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RACE, REDISTRICTING AND A REPUBLICAN POLL TAX: THE SUPREME COURT'S VOTING RIGHTS DECISIONS OF THE 1995-96 TERM

Hon. Leon D. Lazer:

Now, we will deal with the question of affirmative action and the racial problems of the country; more specifically, the question of racially oriented legislative districts. We are honored to have one of the prime authorities on this subject, Professor Frank Parker. Professor Parker is a visiting professor at Washington and Lee University School of Law in Lexington, Virginia. He has written extensively in the area of civil rights. He is the recipient of numerous awards including: the American Bar Association Silver Gavel Award, the American Political Science Association, the Ralph J. Bunche Award, and the Southern Political Science Association award. Prior to becoming a law professor, Professor Parker was Director of the Voting Rights Project of the Lawyer's Committee for Civil Rights Under Law from 1981 to 1993, where he litigated numerous voting rights cases, including the Mississippi Congressional redistricting cases and Mississippi and Virginia's legislative redistricting cases. In addition, he was active in civil rights litigation, particularly in Mississippi, over a period of twelve years. We are particularly honored to have Professor Frank Parker as a speaker.

Professor Frank Parker:

Thank you very much, Judge Lazer. It is a pleasure for me to come before you from the mountains of western Virginia, not West Virginia, to be here with you today.

I am coming to talk to you today about the voting rights cases of the Supreme Court which have become a major part of the Supreme Court's docket. The decisions last term in *Shaw v. Hunt*¹, which was *Shaw v. Reno*,² round two, *Bush v. Vera*³ and *Morse v. Republican Party of Virginia*⁴ are three decisions which encompass 156 pages. A commentary on these three Court

1. 116 S. Ct. 1894 (1996). The Court reheard a case that it remanded to the district court in *Shaw v. Reno*, 509 U.S. 630 (1993). *Id.* at 1899. The issue presented in both cases was whether North Carolina's reapportionment scheme was "narrowly tailored to serve a compelling state interest" so that it would not violate the Equal Protection Clause of the United States Constitution. *Id.* The reapportionment plan, which included two majority-black districts, was adopted following the 1990 census, when North Carolina was allocated an additional seat in Congress. *Id.* The district court held that although the lines were drawn with the intention of drawing districts with certain racial compositions, the scheme was constitutional because it was "narrowly tailored to further the State's compelling interests in complying with . . . the Voting Rights Act." *Id.* at 1899-1900. The Court held that the North Carolina reapportionment scheme violated the Equal Protection Clause because it was not narrowly tailored to further a compelling state interest. 116 S. Ct. at 1899. The district did not contain a "geographically compact" population of any race. *Id.* at 1905.

2. 509 U.S. 630 (1993). *See supra* text accompanying note 1.

3. 116 S. Ct. 1941 (1996). Following the 1990 census, the Texas Legislature redistricted by creating a new majority-African-American district, a new majority-Hispanic district, and reconfigured a district to make it a majority-African American district. *Id.* at 1950-51. The Court held that the district lines at issue "[we]re not narrowly tailored to serve a compelling state interest." *Id.* at 1951. It was feasible for the districts to retain their majority-minority status by making them more compact and less bizarrely shaped. *Id.* at 1961.

4. 116 S. Ct. 1186 (1996). Registered voters wishing to declare their support for the Republican Party's nominees were permitted to participate in the nominating process for the election of the United States Senator upon paying a registration fee. *Id.* at 1191. In 1993, the Republican Party of Virginia called for a state convention to nominate the Republican candidate for the office of United States Senator. *Id.* All registered voters in Virginia could participate in local mass meetings, canvasses or conventions. *Id.* Only those voters who paid the registration fee could be certified as a delegate to the state convention. *Id.* The Court held that the Republican party had been "acting under authority explicitly or implicitly granted by a covered jurisdiction," and was therefore, subject to the Voting Rights Act's preclearance requirement. *Id.* at 1193.

decisions could have been a major book review, rather than a summary of Supreme Court cases. There are thirteen opinions in these 156 pages. What does that tell us? One, it means that Justice Stevens has, for as long as he has been on the Court, not learned how to write short opinions. And two, it shows that the Court is still very heavily divided in this area.

We see the Court's divisions by listing the opinions in *Bush*. Justice O'Connor wrote an opinion in which she rendered the judgment of the court, joined by Justices Rehnquist and Kennedy.⁵ Then Justice O'Connor wrote a separate concurring opinion.⁶ Therefore, in *Bush*, it is puzzling why Justice O'Connor required a second opinion. Justice Kennedy wrote a second concurring opinion with Justices Thomas and Scalia, and that is just the majority.⁷ Justice Stevens dissented, joined by Justices Ginsburg and Breyer. In addition, Justice Souter dissented, also joined by Justices Ginsburg and Breyer. We still have a heavily fractionated court in this area of the law, which is still somewhat unsettling.

Let me give you a brief background on the voting rights cases as they have come to the Supreme Court and the legal context of current decisions. In 1980, the Supreme Court decided *City of Mobile v. Bolden*.⁸ The Court held that in voting rights cases brought by minorities, the plaintiffs had to prove discriminatory

5. *Bush*, 116 S. Ct. at 1950.

6. *Id.* at 1968.

7. *Id.* at 1971-72.

8. 446 U.S. 55 (1980). Mobile, Alabama was governed by a three-member City Commission that was elected by voters throughout the city. *Id.* at 58. A class action suit was brought alleging that this practice "unfairly diluted the voting strength of Negroes in violation of § 2 of the Voting Rights Act of 1965, of the Fourteenth Amendment, and of the Fifteenth Amendment." *Id.* The Court concluded that § 2 was not meant to have an effect that was in opposition to that of the Fifteenth Amendment. *Id.* at 61. The Court held that plaintiff's Fifteenth Amendment rights were not violated because "their freedom to vote ha[d] not been denied or abridged by anyone." *Id.* at 65. The Court also held that their Fourteenth Amendment Rights were not violated because it was insufficient to show primarily "that the group allegedly discriminated against has not elected representatives in proportion to its members." *Id.* at 66.

purpose to mount a successful Fourteenth Amendment challenge to a voting practice or particular redistricting plan.⁹ Much of the voting rights litigation that had been in progress up to that date was brought to a complete halt. Bolden was viewed by minority plaintiffs as an insurmountable obstacle to minority voting rights litigation.

In 1982 Congress amended the Voting Rights Act.¹⁰ Congress eliminated the requirement of proving discriminatory intent to establish a violation of Section 2 of the Voting Rights Act and substituted a results test. The results test required that in any voting practice, plaintiffs must prove that there was a discriminatory result. The discriminatory result could thus be challenged under Section 2 of the Voting Rights Act.

9. *Id.* (holding that the plan must have been “conceived or operated as [a] purposeful devic[e] to further racial . . . discrimination”).

10. Pub. L. No. 97-205, 96 Stat. 131 (codified as amended at 42 U.S.C. § 1973 (1973). Section 1973 states:

- (a) No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.
- (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political process leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice . The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Id.

Matthew M. Hoffman, *The Illegitimate President Minority Vote Dilution and the Electoral College*, 105 YALE L.J. 5, 1963-64 (1996). The 1982 amendments to § 2 came in response to the decision in *Mobile, Id.* Congress “add[ed] § 2(b) and the “results” language of § 2(a), creating a generally statutory basis for vote-dilution claims.” *Id.*

In 1986, the Supreme Court handed down its decision in *Thornburgh v. Gingles*¹¹ and further simplified the proof required in voting rights litigation to three basic elements.¹² The Court in *Gingles* held that in order to prevail, a plaintiff claiming to be a minority group must prove: 1) that the minority group is sufficiently large and geographically compact to constitute a majority in a single member district and that a majority member or single member district could be drawn; 2) that the minority group is politically cohesive, and the minority group "bloc voted" on a regular basis; and 3) that the white majority votes in a block which would enable it to usually defeat the minority's preferred candidate.¹³ It did not take long for state legislatures and local governments to recognize these elements. If the three elements are deconstructed, they can be translated into an "if then" statement. If elements two and three are present, that is, if you could show that minority voters, "bloc voted" for minority candidates, and if you can show that white voters regularly "bloc voted" to defeat minority candidates, then the failure to create a majority-minority district¹⁴ where one could be created, could be a violation of Section 2 of the Voting Rights Act.

After the 1990 census, a number of state legislatures and local governmental bodies adopted an unprecedented number of

11. 478 U.S. 30 (1986). The North Carolina General Assembly enacted a redistricting plan for the State's Senate and House of Representatives. *Id.* at 34-35. The action was brought by black plaintiffs in order to challenge one single-member and six multimember districts. *Id.* at 35. The plaintiffs alleged that the redistricting plan violated the Fourteenth and Fifteenth Amendments because it prevented black citizens from electing their chosen representatives. *Id.*

12. *Id.* at 50-51.

13. Bloc voting occurs when a majority votes in a cohesive unit, thereby enabling it to defeat a minority candidate, unless the minority candidate is unopposed. *Id.* at 51. The majority bloc could usually succeed in defeating candidates advanced by a "politically unified, cohesive, geographically insular minority group." *Id.* at 49.

14. *Voinovich v Quilter*, 507 U.S. 146, 149 (1993) (stating that a majority-minority district is one wherein a majority of the population belongs to a given minority group).

majority-minority districts. The number of majority black and majority Hispanic Congressional Districts doubled from twenty-six to fifty-two. The creation of these districts resulted not only from the mandate of Section 2 of the Voting Rights Act, but also from pressure from the Justice Department, which required preclearance pursuant to Section 5 of the Voting Rights Act.¹⁵ Local jurisdictions were basically informed that if they did not create additional majority-minority districts, where the creation of those districts was possible, the Justice Department would not approve their plans. It is also possible that many jurisdictions affected by the Voting Rights Act simply adopted additional majority-minority districts to achieve racial fairness, because minorities did not have representation. This increase in the number of majority-minority districts after the 1990 census, particularly at the Congressional level, led to substantial increases in minority representation in Congress.

Beginning in 1993, the Supreme Court began to adopt standards and principles that would limit the development of majority-minority districts. The Supreme Court in *Shaw*, confronted two highly irregular majority-black congressional districts in North Carolina and sustained a new Equal Protection cause of action.¹⁶ The Court held that if a state adopted a majority-minority district that was highly irregular in shape, the adoption of such a district would be considered as an effort to separate the voters on the basis of race, which would constitute an Equal Protection violation.¹⁷ The Court did not strike down

15. *Georgia v. United States*, 411 U.S. 526, 529 (1973) (holding that state legislatures in states covered by Section 5 of the Voting Rights Act, 42 U.S.C. §1973c (1994), are required to obtain preclearance of new redistricting plans). *See also, Morse*, 116 S. Ct. at 1193. Preclearance is required when a political party effects a change regarding voting. *Id.* Two conditions must be satisfied: 1) the change must relate to a public electoral function of the political party and 2) the political party must be acting pursuant to the implicit or explicit authority granted by a covered jurisdiction. *Id.*

16. *Shaw*, 509 U.S. at 658. The Court concluded that a plaintiff may allege that the ostensibly race-neutral statute is actually an effort to racially separate voters into different districts, and that such separation is unjustified. *Id.* at 649.

17. *Id.* at 658.

these districts; rather, it remanded the case to the North Carolina District Court. The North Carolina District Court in *Shaw v. Reno* held that this Equal Protection violation was not established.

In *Miller v. Johnson*¹⁸ in 1995, the Court was faced with the 11th Congressional District in Georgia, which was also highly irregular in shape. The Court held that this district was drawn as a majority-minority district.¹⁹ As such, it was subject to strict scrutiny²⁰ if the State Legislature adopted districts in which race was the predominant factor in the delineation of the district. The Court thus moved from a standard of looking at the shape of the districts, in which a highly irregular shaped district would trigger strict scrutiny, to another stronger and more pervasive standard. If race were the predominant factor in the drawing of district lines, then strict scrutiny would be triggered and the burden would shift to the state to show that these districts were narrowly tailored to serve a compelling governmental interest. This strict scrutiny standard is a very demanding standard indeed.

Professor Gunther has written that strict scrutiny is "strict in theory, fatal in fact."²¹ Justice O'Connor, in the *Adarand Constructors, Inc. v. Peña*²² decision, denied that strict scrutiny

18. 115 S. Ct. 2475 (1995). Georgia residents challenged the constitutionality of Georgia's congressional redistricting plan. *Id.* at 2482.

19. *Id.* at 2488-89.

20. See *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (citing the proposition that "the Equal Protection Clause demands that racial classifications . . . be subjected to the 'most rigid scrutiny'"). See also, *Miller*, 115 S. Ct. at 2475. "Laws classifying citizens on the basis of race cannot be upheld unless they are narrowly tailored to achieving a compelling state interest." *Id.* at 2482. "[R]edistricting legislation that is so bizarre on its face that it is unexplainable on grounds other than race . . . demands the same close scrutiny that we give other state laws that classify citizens by race." *Id.* at 2483 (quoting *Shaw v. Reno*, 113 S. Ct. 2816, 2825 (1993)).

21. Gerald Gunther, The Supreme Court, 1971 Term-Foreword: *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

22. 115 S. Ct. 2097 (1995). Plaintiff, a construction company, submitted the lowest bid to serve as subcontractor to supply guardrails to a federal highway project. *Id.* at 2102. The bid was denied in favor of a construction company that was controlled by "socially and economically disadvantaged

is "strict in theory, fatal in fact."²³ But we have yet to see an instance in which the Supreme Court has sustained any of these newly created majority-minority districts. And indeed, in the two cases under examination today, the Supreme Court struck them down.

Shaw v. Hunt was *Shaw v. Reno* upon its return to the United States Supreme Court. The district court, on remand in *Shaw*, sustained the constitutionality of the majority black Congressional Districts in North Carolina and sustained the evidence that the plaintiffs presented.²⁴ The 12th Congressional District of North Carolina started in the Raleigh-Durham area proceeded down a narrow band along I-85 to Charlotte and continued on to Gastonia.²⁵ One of the commentators remarked that if you drove down I-85 with the doors open, you were liable to kill half the people in the district.²⁶ This was intended as a joke, but the United States Supreme Court took it very seriously as a commentary on the narrow shape of the district.

The district court examined the state's purpose in creating the new districts. First of all, the North Carolina legislature had a rational purpose in adopting two Congressional Districts in this area, both of which were majority black.²⁷ One purpose was to adopt a district which was predominantly rural.²⁸ Accordingly, the 1st congressional district was established in the rural area north of the 12th district.²⁹ The second goal was to adopt

individuals." *Id.* The general contractor received additional compensation from the government for accepting bids from construction companies that fit into this category. *Id.* The Court concluded that when a party receives unequal treatment from the government because of their race, an injury has occurred that "falls squarely within the language and spirit of the Constitution's guarantee of equal protection." *Id.* at 2114.

23. *Id.* at 2117.

24. *See supra* text accompanying note 1.

25. *Shaw v. Hunt*, 861 F. Supp. 408, 417 (E.D.N.C. 1994), *rev'd*, 116 S. Ct. 1894 (1996).

26. *Shaw*, 509 U.S. at 636 (quoting Joan Biskupic, *A Case to Pose Test of Racial Redistricting*, WASH. POST, Apr. 20, 1993, at A4).

27. *Shaw*, 861 F. Supp. at 417.

28. *Id.*

29. *Id.*

another district that was predominantly urban.³⁰ There is a string of cities and towns along I-85, all of which qualified as big cities with populations over 20,000 which satisfied the requirement of adopting an urban district.³¹ This district was designated as the Piedmont Crescent District or the Central Piedmont Urban Corridor.³² The plaintiffs thus succeeded at the district court level in justifying the formation of the two districts on the basis of non-racial factors.

The third goal was to preserve incumbents in office. This was also a non-racial criterion. The district court, however, despite the presence of non-racial criteria, ruled that race had been a predominant factor in the drawing of these district lines.³³ Nevertheless, the court held that the districts were justified in attempting to comply with Section 2 of the Voting Rights Act, the results tests which Congress had adopted in 1982, and the *Thornburg v. Gingles* standards³⁴ and Section 5³⁵ of the Voting Rights Act.³⁶ When a jurisdiction is covered by Section 5 of the Voting Rights Act, it has to submit its voting law changes, including new redistricting plans, to the Justice Department in Washington.³⁷ If the Justice Department objects to these plans,

30. *Id.*

31. *Id.* at 468. These cities included Gastonia and Winston-Salem. *Id.*

32. *Id.* at 468.

33. *Id.* at 431. The Court looked to the "race-as-a-motivating-factor" triggering test. *Id.* This test helped demonstrate that the redistricting plan deliberately created another district wherein a particular racial group was a majority, even though the precise delineation and location of the district may have been motivated by non-racial factors. *Id.*

34. *Id.* at 438.

35. 42 U.S.C. § 1973b (1994). Section 1973b states in pertinent part:

(2) To assist the court in determining whether to issue a declaratory judgment under this subsection, the plaintiff shall present evidence of minority participation, including evidence of the levels of minority group registration and voting, changes in such levels over time, and disparities between minority-group and non-minority group participation.

Id.

36. *Id.* at 443.

37. *Id.*

then the plans cannot be implemented.³⁸ Indeed, the Justice Department had objected to North Carolina's first plan, which only had one majority black district.³⁹ In order to comply with the Justice Department's objection, North Carolina had to adopt a second majority black district.⁴⁰ The district court in this case ruled that this was sufficient justification for drawing two majority black districts.⁴¹

The facts in *Bush* are a little more complicated. Even in the majority opinion, Justice O'Connor wrote that this was a mixed motive case.⁴² If you look at the map of Texas Congressional District 30 in the Dallas area, you would immediately think that it looks like a Rorschach or a psychiatric ink blot test. However, if you know the facts of this case, the shape of these district lines can be perfectly logical. The black population of Dallas lives in an area in the southeast section of Dallas. The area just to the north of that is called the Park Cities area. It is called Park Cities because it is a series of cities all of which have "Park" in their last name, like Highland Park. This is a predominantly white, Republican area. The people living in the Parks Cities area did not want to be in the same Congressional District with the black population of southeast Dallas. Nor did the black population of southeast Dallas necessarily want the white Republicans of Park Cities to be in their districts, accordingly they concluded an agreement. The boundary lines of this Congressional District would thus circumvent the Park Cities area. This was acceptable to everyone, including the white, incumbent member of Congress from the Park Cities area.

38. *Id.* at 442. The Justice Department has been authorized by Congress "to serve as a surrogate for the District Court in reviewing § 5 submissions." *Id.*

39. *Id.* at 464. The Justice Department stated that "two majority-minority congressional districts . . . could be drawn in North Carolina, and that . . . failure to do so constituted an impermissible dilution of minority voting strength." *Id.*

40. *Id.*

41. *Id.* at 474.

42. 116 S. Ct. at 1948. Therefore, "a careful review [was] . . . necessary to determine whether the districts at issue [were] subject to [strict] scrutiny." *Id.*

The residents of Southeast Dallas and Park Cities now had a problem because their proposal failed to include the required population; there must be a prescribed number of people in the Congressional District to satisfy the "one person, one vote"⁴³ requirement. If Park Cities were bypassed, the district would fail to reach the required population level. The only way to satisfy the population requirement would be to expand east and north. There were certain groups in this area which did not want to be included in the district. The district actually extended into the next county and included a racially mixed neighborhood. With regard to this tentacle on the north, part of the district was not even majority black. It was only twenty to thirty percent black. The district was drawn in such a way as to protect the incumbent members of Congress, and preserve their re-election opportunities. On both the east side and the west side, the same conditions applied. There were two white Democrats in Congress from this area, Martin Frost and John Bryant. Both Frost and Bryant did not want the district lines to take too many loyal Democrats from their areas because they were concerned about their chances of re-election. These Democratic areas were basically sliced up and deals were made, almost on a block by block basis. The negotiations resolved which portions would be included in the 30th District and which portions were to be included in the other district. The solution was to create a majority-minority district, a majority black district. Eddie Bernice Johnson,⁴⁴ the Chair of the Senate District Committee that was responsible for drawing the district lines, ran and was elected to Congress from this district in the 1992 elections.

This ostensibly self-serving practice of drawing Congressional District lines and then running for and getting elected to Congress

43. *Reynolds v. Sims*, 377 U.S. 533, 558 (1964) (noting that the Equal Protection Clause guarantees equality to all citizens, in order to preserve their right to one person, one vote).

44. Texas State Senator Eddie Bernice Johnson sat on the Senate Committee of the Whole on Redistricting and chaired the Subcommittee on Congressional Districts. 861 F. Supp. 1304, 1313 (1994). "It was widely acknowledged that then-Senator Johnson had enormous authority in drawing the boundaries of District 30 as she saw fit." *Id.* at 1320 n.20.

was simply a long-standing Texas tradition. Whenever Texas got additional Congressional Districts, the State Legislator would simply say, "that is my district." The legislators' wishes were thus observed. They drew the district lines, they would run, and they would be elected. That was simply politics as usual in Texas. I am certain that this has occurred in other states as well.

In this instance, the three judge district court was very hostile to the three districts. There was one majority black district in Dallas and one majority black district in Houston. There was also a majority Hispanic district in Houston, which did not elect a Hispanic member of Congress in the 1992 election. The district court was very hostile to those districts and struck them down as being drawn primarily according to racial classifications.

Both of these two cases came to the Supreme Court. The North Carolina irregularly shaped district had been sustained by the district court, while the Texas districts were struck down by the district court.

In both of these cases the Supreme Court invalidated the districts, stating that they failed to meet Equal Protection standards. The vote was five to four, which suggests a heavily fragmented court.⁴⁵ The Court reasoned that race was the predominant factor in drawing these district lines. Therefore, the districts in both of these states were subject to strict scrutiny. The states, in both instances, failed to demonstrate that the districts were narrowly tailored to satisfy a compelling governmental interest.

The states argued that their first interest was to remedy past discrimination.⁴⁶ The Court held that this interest was not specific enough.⁴⁷ The states had to identify the discrimination

45. *Shaw*, 116 S. Ct. at 1898 (delivering the majority opinion were Chief Justice Rehnquist, joined by Justices O'Connor, Scalia, Kennedy, and Thomas; Justices Stevens, Ginsburg, Breyer and Souter dissented); *Vera*, 116 S. Ct. at 1950 (holding for the majority: Justices O'Connor, Rehnquist, Kennedy, Thomas and Scalia; Justices Stevens, Ginsburg, Breyer and Souter dissented).

46. *Vera*, 116 S. Ct. at 1960; *Shaw*, 116 S. Ct. at 1902.

47. *Vera*, 116 S. Ct. at 1963; *Shaw*, 116 S. Ct. at 1903.

and show how the district was narrowly tailored to remedy it.⁴⁸ The second compelling state interest was compliance with Section 5 of the Voting Rights Act.⁴⁹ The states argued that the Justice Department made them create the districts.⁵⁰ The Court held that this justification was insufficient to satisfy the compelling state interest standard.⁵¹ Section 5 of the Voting Rights Act, as the Court had held in prior decisions, only protect against retrogression or actions by the state voting law changes that diminish existing levels of minority voting strength.⁵² The Court stated that Section 5 of the Voting Rights Act had never been interpreted to require augmentation of minority voting strength.⁵³ Its purpose was to protect against diminishing minority voting strength.⁵⁴ As a result, the Court held that Section 5 of the Voting Rights Act did not require the creation of additional majority-black and majority-Hispanic districts.⁵⁵

Additionally, the state argued these districts were justified to comply with Section 2 of the Voting Rights Act under the *Thornburg* standards.⁵⁶ The Court pointed out that this was not accurate.⁵⁷ The first factor in establishing a Section 2 violation under *Thornburg* was the requirement that a plaintiff had to prove that the minority group was sufficiently large and geographically compact to constitute a majority in a single member district.⁵⁸

48. *Vera*, 116 S. Ct. at 1963; *Shaw*, 116 S. Ct. at 1902.

49. *Vera*, 116 S. Ct. at 1960; *Shaw*, 116 S. Ct. at 1902.

50. *Shaw*, 116 S. Ct. at 1903.

51. *Vera*, 116 S. Ct. at 1960; *Shaw*, 116 S. Ct. at 1903.

52. *Vera*, 116 S. Ct. at 1963; *Shaw*, 116 S. Ct. at 1904. See *Miller v. U.S.*, 115 S. Ct. 2475, 2492 (1995) (invalidating a Georgia congressional redistricting plan on Equal Protection grounds where race was found to be the primary motivating factor in setting district boundaries); *Beer v. U.S.*, 425 U.S. 130, 141 (1976) (upholding a New Orleans city council redistricting plan which provided for the first two majority-black districts, only one of which contained a black voting majority).

53. *Shaw*, 116 S. Ct. at 1904.

54. *Vera*, 116 S. Ct. at 1963 (citing *Miller*, 115 S. Ct. at 2493).

55. *Vera*, 116 S. Ct. at 1963; *Shaw*, 116 S. Ct. at 1903 (citing *Miller*, 115 S. Ct. at 2491).

56. *Vera*, 116 S. Ct. at 1960; *Shaw*, 116 S. Ct. at 1902.

57. *Vera*, 116 S. Ct. at 1961; *Shaw* at 1906.

58. *Thornburg*, 478 U.S. at 50.

The minority groups were not sufficiently compact in either of these instances.⁵⁹ The groups were spread out and the districts were highly irregular and uncompact in their shape.⁶⁰ Therefore, the creation of these districts was not required to remedy a violation of Section 2 of the Voting Rights Act.⁶¹ Thus, in both cases the Supreme Court failed to find any compelling state interest or any state interest at all that would justify sustaining the districts.

All of the cases are consistent, from *Shaw v. Reno* to *Bush v. Vera*. The Supreme Court struck down increases in minority representation in Congress from majority-black and majority-Hispanic districts. Nevertheless, there are several problems with these cases. One problem is that the decisions fail to fit within the traditional parameters provided for Equal Protection violations. None of the plaintiffs in these cases, all of them white, claim that they were denied either the right to vote or that their voting strength in any way was diluted. In both cases, white voters had proportional representation or better on a statewide basis. The cases thus lacked the critical elements of an Equal Protection violation. There were no allegations of discriminatory intent or discriminatory purpose. There is no proof of any discriminatory effect. Certainly, some whites who had previously been in white-majority districts were placed in majority-black or Hispanic districts. But the Supreme Court has never held that the mere placement in such a district, in and of itself, was sufficient to establish a Constitutional injury. If that were true, there could never be a redistricting plan that would pass Constitutional muster. In every redistricting plan ever drawn, there are whites in majority-minority districts and minorities in majority-white districts. That cannot possibly be a Constitutional violation.

In addition, these cases fail to satisfy traditional Equal Protection analysis because they depart substantially from what is termed the political process theory in Equal Protection analysis.

59. *Vera*, 116 S. Ct. at 1961; *Shaw*, 116 S. Ct. at 1906.

60. *Vera*, 116 S. Ct. at 1961; *Shaw*, 116 S. Ct. at 1899 (citing *Shaw v. Reno*, 509 U.S. 630, 635-36 (1993)).

61. *Vera*, 116 S. Ct. at 1961; *Shaw*, 116 S. Ct. at 1906.

Commentators have said that the primary function of the Equal Protection Clause should be to protect traditionally disadvantaged, disempowered and disenfranchised minorities from the will of the majority.⁶² Minorities should be protected, especially in instances where they are subjected to discrimination or where there has been an unequal distribution of benefits and burdens. These have been the criteria by which the Supreme Court has identified protected classes under the Equal Protection Clause. These criteria do not apply in the aforementioned cases, because the plaintiffs were all white voters. Additionally, all of the plans were passed by majority-white legislatures, so there was no instance of a disenfranchised or historically disempowered minority needing the protection of the court from the majority.

I would like to suggest that there is another way of looking at *Shaw* and *Bush* that makes much more sense. *Shaw* and *Bush* are actually substantive due process cases,⁶³ as distinct from the Equal Protection analysis to which the Court subjected the above cases. These cases are really much closer, for example, to *Lochner v. New York*⁶⁴ than they are to *Gomillion v. Lightfoot*.⁶⁵

62. See Jacobus ten Broek, *Thirteenth Amendment to the Constitution of the United States - Consummation to Abolition and Key to the Fourteenth Amendment*, 39 CAL. L. REV. 171, 200-01 (1951); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 30-31 (1980); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (2nd ed. 1988).

63. Paul G. Kauper, *Penumbra and Peripheries*, 64 MICH. L. REV. 235 (1965). "Substantive due process" refers to an interpretation of the Fourteenth Amendment which holds that certain fundamental rights are protected from arbitrary governmental infringement. *Id.* at 236. Utilizing this theory, the Court has invalidated governmental restrictions which unreasonably interfered with rights not protected explicitly in the first eight amendments, as well as some of the rights protected therein. *Id.* at 239.

64. *Lochner v. New York*, 198 U.S. 45 (1905). The challenged statute prohibited an employer from requiring or permitting a bakery employee to work in excess of sixty hours per week, or in excess of ten hours per day on average for the week. *Id.* at 46 n.1.

65. *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). An Alabama law redefined the City of Tuskegee boundaries, changing its shape "from a square to an uncouth twenty-eight sided figure." in an attempt to disenfranchise African-American voters. *Id.* at 341. While the statute was not facially

The Court is really saying that the state lacks the power to create majority-minority districts. That certainly is one element of substantive due process. In *Lochner*, the plaintiffs challenged the New York statute which regulated the working hours of bakers. The statute provided that the bakers could work no more than ten hours a day and not more than six days a week. This was intended to be protective legislation. The Supreme Court struck down the statute. The Court reasoned that the state legislature had no legitimate governmental purpose in regulating labor conditions; moreover, the statute was an improper exercise of the state's police power.⁶⁶ The Court further held that the state regulation was an arbitrary and unnecessary interference with an employer's Fourteenth Amendment right to limit their employees' work.⁶⁷

The same analysis arguably can be applied to both *Shaw* and *Bush*. First, the Supreme Court is saying that the states have neither a legitimate purpose, nor authority under Sections 5 or 2 of the Voting Rights Act to create these majority-black and Hispanic districts. Second, the creation of majority-minority districts was an arbitrary and unreasonable interference with the liberty of white voters to live in a white-majority district. The above interpretation of *Shaw* and *Bush* is implicitly supported by a doctrine that the Supreme Court has invented in these decisions, entitled the Doctrine of Representational Harm.⁶⁸ In the first Representational Harm case, the court in *Shaw* held that when a

discriminatory, its impact was racially disproportionate: it removed "all but 4 or 5 of its Negro voters while not removing a single white voter or resident." *Id.* The Supreme Court reversed the District Court's dismissal of the complaint, affirmed by the Fifth Circuit, holding that the Fifteenth Amendment prohibited the Legislature from causing a deprivation of voting rights on the basis of race. *Id.* at 346.

66. *Lochner*, 198 U.S. at 61.

67. *Id.* at 64.

68. *Shaw*, 116 S. Ct. at 1911 (Stevens, J., dissenting). The doctrine of representational harm states that "race-based districting may cause officeholders to represent only those of the majority race in their district . . . [rendering them] unlikely to provide effective representation to those voters whose interest are not aligned with those of the majority race in their district." *Id.*

district is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole.⁶⁹

The Court is arguably reasoning that if the State Legislature creates a majority black district or Hispanic district, and a black or Hispanic representative is elected, those representatives are more likely to believe that their primary obligation is to represent the black voters or the Hispanic voters of a particular district, rather than the white voters of the district. This is the first time that the Court has ever said this. In all of the prior vote dilution cases, including the political gerrymandering cases, *Davis v. Bandemer*⁷⁰ and others, the Court has uniformly held that it cannot be presumed that any elected representative will only represent the majority voters of his or her district. The court will presume that the elected representatives will represent everyone equally in the district. It is up to the plaintiffs to prove that the

69. *Shaw*, 116 S. Ct. at 646.

70. *Davis v. Bandemer*, 478 U.S. 109 (1986). Claiming that Democratic votes were unconstitutionally diluted, appellees challenged a 1981 Indiana state legislative reapportionment plan on equal protection grounds. *Id.* at 113. Specifically, they alleged that the results of the 1982 elections demonstrated a disparate impact on Democratic voting power. *Id.* Although Democrats received a majority of the statewide vote in Indiana House of Representatives elections, they won merely forty-three per cent of the races, and fared only marginally better in State Senate races. *Id.* at 115. The Court found that resolution of the issue was not precluded by the political question doctrine, but resolvable by the courts on equal protection grounds. *Id.* at 124. In upholding the plan, the Court held that the results of one election were insufficient "evidence of continued frustration of the will of a majority of the voters" *Id.* at 133. See also *United Jewish Organizations v. Carey*, 430 U.S. 144, 166 (noting that a 1974 race-conscious redistricting plan for Brooklyn did not violate the Equal Protection rights of whites residing in new minority-majority districts because they would receive adequate representation from legislators elected in the remaining majority white districts); *Whitcomb v. Chavis*, 403 U.S. 124, 158-59 (finding that multimember districting is not inherently discriminatory because the Fourteenth Amendment only requires access to the political system, not success in it).

representatives are not providing adequate representation to the minority.

The Supreme Court has reversed the presumption and is now presuming, in the case of majority-minority districts, that the elected representative will only represent voters of the same race. The Court's decision seems to suggest the existence of a new substantive due process liberty of white voters to live in a white-majority district. As in *Lochner*, I believe this standard makes the action of the State Legislatures in creating Constitutional majority-minority districts very often dependent upon the individual views of the justices who might be in the majority. It is submitted that this is basically what happened here and in this line of cases. In *Lochner*, Justice Holmes, in his dissent, said the Fourteenth Amendment does not enact.⁷¹ Herbert Spencer's *Social Statics*,⁷² upon which the *Lochner* case was based, and which, was a particular economic theory in Herbert Spencer's work. With regard to the theory, there was no particular consensus. It was simply a particular viewpoint. I think the same thing is true in these cases. We might say that the Fourteenth Amendment does not enact Abigail Thernstrom's *Whose Votes Count?*⁷³

What is the essence of these cases? Do these cases completely outlaw majority-minority districts or can majority-minority districts still be drawn and still meet Constitutional requirements? First, legislatures can still draw multimember districts if equal weight is given to non-racial neutral criteria. Arguably, in these cases, such districts are not even subject to strict scrutiny. If a state legislature could draw regularly shaped majority-minority districts that meet the traditional requirements of compactness and continuity and the preservation of the community's interest, those districts should not be subject to Constitutional attack. Second, I

71. *Lochner*, 198 U.S. at 74.

72. *Id.* at 75. HERBERT SPENCER, *SOCIAL STATICS* (1872). LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 438 (1978). Spencer was a leading advocate of the theory of Social Darwinism, which influenced the Court's decisions protecting freedom of contractual rights in the *Lochner* era. *Id.*

73. See, e.g., ABIGAIL THERNSTROM, *WHOSE VOTES COUNT? AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS* (1978).

think the Court is saying that the majority-minority districts drawn with race as a predominant factor can still be justified in certain cases. The state's interest in remedying past and present discrimination must be specifically identified; if the legislature is able to demonstrate that the districts are narrowly tailored to remedy that discrimination and also to satisfy the standards of Sections 5 and 2 of the Voting Rights Act. In other words, majority-minority districts can be drawn if it is necessary to prevent retrogression or diminish existing levels of minority voting strength.

Let me spend a couple of moments on *Morse v. Republican Party*.⁷⁴ This is another case brought by white Republicans. It seems that white Republicans were successful in voting rights cases in the Supreme Court this past term. This was a very interesting case because it was similar to *Harper v. Board of Elections*⁷⁵ and *Terry v. Adams*.⁷⁶ In *Harper*, the Supreme Court struck down the Virginia poll tax as violative of the Equal Protection Clause. In *Terry*, the Supreme Court struck down the White Jaybird Primary. The White Jaybird Primary was actually

74. *Morse v. Republican Party*, 116 S. Ct. 1186 (1996). The Virginia state party required a \$35 to \$45 "certification fee" for voters seeking to become delegates at the nominating convention for candidates running for the U.S. Senate seat in 1994. *Id.* at 1191. Under the Voting Rights Act of 1965, Virginia was prohibited from effecting changes to voter qualification requirements without preclearance from the Attorney General or a federal court. *Id.* at 1193. Finding that these provisions applied to party nominating conventions, as well as to primaries and general elections, the Court held the requirement invalid. *Id.* at 1206.

75. *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966). Virginia levied a \$1.50 annual poll tax on all residents over the age of 21 years, payment of which was a precondition to voting. *Id.* at 664 n.1. The Court struck the state Constitutional provision, holding that it violated the Equal Protection Clause by conditioning the right to vote on ability to pay. *Id.* at 666.

76. *Terry v. Adams*, 345 U.S. 461 (1953). The Jaybird Democratic Association, limited to white voters, conducted "straw poll" primaries several months prior to the regular party primaries. *Id.* at 463-64. The victors of the Jaybird contest had, in almost every instance for sixty years, become the sole candidate in the Democratic primary, and therefore the presumptive winner in the general election. *Id.* at 463.

a pre-primary, which excluded black people from an opportunity to participate. But *Morse v. Republican Party* reached the Supreme Court within the context of Section 5 of the Voting Rights Act, not under the Equal Protection Clause of the Fourteenth Amendment.

There were two questions presented in *Morse*. First, was a thirty-five or forty-five dollar registration fee to participate in the statewide Republican convention to nominate Virginia's candidate for the United States Senate subject to preclearance under Section 5 of the Voting Rights Act?⁷⁷ Second, was the registration fee vulnerable to challenge in a private right of action as a poll tax, which violates Section 10 of the Voting Rights Act.⁷⁸

Morse involved the statewide Virginia Republican convention which ultimately nominated Oliver North⁷⁹ to be the Republican candidate running against Chuck Robb⁸⁰ for the Virginia seat. The most interesting aspect of the *Morse* case was a proven fact with regard to one of the plaintiffs. The North campaign official told one of the plaintiffs, who happened to be a University of Virginia law student, "[l]ook, if you can't afford the \$35 and you're favoring our candidate, if you want to go to the convention and vote for Oliver North, we'll pay the registration fee." In the original complaint, the plaintiffs alleged that this was

77. *Morse*, 116 S. Ct. at 1193.

78. *Id.* The Voting Rights Act, 42 U.S.C. §1973h (1994), expressly grants the Attorney General authority to institute actions for enjoining enforcement of a poll tax. *Id.*

79. *1994 Senate Races Rundown*, THE COOK POLITICAL REPORT, Mar. 7, 1994, at 39. Ret. Marine Lt. Colonel Oliver North gained notoriety for his involvement in the Iran-contra affair while serving in the Reagan White House. *Id.* His felony conviction for violating the Congressional ban on selling arms to Iran was overturned on appeal. *Id.* Since leaving the military, North became active in conservative political causes, including his run for the Senate in 1994. *Id.*

80. Charles Robb was first elected to the Senate in 1988 by a commanding majority (71%) of the vote, after serving for one term as Governor of Virginia. *Id.* His reelection battle, though ultimately successful, was complicated by charges of involvement with a former Miss Virginia, of frequenting the local party scene, and of his alleged involvement with the eavesdropping of Governor Doug Wilder's cellular phone conversations. *Id.*

patent vote buying which violated Section 11⁸¹ of the Voting Rights Act. This offer was election fraud, which the Voting Rights Act was passed to control. But for some reason, ostensibly legal strategy, the plaintiffs decided to drop that especially interesting allegation.

Both of the contentions in *Morse*, whether the registration fee was subject to preclearance under Section 5 and whether there is a private right of action to litigate an alleged violation of the anti-poll tax provisions of Section 10 of the Voting Rights Act, hinged on whether the white primary cases, *Smith v. Allwright*⁸² and *Terry*, were still good law. The question presented in the Supreme Court, which was argued in October of 1995 and decided in March, is whether these old cases are still good law. The interesting thing is that the Supreme Court split, five to four, on whether *Smith* and *Terry* are still good law. Five justices said that they were still good law and four justices said that they were inapplicable to this particular case.⁸³

The specific issue was whether the charging of a registration fee for a state party convention was covered by the preclearance requirement of Section 5 of the Voting Rights Act. The question was whether the statutory language, "state or political subdivision" encompassed political parties. How is Section 5 applicable to the White Primary Cases? The Court held that the

81. Voting Rights Act, 42 U.S.C. § 1974i (c) (1994). This section provides in pertinent part: "Whoever knowingly or willfully . . . pays or offers to pay or accepts payment . . . for voting shall be fined not more than \$10,000 or imprisoned not more than five years, or both." *Id.*

82. *Smith v. Allwright*, 321 U.S. 649 (1944). The Texas Democratic party limited its membership, and therefore participation in its primary elections, to white citizens who were qualified to vote. *Id.* at 656. The Court found that primary elections were conducted under statutory authority of the state and as such were subject to the same discrimination tests as general elections held directly by the state. *Id.* at 663. Thus, the Fifteenth Amendment prohibited abridgement of the right to vote in the primary on account of race. *Id.* at 666.

83. *Morse*, 116 S. Ct. at 1191. The five justices that adhered to the law set forth in *Smith* and *Terry* were Stevens, who was joined by Ginsburg in delivering the opinion of the Court, and Breyer, who was joined by O'Connor and Souter in filing the concurring opinion. The dissenting opinions were filed by Justices Scalia, Thomas, Rehnquist and Kennedy.

Democratic party holding primary elections and excluding black voters was state action which was covered by the Equal Protection Clause of the Fourteenth Amendment.⁸⁴ The issue in the *Morse* case was whether the word "state" in the Fourteenth Amendment meant the same thing as the word "state" in the Voting Rights Act. Again, the court was split five to four.⁸⁵ Five of the justices of the majority said the word "state" meant the same thing in the Fourteenth Amendment as it does in the Voting Rights Act.⁸⁶ It was amazing that four justices had the audacity to say that "state" in the Voting Rights Act has a narrower meaning than the word "state" in the Fourteenth Amendment.⁸⁷

In *South Carolina v. Katzenbach*⁸⁸, the constitutionality of the Voting Rights Act was challenged, in that the Act's prohibitions were alleged to be much broader than those in the Fourteenth and Fifteenth Amendments. The Voting Rights Act is an amazing piece of legislation. It requires state and local jurisdictions, nine states and parts of seven others, prior to implementing a voting

84. See *Nixon v. Herndon*, 273 U.S. 536 (1927). A Texas statute barred blacks from participating in the state Democratic primary election. *Id.* at 540. Defendants claimed that the statute was not State action in violation of the Fourteenth or Fifteenth Amendment. *Id.* In reversing the District Court's dismissal of the action, the Court found no reason to consider the Fifteenth Amendment issue because the statute was clearly State action in violation of the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 540-41.

85. *Morse*, 116 S. Ct. at 1191. The five justices that agreed that the word "state" meant the same thing in the Fourteenth Amendment as it did in the Voting Rights Act were Justices Stevens, Ginsburg, Breyer, O'Connor and Souter. The four justices who disagreed with that assertion were Justices Scalia, Thomas, Kennedy and Rehnquist. *Id.*

86. Voting Rights Act, 42 U.S.C. § 1973 (1994) .

87. U.S. CONST. amend. XIV.

88. *South Carolina v. Katzenbach*, 383 U.S. 301 (1966). South Carolina challenged several provisions of the Voting Rights Act as an excessive exercise of Congressional power in an area traditionally reserved to the states. *Id.* at 323. Specifically, the Act's remedial application solely to states having a demonstrable record of discrimination was objected to as violating the principle of equal treatment. *Id.* Finding the Act to be a rational means of enforcing the Fifteenth Amendment, the Court dismissed the Article III complaint. *Id.* at 337.

law change, to get the permission of the Justice Department in Washington or the permission of the U.S. District Court. The Voting Rights Act suspended literacy tests in all these jurisdictions and by statute prohibited them, in the absence of any judicial finding, from using literacy tests at all. The contention in cases challenging the constitutionality of the Voting Rights Act is that it is broader than the Fourteenth or Fifteenth Amendments. However, four justices of the Supreme Court were prepared to entertain the notion that it was narrower than the Fourteenth and Fifteenth Amendments, at least pertaining to the definition of "state."

The majority was right in *Morse*. The decision certainly does expand the coverage of Section 5 of the Voting Rights Act. It is unknown how many jurisdictions or political parties charge a registration fee to participate in the statewide party nominating convention, which is actually a substitute for a party primary. But the practice simply creates a barrier, and these jurisdictions will have to get permission from the Justice Department. The Supreme Court gave no indication as to the validity of the registration fee or whether it was racially discriminatory or not discriminatory, only that the fee was covered by the Voting Rights Act and had to be submitted. The most notable part of this decision is footnote 27⁸⁹ where Dean Howard Glickstein,⁹⁰ testifying before Congress in favor of the extension of the Voting Rights Act in 1969 on behalf of the United States Commission on Civil Rights, is quoted extensively in support of the majority interpretation of the scope of Section 5 of the Voting Rights Act.

89. *Morse*, 116 S. Ct. at 1203 n.27. Howard A. Glickstein, Director of the U.S. Civil Rights Commission, detailed the efforts political parties undertook in several states to discriminate against African-Americans through the use of party rules rather than official state action. *Id.* These tactics included exclusion of minority representation at conventions, withholding meeting information from minority members, increasing the filing fee for candidates, and misleading minority candidates about primary election requirements. *Id.*

90. Before joining the U.S. Civil Rights Commission, Howard A. Glickstein served as a Staff Attorney with the Department of Justice. He has served since 1986 as Dean of Touro College Jacob D. Fuchsberg Law Center.

DISCRIMINATION CASES

Hon. Leon D. Lazer:

Let us proceed to another topic which has some relationship in certain respects to Equal Protection. To discuss this topic and the relevant cases, we have Touro's Vice-Dean, who has over the years become a recognized authority in the area of discrimination. Of course, I am referring to Professor Eileen Kaufman.¹ Not only has she become an authority at the law school and indeed at these conferences, but she is the original drafter of the sections of New York Pattern Jury Instructions, the model jury instructions that New York judges use in the course of trying discrimination cases. It is now my pleasure to introduce Professor Eileen Kaufman.

Professor Eileen Kaufman:

Thank you. Leon always asks me to speak late in the day, but the *quid pro quo* is that he gives me the best cases to talk about. The Equal Protection² cases that I will be describing represent either the finest or the worst moments of the term, depending on your point of view.

1. Vice Dean and Professor of Law, Touro College Jacob D. Fuchsberg Law Center. B.A., Skidmore College, 1970; J.D., New York University, 1975; L.L.M., New York University, 1992. In addition to serving as Vice Dean and Professor of Law at Touro Law Center, Dean Kaufman has been a Managing Attorney at Westchester Legal Services, Inc. and serves on the New York State Bar Association President's Committee on Access to Justice, and is Reporter for the New York Pattern Jury Instructions. She has published primarily in the area of civil rights law.

2. See U.S. CONST. amend. XIV, § 1. This amendment provides in pertinent part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." *Id.*

Last term, the Supreme Court decided three important discrimination cases: one involving age discrimination in the workplace,³ one involving discrimination against gays and lesbians in the political process⁴ and one involving sex discrimination in higher education.⁵ Not surprisingly, Justice Scalia figured prominently in all three cases.⁶ I will discuss *O'Connor v. Consolidated Coin Caterers Corp.*,⁷ the statutory age discrimination case, rather quickly so that we can focus on the two highly controversial equal protection cases of the term, *Romer v. Evans*⁸ and *United States v. Virginia*.⁹

The first of these important discrimination cases was *O'Connor v. Consolidated Coin Caterers Corp.* This case arose under the Age Discrimination in Employment Act of 1967¹⁰ [hereinafter "ADEA"].¹¹ The issue in *O'Connor* was whether a plaintiff, in

3. See *O'Connor v. Consolidated Coin Caterers Corp.*, 116 S. Ct. 1307 (1996).

4. See *Romer v. Evans*, 116 S. Ct. 1620 (1996).

5. See *United States v. Virginia*, 116 S. Ct. 2264 (1996). See also Eric J. Stockel, *United States v. Virginia: Does Intermediate Scrutiny Still Exist?*, 13 TOURO L. REV. 229 (1996).

6. Justice Scalia authored the majority opinion in *O'Connor* and wrote particularly ascerbic dissents in *Romer* and *Virginia*, the two equal protection cases.

7. 116 S. Ct. 1307 (1996).

8. 116 S. Ct. 1620 (1996).

9. 116 S. Ct. 2264 (1996).

10. See 29 U.S.C. § 623 (1985). Section 623(a) states:

(a) It shall be unlawful for an employer-

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in a way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age.

29 U.S.C. § 623(a).

11. Petitioner was employed by respondent for twelve years before he was fired. *O'Connor*, 116 S. Ct. at 1309. He claimed that he was discharged in violation of the Age Discrimination in Employment Act of 1967 that prohibits the denial of employment opportunities on the basis of age. *Id.* Petitioner, age

an age discrimination suit, must demonstrate that he or she was replaced by someone outside of the protected age category in order to make out a prima facie case under the *McDonnell Douglas Corp. v. Green*¹² framework.¹³

In *McDonnell Douglas v. Green*, a Title VII case, the Supreme Court developed a formula that allocates the burdens and order of presentation of proof in discrimination cases based on circumstantial evidence.¹⁴ Under this formula, a plaintiff must establish the following four elements to make out a prima facie case of discrimination: 1) that plaintiff is a member of a protected group defined by the statute; 2) that plaintiff applied for and was

56 at the time of his discharge, could not prove that his replacement was a member of a class not protected by the statute. *Id.* at 1310. The Court held that the fact that Petitioner was replaced by someone within the protected class is "irrelevant, so long as he has lost out because of his age. . . . because the ADEA prohibits discrimination on the basis of age and not class membership." *Id.*

12. 411 U.S. 792 (1973). Respondent was employed by petitioner as a mechanic for eight years before he was laid off. *Id.* at 794. Respondent maintained that his discharge was a result of respondent's racially motivated hiring practices and was, therefore, in violation of Title VII of the Civil Rights Act of 1964. *Id.* See generally, 42 U.S.C. § 2000e - 2000e-17 (1988 & Supp. V 1993). Title VII was enacted in response to the nationwide persistence of discrimination against minority groups to eliminate the unfairness and humiliation of discrimination. See, e.g., David Benjamin Oppenheimer, *Kennedy, King, Shuttlesworth and Walker: The Events Leading to the Introduction of the Civil Rights Act of 1964*, 29 U.S.F. L. REV. 645, 671 (1995). In *McDonnell Douglas*, respondent was an active participant in a variety of protests at petitioner's manufacturing plant. *McDonnell Douglas*, 411 U.S. at 794-95. The Court found that, while petitioner was able to justify its reasons for discharging the respondent, the respondent must be afforded an opportunity to refute petitioner's reason for his discharge as a mere pretext. *Id.* at 804. The case was remanded to the District Court because respondent was not given a "full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a cover-up for a racially discriminatory decision." *Id.* at 805.

13. *O'Connor*, 116 S. Ct. at 1309. While the *McDonnell Douglas* framework has traditionally been applied to plaintiffs bringing Title VII discrimination actions, it has also been applied to ADEA cases. *Id.* at 1310. Therefore, in order to make out a claim under the ADEA, petitioner must make a prima facie showing under this framework. *Id.*

14. *McDonnell Douglas*, 411 U.S. at 804.

qualified for a position for which the employer was seeking applicants; 3) that plaintiff did not receive the position; and 4) that after the rejection, the position remained open and the employer continued to interview applicants possessing plaintiff's qualifications.¹⁵ These four elements must be adapted for discharge or promotion cases. Once the plaintiff makes this initial four part showing, the burden of production shifts to the employer to articulate a "legitimate, nondiscriminatory reason for the employer's rejection."¹⁶ After the employer attempts to explain its reasons for the discharge, the plaintiff has the opportunity to establish that the employer's proffered reason was merely a pretext for discrimination.¹⁷

In *O'Connor*, plaintiff, age 56, claimed that he was discharged because of his age in violation of the ADEA.¹⁸ He had no difficulty establishing the first three *McDonnell Douglas* elements.¹⁹ Clearly, he was a member of the age group protected by the ADEA, he was discharged, and at the time of his discharge he was performing his job at a level that met his employer's expectations.²⁰ However, he was unable to meet the burden of proving the fourth element because his replacement was also within the protected age group proscribed by the ADEA.²¹ Thus, the issue became whether a *prima facie* claim of discrimination requires that the replacement be outside the protected class.²² The Court concluded that it does not.²³

15. *Id.* at 802.

16. *Id.*

17. *Id.* at 804.

18. *O'Connor v. Consolidated Coin Caterers Corp.*, 116 S. Ct. 1307, 1309 (1996).

19. *Id.*

20. *Id.* The ADEA protects all persons who are at least 40 years of age. See 29 U.S.C. § 631(a) (1985 & Supp. 1996). Petitioner, at the time of his discharge, was 56 years old, and well within the protected class enumerated in the statute. *O'Connor*, 116 S. Ct. at 1309.

21. *Id.* Plaintiff's replacement was 40 years old. *Id.*

22. *Id.* at 1310.

23. *Id.* The Court noted that "the fact that an ADEA plaintiff was replaced by someone outside the protected class is not a proper element of the *McDonnell Douglas* *prima facie* case." *Id.*

According to the Court, in order to determine whether an inference of discrimination exists, the proper inquiry should be whether the plaintiff was replaced by someone *substantially younger*, not whether plaintiff was replaced by someone outside the protected group.²⁴ The Court reasoned that “the fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant, so long as he has lost out *because of his age*.”²⁵

An important question that arises from *O'Connor* is whether or not this principle will be applied to other discrimination statutes, particularly race or sex discrimination claims arising under Title VII.²⁶ The central rationale of *O'Connor* seems to be equally applicable to cases involving race or gender discrimination although there is already disagreement in the circuits about the applicability of *O'Connor* to Title VII. For example, in *Carson v. Bethlehem Steel Corporation*,²⁷ a case involving race discrimination under Title VII,²⁸ the Seventh Circuit held that *O'Connor* applies and that a Title VII plaintiff need not allege that the replacement was outside the protected class.²⁹ The Court reasoned that:

24. *Id.* The Court illustrated this distinction by comparing a 40 year old who is replaced by a 39 year old to a situation where a 56 year old is replaced by a 40 year old worker. *Id.* In the former circumstance, the replacement is outside the protected class but a one year age difference would hardly support an inference of age discrimination. *Id.* Whereas, in the latter situation, a 16 year age difference may signify age discrimination even though both individuals are within the protected class. *Id.*

25. *Id.*

26. Title VII is aimed at eliminating employment discrimination “against any individual with respect to his compensation, term, conditions, or privileges in employment, because of the individual’s race, sex, color, religion, and national origin.” 42 U.S.C. § 2000e-2(a)(1) (1988 & Supp. V 1996)

27. 82 F.3d 157 (7th Cir. 1996).

28. Plaintiff, a white female, brought suit against her former employee claiming that her discharge was in violation of Title VII. *Id.* at 158.

29. *Id.* at 158. The court noted that the relevant inquiry was “whether the employee would have taken the same action had the employee been of a *different race* . . . and everything else had remained the same.” *Id.* (emphasis added).

[a]n employee may be able to show that his race or another characteristic that the law places off limits tipped the scales against him, without regard to the demographic characteristics of his replacement. . . . That one's replacement is of another race, sex or age may help to raise an inference of discrimination, but it is neither a sufficient nor a necessary condition.³⁰

However, the Sixth Circuit, in dicta, has indicated that the *O'Connor* reasoning does not apply with equal force to sex discrimination cases.³¹ Ultimately, the Supreme Court is likely to decide the scope and reach of the *O'Connor* holding.

The two Equal Protection discrimination cases decided last term are among the most symbolically and practically significant decisions of the Court in recent years. The first case, *Romer v. Evans*,³² involved a challenge to Amendment 2 of the Colorado State Constitution, which prohibited the State of Colorado and its political subdivisions from enacting any statute, regulation, ordinance or policy designed to protect homosexual persons from

30. *Id.* at 158-59. The Seventh Circuit hypothesized an employer who retains black workers only in the top quarter of its labor force on a yearly basis but keeps white employees at the top half. This employer is engaging in racial discrimination which is not purged if, thereafter, the employer has another black employee. *Id.*

31. *See Hartsel v. Keys*, 87 F.3d 795 (6th Cir. 1996) (holding that, even though the plaintiff met the four element test of *McDonnell Douglas*, the defendant was able to prove that their decision not to promote plaintiff was not based on sex, but rather that plaintiff lacked necessary computer skills), *cert. denied*, 117 S. Ct. 683 (1997).

32. 116 S. Ct. 1620 (1996). Respondents challenged the constitutionality of the State of Colorado's Amendment 2 on the grounds that it violated the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 1623. The effect of Amendment 2 was to prohibit any governmental entity from adopting any statute, ordinance, rule or policy that barred discrimination based sexual preferences. *Id.* at 1624. Respondents alleged that Amendment 2 would "subject them to immediate and substantial risk of discrimination on the basis of their sexual orientation." *Id.* Petitioners maintained that Amendment 2 only denies homosexuals preferential treatment. *Id.* The majority of the Court ruled that Amendment 2 puts homosexuals in a "solitary class . . . [and] withdraws from [them], but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies." *Id.* at 1625.

discrimination.³³ The Amendment withdrew from gays and lesbians “specific legal protection from the injuries caused by [private and governmental] discrimination.”³⁴ Further, Amendment 2 forbade such anti-discrimination laws, which had already been enacted in Denver, Aspen and Boulder, to be reinstated.³⁵ Thus, while the proponents of Amendment 2 linguistically described the amendment as denying special rights, Amendment 2 did just the opposite; it imposed a special disability on this group alone because no other group must amend the State constitution in order to obtain protection against discrimination.³⁶

In a 6-3 decision, Justice Kennedy, writing for the majority, subjected the legislation to rational basis review,³⁷ the lowest level of judicial scrutiny afforded to equal protection claims.³⁸ Under the rational basis test, a classification is upheld so long as it bears a rational relation to a legitimate end.³⁹ Thus, even a law that “seems unwise or works to the disadvantage of a particular group” or is supported by only a tenuous rationale, will, nevertheless, survive constitutional challenge.⁴⁰

However, Colorado’s Amendment 2 could not pass even this most deferential level of scrutiny.⁴¹ The Court could not find a legitimate, nondiscriminatory reason for the classification and noted that this type of broad “disqualification of a class of persons from the right to seek specific protection from the law is

33. *Id.* at 1623.

34. *Id.* at 1625.

35. *Id.*

36. *Id.* at 1626-27.

37. *Id.* at 1627.

38. *See e.g., Heller v. Doe*, 113 S. Ct 2637 (1993) (holding that a state statute that draws classifications involving the mentally retarded and mentally ill are upheld if there is a rational basis between the classification drawn and a legitimate governmental purpose).

39. *Romer*, 116 S. Ct. at 1627.

40. *Id.* The Court stated that “[b]y requiring that a classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law.” *Id.*

41. *Id.* at 1628.

unprecedented in our jurisprudence.”⁴² The disadvantage imposed on the group was not a by-product of the classification, it was itself the purpose of the classification.⁴³ The Court concluded that “the inevitable inference raised by Amendment 2 is that the disadvantage imposed was born of animosity toward the class of persons affected.”⁴⁴ Justice Kennedy strongly reminded us that, “[i]f the constitutional concept of ‘equal protection’ of the laws means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”⁴⁵

The majority opinion is as interesting for what it does not say as for what it does say. First, the Court makes no mention of the political process cases, such as *Hunter v. Erickson*,⁴⁶ even though that was the basis for the Colorado Supreme Court decision.⁴⁷ The Colorado Supreme Court had held that Amendment 2

42. *Id.*

43. *Id.*

44. *Id.* “Amendment 2 . . . make[s] a general announcement that gays and lesbians shall not have any particular protections from the law, inflicts on them immediate, continuing and real injuries that outrun and belie any legitimate justifications that may be claimed for it.” *Id.* at 1628-29.

45. *Id.* at 1628 (*quoting* Department of Agriculture v. Moreno, 413 U.S. 528, 534 (1973)(emphasis omitted)).

46. 393 U.S. 385 (1969). After the City Council of Akron, Ohio adopted a fair housing ordinance, voters amended the city charter to prohibit any ordinance regulating “the use, sale advertisement, transfer . . . of real property . . . on the basis of race, color, religion or ancestry.” *Id.* at 387. The Court held that a State may not “disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person’s vote or give any group a smaller representation than another of comparable size.” *Id.* at 393. Since this was exactly what the City of Akron intended to do, the ordinance violated the equal protection clause and constituted “a real, substantial, and invidious denial of equal protection of the laws.” *Id.*

47. *Romer*, 116 S. Ct 1624. The Colorado Supreme Court found that “Amendment 2 was to be subject to strict scrutiny because it infringed the fundamental right of gays and lesbians to participate in the political process.” *Id.* The Colorado court relied on previous United States Supreme Court decisions in both voting rights cases and cases involving discriminatory restructuring of governmental decision making. *Id.* See *Evans v. Romer*, 882 P.2d 1335 (Colo. 1994).

violated the fundamental right of equal participation in the political process.⁴⁸ Second, the majority opinion neither mentions nor cites *Bowers v. Hardwick*,⁴⁹ the 1986 decision upholding Georgia's consensual sodomy statute. More about that in a moment. Third, the Court failed to decide whether heightened scrutiny should be applied in Equal Protection challenges based on sexual orientation. Instead, the Court's opinion reflects the approaches advocated in two amicus briefs, one submitted by five constitutional law professors including Lawrence H. Tribe of Harvard Law School⁵⁰ and the other by the Human Rights Campaign Fund.⁵¹ The brief filed by the

48. *Romer*, 116 S. Ct 1624.

49. 478 U.S. 186 (1986). Respondent was charged with committing sodomy with another adult male in the privacy of his home in violation of a Georgia statute forbidding sodomy by any person. *Id.* at 187-88. Hardwick brought suit challenging the constitutionality of the Georgia statute. *Id.* at 188. Hardwick challenged the statute on the basis of substantive due process and the Court framed the issue as whether he had a fundamental right to engage in homosexual sodomy. *Id.* at 191. The Court held that fundamental liberties are either "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty." *Id.* at 194. As such, the Court concluded that homosexual sodomy was not such a liberty under the aforementioned criteria and therefore, the Court upheld the statute against Respondent's substantive due process attack. *Id.* at 196.

50. See Amicus Brief of Lawrence H. Tribe, John Hartley, Gerald Gunther, Phillip B. Kurland and Kathleen M. Sullivan in Support of Respondents, 1995 WL 862021 (No. 94-1039).

51. See Amicus Brief of the Human Rights Campaign Fund, et al., in Support of Respondents, 1995 WL 782809 (No. 94-1039). Amici consisted of a variety of organizations including:

several national organizations dedicated to the protection of civil rights, including the Human Rights Campaign Fund, the National Gay and Lesbian Task Force, the National Lesbian and Gay Law Association, the National Center for Lesbian Rights, the Gay and Lesbian Medical Association, the Union of American Hebrew Congregations, the National Asian Pacific American Legal Consortium, the National Organization for Women and the NOW Legal Defense and Education Fund.

Amici also include state organizations concerned about discrimination, including the Connecticut Women's Education and Legal Fund, Inc., the Gay and Lesbian Law Association of Florida, the Oregon Gay and Lesbian Law Association, Bay Area Lawyers for Individual Freedom,

constitutional law professors argued that Amendment 2 was the rare example of a literal deprivation of equal protection because only gays and lesbians were ineligible for state law protection against discrimination.⁵² The brief submitted by the Human Rights Campaign Fund argued that given the state's justifications for Amendment 2, which included the protection of the freedom of association of landlords and employers and the need to conserve law enforcement resources, the amendment could not withstand rational basis review because the amendment was so tremendously over and under inclusive with respect to those objectives. The majority opinion incorporates both theories enumerated in the amicus briefs and, despite its failure to tackle some of the obvious questions prompted by this Amendment, it does establish the principle that governmental discrimination against gays and lesbians will not be upheld when supported only by an animus directed against this particular group.⁵³

Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, wrote a particularly scathing dissenting opinion.⁵⁴ In the very first sentence, Justice Scalia writes "[t]he Court has mistaken a Kulturkampf for a fit of spite."⁵⁵ Kulturkampf refers to the conflict between the German imperial government and the Roman Catholic Church in the late 19th century, chiefly over the control of educational and ecclesiastical appointments.⁵⁶ In other words, a kulturkampf is a culture struggle and Justice Scalia makes clear which side of this culture war he supports. According to Justice Scalia, Amendment 2 is the result of a cultural debate over whether opposition to homosexuality is as

Lawyers for Human Rights - the Lesbian and Gay Bar Association of Los Angeles, Orange County Lawyers for Equality Gay and Lesbian, and the Tom Homann Bar Association of San Diego.

Id. at *1.

52. Amicus Brief of Lawrence H. Tribe, et al., 1995 WL 862021, *3 (No. 94-1039).

53. *Romer v. Evans*, 116 S. Ct 1620, 1627 (1996).

54. *Id.* at 1629 (Scalia, J., dissenting).

55. *Id.* (Scalia, J., dissenting)

56. Kulturkampf is defined as a "conflict between civil government and religious authorities especially] over control of education and church appointments." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 667 (1989).

reprehensible as racial or religious bias.⁵⁷ To Justice Scalia, there is nothing objectionable about a “modest attempt by seemingly tolerant Coloradoans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws.”⁵⁸

Moreover, Justice Scalia found the majority’s reasoning to be inconsistent with *Bowers*. He maintained that if *Bowers* permitted a State to make homosexual conduct illegal, then it must surely be “constitutionally permissible for a State to enact other laws merely disfavoring homosexual conduct.”⁵⁹ Anticipating the argument that Amendment 2 reaches status and not conduct, Justice Scalia asserted that it is surely “rational to deny special favor and protection to those with a self-avowed tendency or desire to engage in the conduct.”⁶⁰ One of the mistakes that Justice Scalia makes in his analysis is that homosexual sodomy is not synonymous with homosexual conduct.

The intriguing question that arises after *Romer* is to what extent, if at all, *Romer* undercuts the continued vitality of *Bowers*. As an aside, we should note that after Justice Powell retired, he admitted that he probably made a mistake in joining the 5-4 majority in *Bowers*.⁶¹ On the surface, one can easily reconcile the two cases by pointing out that *Romer* is an Equal Protection case whereas *Bowers* was a substantive due process case. Second, the Court is unquestionably averse to expanding substantive due process. Third, it is not necessarily inconsistent to permit a state to prohibit a particular activity while not permitting the state to immunize open-ended discrimination against an entire class of persons, some of whom might engage in

57. *Romer*, 116 S. Ct. at 1629 (Scalia, J., dissenting).

58. *Id.* (Scalia, J., dissenting)

59. *Id.* at 1631 (Scalia, J., dissenting) (emphasis omitted).

60. *Id.* at 1632 (Scalia, J., dissenting).

61. See JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR.: A BIOGRAPHY 530 (1994) (“On October 18, 1994, Powell gave the annual James Madison lecture at New York University Law School and afterward answered students’ questions. . . . ‘I think I probably made a mistake on that one,’ Powell said of *Bowers*.”).

that activity.⁶² At the very least, *Romer* symbolically marks the beginning of a new era in which the Court, for the very first time, has recognized and sustained an equal protection claim advanced by gays and lesbians.⁶³

The other equally controversial Equal Protection case of the term was *United States v. Virginia*,⁶⁴ where the Court found that Virginia's policy of excluding women from the Virginia Military Institute [hereinafter "VMI"] violated the Equal Protection Clause.⁶⁵ VMI, as we all know, is an unusual and indeed a unique institution. Its self-described mission is to produce "citizen-soldiers" defined as men prepared for leadership in either military service or civilian life.⁶⁶ VMI has been quite successful in fulfilling this mission as its graduates include military generals, Congressmen, and captains of industry.⁶⁷ The manner in which VMI prepares its students to be citizen-soldiers is through a model of education featuring "physical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior and indoctrination in desirable values."⁶⁸

62. *Romer*, 116 S. Ct. at 1622. Kathleen Sullivan, counsel for Amici Curiae, argued that even if a State made gambling illegal, it would not follow that the same State may authorize unlimited discrimination against gamblers as a class. Amicus Brief of Lawrence H. Tribe, et al., 1995 WL 862021, *10 (No. 94-1039). Furthermore, when the State permits inequality under the law, it "renders a person ineligible for the protection from an entire category of wrongful conduct that might otherwise be available through the state's system for making and enforcing laws." *Id.*

63. *Romer*, 116 S. Ct. 1629.

64. 116 S. Ct. 2264 (1996).

65. *Id.* at 2287 ("The State [of Virginia] has shown no 'exceedingly persuasive justification' for withholding from women qualified for the experience premier training of the kind VMI affords.").

66. *Id.* at 2269. VMI's mission statement aims "to produce educated and honorable men, prepared for the varied work of civil life, imbued with love of learning, confident in the functions and attitudes of leadership, possessing a high sense of public service . . . and ready as citizen-soldiers to defend their country in time of national peril." *Id.* at 2270 (quoting Mission Study Committee of the VMI Board of Visitors, Report, May 16, 1986).

67. *Id.* VMI's reputation as an exceptionally challenging military undergraduate school and its wide base of alumni contacts attracts men dedicated to becoming citizen-soldiers. *Id.* at 2270-71.

68. *Id.* at 2270.

All sides in the dispute agreed that this model of education was unique to VMI and unavailable to women.⁶⁹

Despite that fact, the district court ruled in favor of VMI, finding that single sex education yields substantial benefits, which would be lost if women were permitted to enroll.⁷⁰ Moreover, the district court found that single-sex education brings diversity to an otherwise coeducational school system.⁷¹ The Fourth Circuit reversed, finding that Virginia had failed to rationalize its determination to achieve diversity by offering VMI's unique type of program to men but not to women.⁷² The court concluded that "a policy of diversity which aims to provide an array of educational opportunities, including single-gender institutions, must do more than favor one gender."⁷³

The Fourth Circuit offered the following three remedial options to VMI: (1) admit women to VMI; (2) establish a parallel program; or (3) give up financial support from the State.⁷⁴ Virginia responded by proposing a plan to establish an all-female, publicly-funded military college that would provide a single-sex education similar to that of VMI.⁷⁵ The Virginia Woman's Institute for Leadership [hereinafter "VWIL"] would be located at Mary Baldwin College, a private liberal arts college, and would be supported with funding equal to the support provided for VMI cadets. Both the District Court and a divided Fourth Circuit approved this remedial plan by using a "substantive

69. "VMI pursues this mission through pervasive training of a kind not available anywhere else in Virginia." *Id.* at 2269.

70. 766 F. Supp. 1407, 1411 (W.D.Va. 1991).

71. *Id.* at 1413.

72. 976 F.2d 890, 892 (4th Cir. 1992).

73. *Id.* at 899. The court went further and stated that "if responsibility for implementing diversity has somehow been delegated to an individual institution, no explanation is apparent as to how one institution with autonomy, but with no authority over any other state institution, can give effect to a state policy of diversity among institutions." *Id.*

74. *Id.* at 900.

75. The plan called for the establishment of the Virginia Woman's Institute for Leadership. *United States v. Virginia*, 116 S. Ct. 2264, 2282-83 (1996).

comparability” test, roughly equivalent to a “separate but equal” approach.⁷⁶

Two issues were presented for Supreme Court review: first, did Virginia’s exclusion of women from VMI constitute unlawful gender discrimination under the Equal Protection Clause; and second, presuming that the exclusion violated the Equal Protection Clause, what is the appropriate remedy for that constitutional violation.⁷⁷

Writing for the majority, Justice Ginsburg must have derived tremendous satisfaction.⁷⁸ After all, she led the fight in the 1970’s to establish the Equal Protection Clause as a weapon to combat sex discrimination.⁷⁹ It was not until 1971, in *Reed v. Reed*,⁸⁰ that the Equal Protection Clause was used to strike down

76. See generally, *United States v. Virginia*, 852 F. Supp. 471 (W.D.Va. 1994); *United States v. Virginia*, 44 F.3d 1229 (4th Cir. 1995). The Fourth Circuit determined that, in order for Virginia to satisfy the “substantive comparability” test, the court had to determine:

(1) whether the state’s objective of providing single-gender education to its citizens may be considered a legitimate and important governmental objective; (2) whether the gender classification adopted is directly and substantially related to that purpose; and (3) whether the resulting mutual exclusion of women and men from each other’s institutions leaves open opportunities for those excluded to obtain substantively comparable benefits at their institution or through other means offered by the state.”

Id. at 1237.

77. *United States v. Virginia*, 116 S. Ct. 2264, 2274 (1996).

78. The majority opinion was written by Justice Ginsburg and was joined by Justices Stevens, O’Connor, Kennedy, Souter and Breyer. Chief Justice Rehnquist concurred separately and Justice Scalia dissented. Justice Thomas did not participate because his son attends VMI.

79. See Deborah L. Marcowitz, *In Pursuit of Equality: One Woman’s Work To Change The Law*, 14 WOMAN’S RTS. L. REP. 335 (1992). Justice Ginsburg became active with women’s rights in the 1960’s while she was a professor at Rutgers University School of Law. *Id.* at 337. Shortly after acting as a volunteer attorney for the New Jersey affiliate of the ACLU, she joined Melvin L. Wulf, Legal Director of the ACLU, in drafting the ACLU’s amicus brief in *Reed v. Reed*. *Id.* See 404 U.S. 71 (1971).

80. *Id.*

a state statute that discriminated against women.⁸¹ Justice Ginsburg painstakingly detailed the history of romantic paternalism that was the hallmark of the judicial response to claims of gender discrimination in an effort to remind the reader why the Court applies heightened scrutiny when reviewing gender classifications.⁸² Interestingly, despite the fact that mid-level scrutiny has come to be recognized as the appropriate test to evaluate gender claims, Drew S. Days, Jr., on behalf of the Clinton administration, argued that the Court should adopt strict scrutiny in this case.⁸³

While not adopting strict scrutiny, the Court did apply a particularly rigorous mid-level or intermediate scrutiny test.⁸⁴ Mid-level scrutiny generally requires that the classification be based upon an important governmental objective and that the means employed by the state be substantially related to achieving that objective.⁸⁵ Since the adoption of mid-level scrutiny in 1976,⁸⁶ we have seen at least a few variations on how that test is employed. For example, in the hands of Justice Rehnquist, mid-level scrutiny is hard to distinguish from rational basis review, most notably in *Matter of Michael M. v. Superior Court*,⁸⁷ the statutory rape case.

81. *Id.* at 73. In *Reed*, the Court held that a mandatory provision of an Idaho statute, which gave preference to men over women for appointments as administrators of estates, was an unconstitutional gender classification. *Id.* at 77. The Court rejected the State's argument that administrative convenience sufficed to justify the disparate treatment under the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 76.

82. *Virginia*, 116 S. Ct. at 2274-75. Heightened scrutiny places a burden on the State to show that the classification serves "important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Id.* at 2275.

83. See Reply Brief for the Petitioner at 18, *United States v. Virginia*, 116 S. Ct. 2264 (1996) (No. 94-1941).

84. *Id.*

85. *Id.*

86. See *Craig v. Boren*, 429 U.S. 190 (1976). In *Craig*, a majority of the Court adopted an intermediate standard of judicial scrutiny for discrimination based upon gender. *Id.* at 197.

87. 450 U.S. 464 (1981).

However, in *United States v. Virginia*, Justice Ginsburg refereed to mid-level scrutiny as “skeptical scrutiny,”⁸⁸ requiring a searching review, whereby the Court determines whether the government has satisfied the demanding burden of establishing an exceedingly persuasive justification.⁸⁹ This exceedingly persuasive justification must be “genuine, not hypothesized or invented *post hoc* in response to litigation . . . and it must not rely on over-broad generalizations about the different talents, capacities, or preferences of males and females.”⁹⁰

Applying this standard to VMI’s exclusion of women, Justice Ginsburg rejected Virginia’s claim that the exclusion of women furthered the state’s interest in achieving diversity in education.⁹¹ Because mid-level scrutiny requires that the classification be evaluated in reference to its actual objectives, and not after the fact justifications, the majority concluded that the history of excluding women from VMI was unrelated to achieving educational diversity.⁹² In other words, the Court decided that achieving diversity among institutions was not the actual reason for the challenged admissions policy.⁹³

The majority had little trouble rejecting Virginia’s claims that: (1) the program at VMI could not be adapted for women; (2) that the admission of women would downgrade VMI’s stature; and (3) that women would not be interested in enrolling at VMI.⁹⁴ While conceding that most women would not choose to attend VMI, the majority also noted that most men would choose not to enroll.⁹⁵ However, that was not the issue in this case. The issue was “whether the State can constitutionally deny to women who

88. *Virginia*, 116 S. Ct. at 2274.

89. *Id.* at 2275.

90. *Id.* at 2274-75.

91. *Id.* at 2279.

92. *Id.* at 2277. The Court cautioned that “benign justifications proffered in defense of categorical exclusions will not be accepted automatically; a tenable justification must describe actual State purposes, not rationalizations for actions in fact differently grounded.” *Id.*

93. *Id.* at 2279.

94. *Id.*

95. *Id.* at 2280.

have the will and capacity, the training and attendant opportunities that VMI uniquely affords.”⁹⁶

In response to the concern that the admission of women would tarnish the reputation of VMI, if not completely destroy the institution, Justice Ginsburg documented the fact that, over the ages, this fear has been used to deny rights and opportunities to women.⁹⁷ She cited a 1925 report from Columbia Law School which stated:

the faculty . . . never maintained that women could not master legal learning . . . No, its argument has been . . . more practical. If women were admitted to the Columbia Law School, [the faculty] said, then the choicer, more manly and red-blooded graduates of our great universities would go to the Harvard Law School!⁹⁸

The majority concluded that VMI’s goal of producing citizen soldiers would not be compromised by the admission of women “who today count as citizens in our American democracy equal in stature to men.”⁹⁹

Having found that the admissions policy violated the Equal Protection Clause, the Court had to determine an appropriate remedy. The Court noted that a proper remedy must “eliminate to the extent possible the discriminatory effects of the past and bar like discrimination in the future.”¹⁰⁰

The Court found Virginia’s remedial plan, which consisted of establishing VWIL at Mary Baldwin College, to be woefully inadequate.¹⁰¹ The Court found that, although described as a parallel program, VWIL did not provide a rigorous military training, the very hallmark of VMI.¹⁰² Instead, VWIL de-

96. *Id.*

97. *Id.* at 2281 (“The notion that admission of women would downgrade VMI’s stature, destroy the adversative system and, with it, even the school, is a judgment hardly proved, a prediction hardly different from other ‘self-fulfilling prophecies.’”).

98. *Id.* (quoting *The Nation*, Feb. 18, 1925, at 173).

99. *Id.* at 2282.

100. *Id.*

101. *Id.* at 2284.

102. *Id.* at 2283.

emphasized military training in favor of a cooperative method of education designed to reinforce self-esteem.¹⁰³

Furthermore, VWIL students do not wear uniforms, they do not live together throughout the four year program and they do not eat meals together.¹⁰⁴ In short, none of the VMI barracks style living, "designed to foster an egalitarian ethic" and deemed so essential to that experience, exist at VWIL.¹⁰⁵ Thus, in many ways, the VWIL program proved dramatically inferior: the students were less qualified; the faculty was less impressive and not paid as well; the course offerings were far more limited; and the facilities were far less extensive.¹⁰⁶

While acknowledging the pragmatic differences between the programs, Virginia maintained that they were justified pedagogically based on the important differences between how men and women learn.¹⁰⁷ However, the Court stated that this is just the type of stereotypical thinking and over-broad generalization that proves fatal when evaluating gender discrimination claims.¹⁰⁸ According to the Court, Virginia could not demonstrate the substantial equality between the two programs, and as such, the remedy failed to match the severity of the constitutional violation and was deemed inadequate.¹⁰⁹

Justice Scalia wrote another scathing dissent, criticizing the majority for applying what, to him, seems to be a beefed up mid-level scrutiny test.¹¹⁰ He also condemned the Court for implying that it has not ruled out the use of strict scrutiny to resolve gender cases.¹¹¹ Justice Scalia accused the majority of playing Supreme Court "peek-a-boo" and of irresponsibly using language

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at 2287.

107. *Id.* at 2283.

108. *Id.* at 2284.

109. *Id.*

110. *Id.* at 2295 (Scalia, J., dissenting) ("Intermediate scrutiny has never acquired a least-restrictive-means analysis, but only a 'substantial relation' between the classification and the State interests that it serves.").

111. *Id.* at 2292 (Scalia, J., dissenting).

calculated to destabilize the law.¹¹² Even Chief Justice Rehnquist fails to escape Justice Scalia's pen. Although finding Justice Rehnquist's concurring opinion more moderate than the majority's, Justice Scalia believes that was at the expense of being even more implausible.¹¹³

What is the status of government supported single-sex institutions, given the VMI decision? In *Mississippi University for Women v. Hogan*,¹¹⁴ the 1982 nursing school case, the Court declined to decide the question of whether states can provide separate but equal undergraduate institutions for males and females.¹¹⁵ In *United States v. Virginia*, the Court pointedly stated that it was addressing only the constitutionality of an educational opportunity recognized as being unique and available only at the State's sole single-sex university.¹¹⁶ However, in a footnote, the majority acknowledged they "do not question the

112. *Id.* at 2295 (Scalia, J., dissenting). Justice Scalia argued that both the State and Federal Government are entitled to know what standard of judicial scrutiny they will be held to before they act. *Id.* (Scalia, J., dissenting).

113. *Id.* at 2303 (Scalia, J., dissenting). Justice Scalia found that Chief Justice Rehnquist's approach was even more implausible than the majority's approach because of his dismissal of Virginia's justifications for a single-sex admission policy. *Id.* at 2304 (Scalia, J., dissenting). To Justice Scalia, one question was left unanswered under Justice Rehnquist's rationale: "[I]f Virginia cannot get *credit* for assisting women's education if it only treats women's private schools . . . then why should it get [the] *blame* for assisting men's education if it only treats VMI as it does all other public schools? This is a great puzzlement." *Id.* at 2305 (Scalia, J., dissenting).

114. 458 U.S. 718 (1982). In *Mississippi Univ. for Women v. Hogan*, the State of Mississippi sought to uphold the female-only admissions policy at the Mississippi University for Women School of Nursing on the grounds that the admissions policy was designed to compensate for past discrimination against women, and therefore, constituted educational affirmative action. *Id.* at 727. The lawsuit was brought by Joe Hogan, a male who had sought admission to the baccalaureate program at the nursing school. *Id.* at 720. He was denied admission solely on the basis of his sex, even though his qualifications equaled those of the admitted women. *Id.* at 720-21. The *Hogan* Court, applying intermediate scrutiny, struck down the statute, finding the exclusion did not serve the compensatory purpose proffered by the State. *Id.* at 730.

115. *Id.* at 721 n.1.

116. *Virginia*, 116 S. Ct. at 2276 n.7.

State's prerogative evenhandedly to support diverse educational opportunities."¹¹⁷

In my opinion, this statement means that the court would uphold single-sex schools so long as they were justified pedagogically, and so long as substantial equality between the schools was established. However, what is less clear is whether substantial equality will, in every case, require programmatic equivalence.

As a final note, I should add that we may be entering a new era of Equal Protection analysis, whereby the choice of what standard of review governs may be less outcome-determinative than in the past. Two terms ago, in *Adarand Construction v. Peña*,¹¹⁸ an affirmative action case, the Court explicitly rejected the maxim that "strict scrutiny was strict in theory but fatal in fact."¹¹⁹ Moreover, the Court's use of rational basis in *Romer v. Evans* may signify a toothier test than the "any conceivable basis" version lately in vogue.

While the outcome of cases using mid-level scrutiny has always been difficult to predict, it may be that, if the Court continues to use the version of mid-level scrutiny employed by the majority in *VMI*, the test may more closely resemble strict scrutiny than it has in the past.¹²⁰

Perhaps the Court is unwittingly and unself-consciously edging toward what Justice Marshall unsuccessfully advocated more than twenty years ago, a sliding scale of judicial review dependent on

¹¹⁷. *Id.*

¹¹⁸. 115 S. Ct. 2097 (1995).

¹¹⁹. *Id.* at 2275 n.6.

¹²⁰. It must be noted that the Supreme Court has, on two occasions, seemingly left open the possibility that strict scrutiny may be adopted for review of gender classifications in the future. *See* Stockel, *supra* note 5, at 237, n.55 (*citing* *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 n.9 (1982) ("Because we conclude that the challenged statutory classification is not substantially related to an important objective, we need not decide whether classifications based upon gender are inherently suspect."); *J.E.B. v. Alabama*, 114 S. Ct. 1419, 1425 n.6 (1994) ("Because we conclude that gender-based peremptory challenges are not substantially related to an important government objective, we once again need not decide whether classifications based on gender are inherently suspect.")).

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the strength of the interest asserted and the invidiousness of the classification itself.¹²¹ The Court's recent Equal Protection cases may not signal a major sea of change in Equal Protection analysis but they do signify some shifting of the sands.

121. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 97-110 (1973) (Marshall, J., dissenting).

