 (1940).

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..- nB4 See, e.g., Bell’s Gap R. Co. v. Pennsylvania , 134 U.S. 232 (1890); Carmichael v. Southern Coal & Coke Co. , 301 U.S. 495, 508-509 (1937); Allied Stores of Ohio v. Bowers , 358 U.S. 522 (1959). -