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Legitimizing Racial Discrimination through Antidiscrimination law: A Critcal Review of Supreme Court Doctrine

Alan David Freeman

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if it will kindly be considered that while it is in our interest as tormentors to remain where we are as victims our urge is to move on

—Samuel Beckett, *How It Is*

THE LAW: *"Black Americans, rejoice! Racial discrimination has now become illegal."*

BLACK AMERICANS: *"Great, we who have no jobs want them. We who have lousy jobs want better ones. We whose kids go to black schools want to choose integrated schools if we think that would be better for our kids, or want enough money to make our own schools work. We want political power roughly proportionate to our population. And many of us want houses in the suburbs."*

THE LAW: *"You can't have any of those things. You can't assert your claim against society in general, but only against a named discriminator, and you've got to show that you are an individual victim of that discrimination and that you were intentionally discriminated against.*[1] *And be sure to demonstrate how that discrimination caused your problem,*[2] *for any remedy*

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* Professor of Law, University of Minnesota Law School. I wish to express my gratitude to the Law Alumni Association of the University of Minnesota for its generous support of the research leading to this Article. The views expressed in the Article are, of course, mine alone.

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1. *See, e.g.*, Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 264-65 (1977); Washington v. Davis, 426 U.S. 229, 239-42 (1976).

2. *See, e.g.*, Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 430 (1976); Rizzo v. Goode, 423 U.S. 362, 371-73 (1976); Warth v. Seldin, 422 U.S. 490, 497, 502 (1975).

> *must be coextensive with the violation.*[3] *Be careful your claim does not impinge on some other cherished American value, like local autonomy of the suburbs,*[4] *or previously distributed vested rights,*[5] *or selection on the basis of merit.*[6] *Most important, do not demand any remedy involving racial balance or proportionality; to recognize such claims would be racist."*[7]

This Article, along with a sequel that will follow, attempts, through a discussion of Supreme Court decisions over a period of some 25 years, to account for the dissonance in this dialogue, for as surely as the law has outlawed racial discrimination, it has affirmed that Black Americans can be without jobs, have their children in all-black, poorly funded schools, have no opportunities for decent housing, and have very little political power, without any violation of antidiscrimination law.[8] The purpose of the discussion is descriptive

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3. *See* Milliken v. Bradley, 418 U.S. 717, 744-45 (1974); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971).

4. *See* Milliken v. Bradley, 418 U.S. 717, 745 (1974); *id.* at 766-68 (White, J., dissenting); San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 47-55 (1973); *id.* at 63-65 (White, J., dissenting).

5. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 352-54 (1977).

6. *See* Washington v. Davis, 426 U.S. 229 (1976).

7. *See* Swain v. Alabama, 380 U.S. 202, 203, 208 (1965); Hughes v. Superior Court, 339 U.S. 460 (1950); Bakke v. Regents of the Univ. of Cal., 18 Cal. 3d 34, 61-62, 553 P.2d 1152, 1171, 132 Cal. Rptr. 680, 699 (1976), *aff'd in part, rev'd in part,* 98 S. Ct. 2733 (1978). *See also* Beer v. United States, 425 U.S. 130, 139-43 (1976).

8. For the purpose of this Article, antidiscrimination law is federal constitutional and statutory law, as expounded or interpreted by the United States Supreme Court, defining the conduct to be treated as racial discrimination. I regard this body of law as the best evidence of the current prevailing or official national moral consensus on the subject of racial discrimination. With respect to the inclusion of both constitutional and statutory law, one would have supposed, until recently, that federal statutes shared with the Constitution the same substantive notion of racial discrimination, with the role of the statutes being to add those violators otherwise immune from constitutional coverage because of the state-action doctrine. That there has been a substantive divergence is part of the story to be told in this Article. *See* text accompanying notes 275-76 *infra*.

I should also add that the almost exclusive emphasis of this Article is on racial discrimination, with the principal model that of black-white relations in the United States. To the extent that other forms of discrimination overlap with the model, this Article speaks to them. My belief in the necessity of emphasizing the concrete and historical suggests that other problems of discrimination demand separate scrutiny in their own particular contexts. It seems, for example, that, when compared to race, sex discrimination is in some respects a more tractable problem (where all the law has to do is strike down an irrational and inaccurate factual generalization based on gender) and in other respects more intractable (as in the as yet incomplete task of developing a dominant moral consensus in the face of still widely held cultural assumptions that support sex-stereotypic modes of thought and behavior). *Compare* Reed v. Reed, 404 U.S. 71 (1971), *with* Dothard v. Rawlinson, 433 U.S. 321 (1977), *and* General Elec. Co. v. Gilbert, 429 U.S. 125 (1976). *See generally* Wasserstrom, *Racism, Sexism, and Preferential Treatment: An Approach to the Topics,* 24 U.C.L.A. L. REV. 581, 587-94,

and explanatory, *not* prescriptive or normative. The Article is not a doctrinal brief; no attempt will be made to reconcile new arguments with existing case law or find instances for optimism in the interstices of depressing Supreme Court opinions. Nor will there be any discussion of issues internal to the legal system, such as the apportionment of tasks between courts and legislatures, federal and state courts, or higher and lower courts.[9] Those issues are simply irrelevant to an author seeking to observe and report on evolution of legal doctrine rather than to participate in its manipulation.

While all of the Supreme Court opinions to be discussed are, of course, technical assertions of legal doctrine, and can be analyzed as such, they are also an evolving statement of acceptable public morality. In their latter role, the opinions not only reflect dominant societal moral positions,[10] but also serve as part of the process of forming or crystallizing such positions. Given a view that law serves largely to legitimize the existing social structure and, especially, class relationships within that structure, the ultimate constraints are outside the legal system.[11] But if law is to serve its legitimation function, those ultimate constraints must yield up just enough autonomy to the legal system to make its operations credible for those whose allegiance it seeks as well as those whose self-interest it rationalizes.

The sequel to this Article will deal more explicitly with the relationship between antidiscrimination law and the outside social struc-

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605-15 (1977); *see also* B. BABCOCK, A. FREEDMAN, E. NORTON, & S. ROSS, SEX DISCRIMINATION AND THE LAW 89-92 (1973); S. FIRESTONE, THE DIALECTIC OF SEX 118-41 (1970); Easton, *Feminism and the Contemporary Family*, SOCIALIST REV., May-June 1978, at 11; Lasch, *The Flight from Feeling: Sociopsychology of Sexual Conflict*, MARXIST PERSPECTIVES, Spring 1978, at 74.

9. Such nonsubstantive issues as federalism or institutional competence are, for me, never neutral and never severed from a particular substantive position or at least from a world view with heavy substantive implications. For a characterization, with respect to these issues, of the internal workings of judicial decisionmaking that roughly corresponds to my own view, see Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1760-66 (1976).

10. *See* S. SCHEINGOLD, THE POLITICS OF RIGHTS 13-79 (1974); Tushnet, *A Marxist Analysis of American Law*, MARXIST PERSPECTIVES, Spring 1978, at 96, 97-101.

11. *See, e.g.*, C. BOGGS, GRAMSCI'S MARXISM 36-54 (1976); E. GENOVESE, ROLL, JORDAN, ROLL 35-49 (1972); A. GOULDNER, THE COMING CRISIS OF WESTERN SOCIOLOGY 266-77 (1970); J. HABERMAS, LEGITIMATION CRISIS 86-88, 98-102 (paperback ed. T. McCarthy trans. 1975); D. HAY, P. LINEBAUGH, J. RULE, E.P. THOMPSON, & C. WINSLOW, ALBION'S FATAL TREE 17 (1975); K. MARX & F. ENGELS, THE GERMAN IDEOLOGY 26-27, 28-29, 39-43, 60-62 (paperback ed. R. Pascal 1963); THE OPEN MARXISM OF ANTONIO GRAMSCI 35-44 (C. Marzani trans. & ed. 1957); R. UNGER, LAW IN MODERN SOCIETY 196 216 (1976); R. WOLFF, THE POVERTY OF LIBERALISM 150-61 (1968); Balbus, *Commodity Form and Legal Form: An Essay on the "Relative Autonomy" of the Law*, 11 LAW & SOC'Y REV. 571 (1977); Fraser, *The Legal Theory We Need Now*, SOCIALIST REV., July-October 1978, at 147; Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265 (1978); Wood, *The Marxian Critique of Justice*, 1 PHILOSOPHY & PUB. AFF. 244 (1972); Gabel, Book

ture. For the present, the emphasis is on the workings of the legal system within its sphere of limited autonomy. The discussion is premised upon the lack, even within that sphere, of any objective criteria to which one might appeal to justify particular substantive decisions. Neither formal criteria nor more substantive "shared values" emerge to resolve the underlying value-conflicts in these cases.[12] The supposedly shared values that are asserted always turn out, even when presented sincerely, to be attempts to rationalize self-interest through appeal to universal criteria. The lengthy discussion of Supreme Court opinions that follows is intended to be, among other things, a testament to the manipulability of legal doctrine.

The major emphasis, however, is on how the process of legitimation works through that manipulation of doctrine. The doctrine cannot legitimize unless it is convincing, but it cannot be convincing in the context of antidiscrimination law unless it holds out a promise of liberation. Simultaneously, the doctrine must refrain from delivering on the promise if it is to serve its function of *merely* legitimizing. And finally, the doctrine must occasionally offer at least illusions of reconciliation and resolution, lest it collapse in obvious self-contradiction.[13]

I. THE PERPETRATOR PERSPECTIVE

The concept of "racial discrimination" may be approached from the perspective of either its victim or its perpetrator. From the victim's perspective, racial discrimination describes those conditions of actual social existence as a member of a perpetual underclass. This perspective includes both the objective conditions of life—lack of jobs, lack of money, lack of housing[14]—and the consciousness asso-

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Review, 91 HARV. L. REV. 302 (1977) (R. DWORKIN, TAKING RIGHTS SERIOUSLY).

12. *See* R. UNGER, KNOWLEDGE AND POLITICS 88-103, 151-56 (1975); Kennedy, *supra* note 9; *cf.* Heller, *The Importance of Normative Decisionmaking: The Limitations of Legal Economics as a Basis for a Liberal Jurisprudence—As Illustrated by the Regulation of Vacation Home Development*, 1976 WIS. L. REV. 385, 469-500 (describing the inadequacy of economic analysis of law). *See also* Wright, *Professor Bickel, The Scholarly Tradition and the Supreme Court*, 84 HARV. L. REV. 769 (1971).

13. While limiting the presentation to antidiscrimination law, I am willing to speculate that the principal techniques described, especially the victim-perpetrator dichotomy and the remedy-violation relationship, are not peculiar to antidiscrimination law, but, rather, typical of other ostensible law reform efforts.

14. *See, e.g.*, F. PIVEN & R. CLOWARD, POOR PEOPLE'S MOVEMENTS 181-263 (1977); RACE AND POVERTY (J. Kain ed. 1969); THE BURDEN OF RACE (G. Osofsky ed. 1967); U.S. COMM'N ON CIVIL RIGHTS, LAST HIRED, FIRST FIRED: LAYOFFS AND CIVIL RIGHTS (1977); U.S. COMM'N ON CIVIL RIGHTS, TWENTY YEARS AFTER BROWN: EQUAL OPPORTUNITY IN HOUSING (1975); U.S. COMM'N ON CIVIL RIGHTS, TWENTY YEARS AFTER BROWN: EQUALITY OF ECONOMIC OPPORTUNITY (1975); U.S. COMM'N ON CIVIL RIGHTS, TWENTY YEARS AFTER BROWN: EQUALITY OF EDUCATIONAL OPPORTUNITY (1975); S. WILLHELM, WHO NEEDS THE NEGRO? 123-76 (1970); Drake, *The Social and Economic Status of the Negro in the United States*, in SOCIAL INEQUALITY 297 (paperback ed. A. Beteille 1969); Was-

ciated with those objective conditions—lack of choice and lack of human individuality in being forever perceived as a member of a group rather than as an individual.[15] The perpetrator perspective sees racial discrimination not as conditions, but as actions, or series of actions, inflicted on the victim by the perpetrator. The focus is more on what particular perpetrators have done or are doing to some victims than it is on the overall life situation of the victim class.

The victim, or "condition,"[16] conception of racial discrimination suggests that the problem will not be solved until the conditions associated with it have been eliminated. To remedy the condition of racial discrimination would demand affirmative efforts to change the condition. The remedial dimension of the perpetrator perspective, however, is negative. The task is merely to neutralize the inappropriate conduct of the perpetrator.

In its core concept of the "violation," antidiscrimination law is hopelessly embedded in the perpetrator perspective. Its central tenet, the "antidiscrimination principle," is the prohibition of race-

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serstrom, *supra* note 8, at 584-87. *See also* Greer, *Racial Employment Discrimination in the Gary Works, 1906-1974*, in SOCIAL CLASS IN THE CONTEMPORARY UNITED STATES 29-73 (G. Erickson & H. Schwartz eds. 1977).

15. *See, e.g.*, J. BALDWIN, NOTES OF A NATIVE SON 71-95 (paperback ed. 1964); C. BROWN, MANCHILD IN THE PROMISED LAND (1965); F. DOUGLASS, MY BONDAGE AND MY FREEDOM (New York 1855); W.E.B. DUBOIS, SOULS OF BLACK FOLK (1903); F. FANON, BLACK SKIN WHITE MASKS (1967); W. GRIER & P. COBBS, BLACK RAGE (1968); INSTITUTIONAL RACISM IN AMERICA (paperback ed. L. Knowles & K. Prewitt 1969); R. WRIGHT, BLACK BOY (paperback ed. 1951); Yerby, *The Thunder of God*, in WRITERS IN REVOLT 203 (paperback ed. J. Conroy & C. Johnson 1973).

16. I concede an irony in, but nevertheless will adhere to, my use of "victim perspective." If the real point of the victim perspective is to talk about conditions rather than practices, why talk about victims? Both are true. In the context of race, "victim" means a current member of the group that was historically victimized by actual perpetrators or a class of perpetrators. Victims are people who continue to experience life as a member of that group and continue to experience conditions that are actually or ostensibly tied to the historical experience of actual oppression or victimization, whether or not individual perpetrators, or their specific successors in interest, can be identified now. The victim perspective is intended to describe the expectations of an actual human being who is a current member of the historical victim class—expectations created by an official change of moral stance toward members of the victim group. Those expectations, I suggest, include changes in conditions.

The perpetrator perspective, on the other hand, is the stance of the legal system, or legal ideology, as a third entity subjecting all of contemporary society to its gaze. To the extent the ideology is received, that view also becomes the view of members of the victim group, nonperpetrator members of the nonvictim group, and perpetrator members of the nonvictim group.

For a related dichotomy between the "consumer" and the "imperial" perspectives, which has some overlap with mine and probably affected my choice of phrases, see E. CAHN, *Law in the Consumer Perspective*, in CONFRONTING INJUSTICE 15 (L. Cahn ed. 1966).

dependent decisions that disadvantage members of minority groups,[17] and its principal task has been to select from the maze of human behaviors those particular practices that violate the principle, outlaw the identified practices, and neutralize their specific effects. Antidiscrimination law has thus been ultimately indifferent to the condition of the victim; its demands are satisfied if it can be said that the "violation" has been remedied.

The perpetrator perspective presupposes a world composed of atomistic individuals[18] whose actions are outside of and apart from the social fabric and without historical continuity. From this perspective, the law views racial discrimination not as a social phenomenon, but merely as the misguided conduct of particular actors.[19] It is a world where, but for the conduct of these misguided ones, the system of equality of opportunity would work to provide a distribution of the good things in life without racial disparities and where deprivations that did correlate with race would be "deserved" by those deprived on grounds of insufficient "merit." It is a world where such things as "vested rights," "objective selection systems," and "adventitious decisions" (all of which serve to prevent victims from experiencing any change in conditions) are matters of fate, having nothing to do with the problem of racial discrimination.[20]

Central to the perpetrator perspective are the twin notions of "fault" and "causation." Under the fault idea, the task of antidiscrimination law is to separate from the masses of society those blameworthy individuals who are violating the otherwise shared norm. The fault idea is reflected in the assertion that only "intentional" discrim-

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17. The best summary and explanation is Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle,* 90 HARV. L. REV. 1 (1976).

18. *See id.* at 49-52.

19. *See* Kiltgaard, *Institutionalized Racism: An Analytic Approach,* in RACIAL CONFLICT, DISCRIMINATION, & POWER 9 (W. Barclay, K. Kumar, & R. Simms eds. 1976).

20. *See* Brest, *supra* note 17, at 36-48, 53.

> I believe that an individual's moral claim to compensation loses force as the nature, extent, and consequences of the wrongs inflicted become harder to identify and as the wrongs recede into the past. . . .
>
> Indeed, as claims to compensation based on the past injustices of human institutions become attenuated, they begin to compete with claims based on the vagaries of fate, and thus become indistinguishable from demands for greater distributive justice among all individuals. . . .
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> The poor nonpreferred white and the black beneficiary of a preferential program are like two children raised as brothers in an impoverished household. It is later discovered that one . . . is . . . the heir to a small fortune . . . . All parties concerned would regard the occurrence as a windfall, and certainly not based on desert. So too is a preference premised on a greater probability that the minority's situation is the result of past injury.

Id. at 42-43.

ination violates the antidiscrimination principle.[21] In its pure form, intentional discrimination is conduct accompanied by a purposeful desire to produce discriminatory results.[22] One can thus evade responsibility for ostensibly discriminatory conduct by showing that the action was taken for a good reason,[23] or for no reason at all.[24]

The fault concept gives rise to a complacency about one's own moral status; it creates a class of "innocents," who need not feel any personal responsibility for the conditions associated with discrimination, and who therefore feel great resentment when called upon to bear any burdens in connection with remedying violations. This resentment accounts for much of the ferocity surrounding the debate about so-called "reverse" discrimination,[25] for being called on to bear burdens ordinarily imposed only upon the guilty involves an apparently unjustified stigmatization of those led by the fault notion to believe in their own innocence.

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21. *See, e.g.*, Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 264-65 (1977); Washington v. Davis, 426 U.S. 229, 239-42 (1976); Milliken v. Bradley, 418 U.S. 717, 737 (1974); Keyes v. School Dist. No. 1, 413 U.S. 189, 208 (1973).

On the ideology of fault, see Pashukanis, *The General Theory of Law and Marxism*, in SOVIET LEGAL PHILOSOPHY 111, 216-21 (H. Babb trans. 1951). The fault notion as applied to racial discrimination today is, I believe, related to the assumption of 1950's liberals that such discrimination was largely a Southern problem. I can recall distinctly the response of my own naively liberal consciousness, as I was sitting in a fifth grade classroom at an all-white elementary school in New York City in 1954, to the announcement that the Supreme Court had outlawed racial segregation in schools: the Law is now going to make those bad Southerners behave; the land of opportunity is just around the corner.

22. *See* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 264-65 (1977); Washington v. Davis, 426 U.S. 229, 239-42 (1976). These cases emphasize that both an act and an intent are necessary to effect intentional discrimination.

23. *See* Palmer v. Thompson, 403 U.S. 217, 225 (1971) (public swimming pools closed for the good reason that they "could not be operated safely and economically on an integrated basis"); Swain v. Alabama, 380 U.S. 202, 221 (1965) (intent of a jury selection system that operated to exclude blacks from petit juries was selection of an "impartial and qualified" jury).

24. This situation arises in cases involving inherently nonrational decisions, such as where to draw district boundary lines. Absent proof that the lines were drawn with intent to discriminate on account of race, the districts are valid regardless of effect. *See, e.g.*, Wright v. Rockefeller, 376 U.S. 52 (1964) (no violation absent proof of intentional discrimination despite proof that four contiguous and irregularly shaped congressional districts ranged in black population from 86.3% (highest) to 5.1% (lowest)).

25. *See, e.g.*, N. GLAZER, AFFIRMATIVE DISCRIMINATION: ETHNIC INEQUALITY AND PUBLIC POLICY (1975); I. KRAFT, DEFUNIS V. ODEGAARD: RACE, MERIT, AND THE FOURTEENTH AMENDMENT (1976); MINORITY ADMISSIONS SUMMER PROJECT, AFFIRMATIVE ACTION IN CRISIS (1977); R. O'NEIL, DISCRIMINATING AGAINST DISCRIMINATION (1975); REVERSE DISCRIMINATION (B. Gross ed. 1977); *Discrimination in Higher Education: A Debate on Faculty Employment*, CIV. RIGHTS DIG., Spring 1975, at 3-21; Dworkin, *Why Bakke Has No Case*, N.Y. REV. BOOKS, November 10, 1977, at 11.

Operating along with fault, the causation requirement serves to distinguish from the totality of conditions that a victim perceives to be associated with discrimination those that the law will address.[26] These dual requirements place on the victim the nearly impossible burden of isolating the particular conditions of discrimination produced by and mechanically linked to the behavior of an identified blameworthy perpetrator, regardless of whether other conditions of discrimination, caused by other perpetrators, would have to be remedied for the outcome of the case to make any difference at all.[27] The causation principle makes it clear that some objective instances of discrimination are to be regarded as mere accidents, or "caused," if at all, by the behavior of ancestral demons whose responsibility cannot follow their successors in interest over time. The causation principle also operates to place beyond the law discriminatory conduct (action taken with a purpose to discriminate under the fault principle) that is not linked to any discernible "discriminatory effect."[28]

The perpetrator perspective has been and still is the only formal conception of a violation in antidiscrimination law. Strict adherence to that form, however, would have made even illusory progress in the quest for racial justice impossible. The challenge for the law, therefore, was to develop, through the usual legal techniques of verbal manipulation, ways of breaking out of the formal constraints of the perpetrator perspective while maintaining ostensible adherence to

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26. For an attempt to build an entire theory on a civil rights version of proximate cause, see Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication,* 52 N.Y.U. L. REV. 36, 42-99 (1977).

27. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 354-55 (1977); Milliken v. Bradley, 418 U.S. 717, 738-45 (1974).

> As applied here, the remedy for unquestioned violations of the equal protection rights of Detroit's Negroes . . . must be totally confined to the limits of the school district and may not reach into adjoining or surrounding districts unless and until it is proved there has been some sort of "interdistrict violation" . . . .
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> . . . The core of my disagreement [with the Court] is that deliberate acts of segregation and their consequences will go unremedied, not because a remedy would be infeasible or unreasonable . . . , but because an effective remedy would cause what the Court considers to be undue administrative inconvenience to the State.

Id. at 763 (White, J., dissenting).

28. *See* Palmer v. Thompson, 403 U.S. 217, 225 (1971) ("Here the record indicates only that Jackson once ran segregated public swimming pools and that no public pools are now maintained by the city. . . . It shows no state action affecting blacks differently from whites."); Evans v. Abney, 396 U.S. 435, 445 (1970) ("Here the effect of the Georgia decision eliminated all discrimination against Negroes in the park by eliminating the park itself, and the termination of the park was a loss shared equally by the white and Negro citizens of Macon . . . .").

the form itself. This was done by separating violation from remedy, and doing through remedy what was inappropriate in cases involving only identification of violations. But since one of the principal tenets of the perpetrator perspective is that remedy and violation must be coextensive, it was necessary to state that tenet and violate it at the same time, no mean task even for masters of verbal gamesmanship. For a while, the remedial doctrines seemingly undermined the hegemony of the perpetrator form, threatening to replace it with a victim perspective. In the end, however, form triumphed, and the perpetrator perspective, always dominant in identifying violations, was firmly reasserted in the context of remedies as well.

The next three parts of this Article will trace these doctrinal developments through the major Supreme Court cases and congressional enactments that comprise modern antidiscrimination law.

II. 1954-1965: THE ERA OF UNCERTAINTY, OR THE JURISPRUDENCE OF VIOLATIONS

In the first era of modern antidiscrimination law, commencing with the Supreme Court's decision in *Brown v. Board of Education* (*Brown I*),[29] there was little occasion to consider the limits of the perpetrator perspective. For the most part, the Court concerned itself with identifying violations rather than remedying them and was therefore able to remain within the perpetrator perspective tradition of merely declaring the illegality of specific practices.[30] Although it was obvious that school desegregation was going to require something more than a statement of illegality, the Court in its subsequent opinion in *Brown v. Board of Education* (*Brown II*)[31] chose to relegate the problem to lower courts, leaving ambiguous the scope of the remedial obligation.

The *Brown I* opinion offers no clear statement of the perpetrator perspective, however, containing within its inscrutable text a number of possible antidiscrimination principles that "explain" the result in the case. These in turn are linked to various "meanings" of the equal protection clause[32] and to conceptions of reality even more abstract

29. 347 U.S. 483 (1954).

30. For the most part, of course, there was no such tradition, since the separate-but-equal doctrine of Plessy v. Ferguson, 163 U.S. 537 (1896), and its progeny served to place much blatant discrimination beyond any declaration of illegality. Nevertheless, to the extent that there was antidiscrimination law, it was exclusively concerned with identifying and outlawing discrete practices. *See, e.g.*, Terry v. Adams, 345 U.S. 461, 470 (1953); Shelley v. Kraemer, 334 U.S. 1, 20 (1948); Smith v. Allwright, 321 U.S. 649, 663-64 (1944); Buchanan v. Warley, 245 U.S. 60, 82 (1917); Strauder v. West Virginia, 100 U.S. 303, 309 (1880).

31. 349 U.S. 294 (1955).

32. The "equal protection clause," as used herein, includes, of course, the equal

and ahistorical than the modern perpetrator perspective—meanings and conceptions that still occasionally insinuate themselves into arguments such as the debate about so-called "reverse" discrimination.[33]

A. The Equal Protection Clause

There are at least three different "meanings" that one can ascribe to the equal protection clause, each of which appears to explain a particular kind of controversy under that clause. The first, the "means-oriented" approach, regards the clause as nothing more than a judicial check on legislative mistakes. Under this view, the judicial role is to articulate permissible levels of overinclusion or underinclusion in legislative classifications and send back to the legislature those statutes that have exceeded the allowable tolerances. In its pure form, the principle is perfectly abstract, concerned only with questions of neatness;[34] inasmuch as it serves to check technique rather than goal, it is utterly value-neutral. It is, therefore, a principle suited to the demands of a formalistic, positivist jurisprudence that purports to separate rule application from questions of value.[35]

There is some question, however, whether the principle ever has been, or ever could be, applied in its pure form. On the one hand, the degree of overinclusion or underinclusion that will be tolerated necessarily varies with the subject matter of the legislation. This problem gives rise to the necessity of separating the occasions for "strict"

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protection dimension of the due process clause of the fifth amendment. *See* Bolling v. Sharpe, 347 U.S. 497 (1954).

33. *See, e.g.*, notes 70-78 *infra* and accompanying text (discussing the color-blind explanation of *Brown I*).

34. *See, e.g.*, 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, 20-24 (1972). "The [means-oriented] model of modest interventionism would have the courts do more than they have done for the last generation to assure rationality of means without unduly impinging on legislative prerogatives regarding ends." *Id.* at 23. *See also* Fiss, *Groups and the Equal Protection Clause*, 5 Philosophy & Pub. Aff. 107, 107-11, 120 (1976); Tussman & tenBroek, *The Equal Protection of the Laws*, 37 Calif. L. Rev. 341, 344-53 (1949) (discussing the principle of "reasonable classification").

35. *Cf.* Heller, *supra* note 12, at 388:

> [M]uch of the current attraction of law to economics seems to lie in the hope of finding a technocratic, value free, nondiscretionary method to resolve social problems. Such a quest for purely procedural justice reflects the influence of liberal social theory which, for historical reasons, is committed to the positivist principle that it is not possible to philosophically compare the merits of competing normative propositions. Contemporary jurisprudence, which has evolved in the liberal period, has drawn back from explicit consideration of the moral and distributional choices which must be made to provide the necessary legal structure for innovative types of conflict.

scrutiny from those demanding only "minimal" scrutiny. Since any legislative generalization is likely to fall if subjected to strict scrutiny, the choice between these alternatives takes on a highly substantive content with the judgment involved in that choice becoming the key decision.[36] Alternatively, the technique of means scrutiny may be employed as a cover for condemnation of an inappropriate purpose or for the creation or extension of a new substantive right.[37]

In either event, the means-oriented technique by itself is a procedural abstraction having nothing in particular to do with racial discrimination. Its application to racial discrimination cases depends on value choices external to questions of means alone. And even where means-oriented review is employed to confirm an implicit value choice about racial discrimination, the employment of this ostensibly value-neutral technique will have the effect of representing the problem of racial discrimination as an ahistorical abstraction removed from the actual setting that gave rise to the implicit value choice for intervention. Moreover, given its preoccupation with the validity of previously chosen means, this version of equal protection is wholly negative in outlook and therefore does not easily lend itself to remedying conditions associated with racial discrimination.

A second meaning of equal protection, which has on occasion produced affirmative remedies for conditions rather than just negative invalidation of practices, is the "fundamental right" rationale. This approach has arisen largely as a way for the Supreme Court to evade self-created limitations on judicial review while seeming to adhere to ground rules such as those offered by the famous footnote in *United States v. Carolene Products Co.*[38] Given a choice between

36. *Compare, e.g.*, Geduldig v. Aiello, 417 U.S. 484, 494-95 (1974), *and* Goesart v. Cleary, 335 U.S. 464, 466-67 (1948), *with* Califano v. Goldfarb, 430 U.S. 199, 206-07 (1977), Frontiero v. Richardson, 411 U.S. 677, 682-88 (1973) (plurality opinion), *and* Reed v. Reed, 404 U.S. 71, 74-77 (1971).

37. *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438, 448-49, 452-53 (1972) (means analysis obscures extension of the substantive right of privacy); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 666-67 (1966) (means analysis obscures extension of substantive voting rights). *See also* Skinner v. Oklahoma, 316 U.S. 535, 541-42 (1942).

38. 304 U.S. 144, 152 n.4 (1938) (citations omitted):

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. . . .
>
> It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. . . .
>
> Nor need we inquire whether similar considerations enter into the review

inventing a new constitutional right explicitly[39] and inventing a new constitutional right by pretending simply to enforce the text of the equal protection clause, the Court has on occasion used the fundamental right doctrine to do the latter.[40] Indeed, in its heyday, the fundamental right doctrine seemed to be the vehicle by which the Court would usher in an era of distributive justice.[41] Now that the smoke has cleared, however, all that happened was the affirmation of some formal, procedural rights.[42] Explicitly rejected as fundamental were those rights having more to do with the substantive conditions of life: education,[43] housing,[44] welfare payments,[45] the right to obtain an abortion[46] (as opposed to the right not to be prevented from going out and paying for one[47]), and even the right to the blessings of federal bankruptcy law.[48]

> of statutes directed at particular religious, . . . or national, . . . or racial minorities . . . : whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

39. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965) (creating a substantive right to privacy).

40. *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438, 448-49, 452-53 (1972) (extension of substantive right of privacy obscured by equal protection analytic framework); Shapiro v. Thompson, 394 U.S. 618, 627, 630-31 (1969) (extension of substantive right to travel obscured by equal protection analytic framework); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 666-67 (1966) (extension of substantive right to vote obscured by equal protection analytic framework).

41. For an eloquent presentation of this view, see Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969). For some, there are instances for continuing hope to be found in even the most depressing of recent opinions. *See* Tribe, *Unraveling* National League of Cities: *The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065 (1977).

The Warren Court's opinions certainly offered a basis for optimism and nearly implied that the fundamental right notion would be extended to substance. For example, Kramer v. Union Free School Dist., 395 U.S. 621 (1969), was trivial in its ostensible role as a voting case, but in its emphasis on the importance of education seemed to promise the opposite of what was finally decided in San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973). Similarly, Shapiro v. Thompson, 394 U.S. 618 (1969), while credible as a travel case, gains much greater force if regarded as the prelude to a contrary decision in Dandridge v. Williams, 397 U.S. 471 (1970).

42. *See, e.g.*, Boddie v. Connecticut, 401 U.S. 371 (1971); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Gideon v. Wainwright, 372 U.S. 335 (1963).

43. *See* Milliken v. Bradley, 418 U.S. 717 (1974); San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973).

44. *See* Lindsey v. Normet, 405 U.S. 56 (1972); James v. Valtierra, 402 U.S. 137 (1971).

45. *See* Dandridge v. Williams, 397 U.S. 471 (1970).

46. *See* Maher v. Roe, 432 U.S. 464 (1977); Poelker v. Doe, 432 U.S. 519 (1977).

47. *See* Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 179 (1973).

48. *See* United States v. Kras, 409 U.S. 434 (1973).

There is no necessary relation between the fundamental right concept and racial discrimination, since the doctrine is principally concerned with the fundamentality of the abstract right involved—a concern that is ostensibly neutral with respect to the race of the claimants. In fact, however, since racial minorities bear so disproportionately the burdens of economic class in the United States, any claim for substantive distributive justice is in essence a claim on behalf of those minorities. For practical reasons alone, the rejection of those claims forms part of the history of antidiscrimination law.

The fundamental right litigation also forms part of, or at least helps one to understand, the doctrinal, as well as the practical, history of antidiscrimination law. For one thing, many of the same decisions that denied fundamental right claims also refused to characterize the problems involved as ones of actual racial discrimination.[49] The Court accomplished that rejection by employing the narrow conception of violation associated with the perpetrator perspective. In addition, even apart from whether the cases should have been treated as racial discrimination cases, to have recognized substantive fundamental rights would have been tantamount to recognizing affirmative claims, a practice associated with the victim perspective. By rejecting such claims, the law, when directly confronted with the victim perspective, explicitly rejected it. Thus, what starts out as a victim perspective claim about the results of racial discrimination is transformed into a complaint about not racial but economic injustice, and then denied in those recast terms. The net effect is that the victim of racial discrimination must persevere until the utopian day when everyone is entitled to distributive justice.[50]

The third meaning of equal protection is the oldest one, and the one that speaks directly to discrimination against black people in the setting of American history. This meaning may be found in the tradition that regards the overwhelming goal of the Civil War amendments to be "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him."[51] Under this conception, the particular target of the equal protection clause is "discrimination against the negroes as a class, or on account of their race":[52]

49. *See* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 35-37, 57 (1973) (no fundamental right to education); Jefferson v. Hackney, 406 U.S. 535, 547-49 (1972) (by implication) (no fundamental right to obtain welfare benefits); James v. Valtierra, 402 U.S. 137, 140-41 (1971) (by implication) (no fundamental right to housing).

50. *See* Brest, *supra* note 17, at 5, 42-43, 52-53.

51. Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 71 (1873).

52. *Id.* at 81.

> The words of the amendment . . . contain a necessary implication of a positive immunity, or right, most valuable to the colored race, — the right to exemption from unfriendly legislation against them distinctively as colored, — exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race.[53]

This version of equal protection is one that I prefer to call "substantive equal protection" to emphasize both its centrality in relation to the other versions of equal protection and its clear focus on ends and purposes, and not just means or legislative rationality. Of the three versions of equal protection, this is the only one that, in employing phrases like "oppressions," "implying inferiority," or "condition of a subject race," speaks to the concrete historical situation of black people in the United States.[54]

To identify a separate principle of equal protection directly concerned with racial discrimination is hardly to give it content, however. In fact, substantive equal protection might be regarded as the source of such divergent formulations as Tussman and tenBroek's "discriminatory legislation,"[55] *Carolene Products'* "discrete and insular minorities,"[56] Owen Fiss' "group-disadvantaging principle,"[57] and

53. Strauder v. West Virginia, 100 U.S. 303, 307-08 (1880).

54. This is not to suggest that no other oppressed group can claim the benefit of substantive equal protection, but only that any such claim must be premised on a similarity between that group's condition and the basic model of white oppression of blacks.

55. *See* Tussman & tenBroek, *supra* note 34, at 356-61.

56. 304 U.S. at 152 n.4. The text of the *Carolene Products* footnote appears in note 38 *supra*. *See generally* Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 729-32 (1974).

57. *See* Fiss, *supra* note 34. Fiss purports to articulate a new conception of equal protection, which he calls the "group-disadvantaging principle." Although the article is ambiguous, and may well do more, Fiss seems to describe as a new principle of antidiscrimination law one that is difficult to distinguish from the modern perpetrator perspective version of substantive equal protection. For one thing, he sets up the narrow means-oriented view as the existing principle against which his new one is to be measured, *see id.* at 107-12, noting, but seemingly discarding, the traditional substantive content of equal protection, *see id.* at 110 n.2, 112, 117 n.14. By going against the easy target, Fiss does not have to go further and discuss competing substantive notions of equal protection. The extent to which his principle might go beyond the perpetrator perspective remains unclear. His discussion is limited to antidiscrimination law under the equal protection clause, rather than antidiscrimination law generally. Under that doctrine, the state is the only perpetrator. Fiss makes it clear that he would limit the application of his principle to practices or action by the state, and he rejects the notion of affirmative claims. *See id.* at 168-70. On the critical question of whether particular practices produce "status-harms" and thereby violate his principle, it is uncertain whether some notion of intent accompanying the practice is relevant or not. *See id.* at 153-59.

Paul Brest's "antidiscrimination principle."[58] Although occasionally threatened by the means-oriented principle, which, in some of its manifestations, tries to consume and supplant substantive equal protection,[59] it is the latter that forms the basis of modern antidiscrimination law and tells us which instances of racial discrimination are to be deemed violations.[60]

A great deal of the confusion surrounding these three separate principles of equal protection stems from their frequent appearance together in individual cases. Given the ambiguity of Supreme Court opinions, it may be nearly impossible to discover in any particular case which principle is the controlling one, or whether it is some, or all. In *Harper v. Virginia State Board of Elections,*[61] for example, the Court struck down as violative of the equal protection clause a Virginia statute requiring payment of an annual tax of $1.50 as a precondition to eligibility for voting. Using means-oriented language, the Court noted that wealth was "not germane to one's ability to participate intelligently in the electoral process," that it was a "capricious or irrelevant factor."[62] This approach makes perfect sense if one assumes that the purpose of the poll tax was to classify potential voters into two categories: those interested in the election (worthwhile voters) and those not interested in the election (worthless voters), with willingness to pay the tax the measure of sufficient interest. It is obvious that the taxpayer category is both overinclusive and underinclusive as a measure of voter interest, since it will include some people who pay the tax just because it is due, regardless of how they feel about voting, while it will exclude others who really care about voting but who cannot afford to pay the tax. The classification thus fails to fit the purpose, and the legislation is not rational.

One problem is that if, as Justice Black did in his *Harper* dissent,[63] one merely adds another purpose to the analysis of the tax—that of collecting revenue—it is hard to say why it is irrational to use the privilege of voting to coerce payment. In fact, it is difficult to see why that choice is any less rational than attaching bank accounts, or seizing property, or putting people in jail, or denying them

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On the other hand, the Fiss article is to be applauded for its careful separation of substantive equal protection from the other equal protection principles, its placement of that notion in its specific historical context, and its admonition to refrain from interpreting the equal protection clause as if its implicit classless individualistic society already existed. *See id.* at 147-50.

58. *See* Brest, *supra* note 17.

59. *See* notes 70-78 *infra* and accompanying text.

60. *See* text accompanying notes 90-94 *infra.*

61. 383 U.S. 663 (1966).

62. *Id.* at 668.

63. *See id.* at 674.

the right to drive automobiles. All this suggests that the case had more to do with the fact that voting was involved than with a mere question of rationality. This view also finds support in the majority opinion, which cites a fundamental right precedent for the proposition that " 'the opportunity for equal participation by all voters in the election of state legislators' is required."[64] This version is bolstered by hindsight, since the Court did go on to develop a substantive jurisprudence of voting as a fundamental right, spelling out in subsequent cases that the right to vote in a general election[65] could not be conditioned on anything other than age, minimal residence, and citizenship.[66]

A third explanation of *Harper* concerns the employment of the poll tax as an administrative device for disenfranchising black people in the South. The Court made no more than passing reference to what would be a substantive equal protection view of the case, merely observing in a footnote that while the " 'Virginia poll tax was born of a desire to disenfranchise the Negro' . . . we do not stop to determine whether on this record the Virginia tax in its modern setting serves the same end."[67] In the next footnote, however, the Court neutrally catalogued the states still using poll taxes as prerequisites to voter eligibility, which, in addition to Virginia, just happened to be Alabama, Texas, and Mississippi.[68]

Having identified these various "meanings" of equal protection, this Article will now return to the more specific context of racial discrimination cases to illustrate how these alternative views may be

64. *Id.* at 670 (quoting Reynolds v. Sims, 377 U.S. 533, 566 (1964)).

65. The Court has distinguished the right to vote in general elections from the right to vote in special elections dealing with issues of particular interest to a limited class of people. *Compare* City of Phoenix v. Kolodziejski, 399 U.S. 204, 206, 215 (1970) (holding unconstitutional as a violation of equal protection an Arizona constitutional and statutory scheme that restricted voting in an election to approve issuance of general obligation bonds to those who paid tax on real property), *and* Kramer v. Union Free School Dist., 395 U.S. 621, 622, 633 (1969) (holding unconstitutional as a violation of equal protection a New York statute that restricted voting in school district elections to those who either owned or leased taxable real property within the district or were parents or had custody of children enrolled in the local public schools), *with* Salyer Land Co. v. Tulare Lake Basin Water Sewage Dist., 410 U.S. 719, 720-21, 725, 734-35 (1973) (holding that a California statute restricting voting in water storage district elections to landowners did not violate equal protection since the water storage district was " 'a special-purpose unit of government assigned the performance of functions affecting definable groups of constituents more than other constituents.' ") (quoting Avery v. Midland County, 390 U.S. 474, 483-84 (1968)).

66. *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330 (1972).

67. Harper v. Virginia Bd. of Elections, 383 U.S. 663, 666 n.3 (1966) (quoting Harman v. Forssenius, 380 U.S. 528, 543 (1965)).

68. *See id.* at 666 n.4.

linked to the development of antidiscrimination doctrine. The illustrative case is *Brown I.*

B. *Brown v. Board of Education*[69]

There are a number of different ways of looking at the *Brown* case, all of which permeate the subsequent evolution of antidiscrimination law. I shall discuss five such: the color-blind constitution theory; the equality of educational opportunity theory; the white oppression of blacks theory; the freedom of association theory; and the integrated society theory.

1. *Color-Blind Constitution*

To explain *Brown* by invoking the slogan that the "Constitution is color-blind"[70] reflects the means-oriented view of the equal protection clause. On this view, what was wrong with school segregation was that government was employing an irrational classification—race. This approach, however, does not explain why it was irrational to classify people by race if the purpose was to prevent blacks and whites from going to school together. How else could one rationally achieve segregation by race in public schools? One answer is that the purpose itself is illegitimate, that it is no business of government to seek to segregate by race in public schools. If that is the answer, however, the color-blind constitution theory is not a means-oriented approach at all, but rather one that collapses into substantive equal protection. If that is the case, however, one must consider not legislative rationality, but, as I suggested above, particular relationships between blacks and whites in the context of American history.

A ploy that avoids the quick collapse into substantive equal protection is to bootstrap the means-oriented principle into its own substantive principle. This is done by starting with the means-oriented assumption that racial classifications are almost always unrelated to *any* valid governmental purpose (purpose here being the wholly abstract world of possible purposes). Since such classifications are likely to be irrational, they should be treated as "suspect," and subjected to "strict scrutiny," which they will survive only if found to satisfy a "compelling governmental interest."[71] If the degree of scrutiny is so

69. 347 U.S. 483 (1954).

70. The color-blind theory was first given explicit voice in 1896: "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting); *see* Posner, *The DeFunis Case and The Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1, 21-26; *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1088-89 (1969) [hereinafter cited as *Developments—Equal Protection*].

71. *See Developments—Equal Protection, supra* note 70, at 1088-90.

strict and the possibility of a sufficiently compelling governmental interest so remote that the rule operates as a virtual per se rule, we then seem to have a means-oriented principle that explains the *Brown* case.

The problem with this second formulation of the color-blind theory is that it still contains a substantive assumption: racial classifications are almost always unrelated to any valid governmental purpose. As an abstract matter, this is hardly intuitively obvious.[72] One could easily envision a society where racial or other ethnic classifications are unrelated to any pattern of oppression or domination of one group by another and, in fact, promote feelings of group identity.[73] Thus, the initial assumption cannot be made except in the context of a particular historical situation, and the source of the assumption that underlies the color-blind theory can easily be found in American history by taking a brief glance at relationships between whites and blacks. Accordingly, the color-blind theory must originate in a notion of substantive equal protection.

Despite this fact, the color-blind theory has tended to become a reified abstraction, to gain a life of its own, and finally to turn back on its origins. Thus, a pure form of the color-blind theory would outlaw any use of racial classifications, no matter what the context, thereby providing easy answers to questions like whether a black community can refuse to participate in an integration plan[74] or whether black students at a public university can establish their own housing units from which whites are excluded. The answers remain easy only so long as the theory remains divorced from its origins in the actuality of black-white relations. By abstracting racial discrimination into a myth-world where all problems of race or ethnicity are fungible, the color-blind theory turns around and denies concrete demands of blacks with the argument that to yield to such demands would be impossible since every other ethnic group would be entitled to make the same demand.[75]

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72. Consider, for example, Paul Brest's illuminating hypothetical: "How should a court treat a school principal's decision, based solely on aesthetics, to have black and white students sit on opposite sides of the stage at the graduation ceremony?" P. BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 489 (1975). The validity of this hypothetical seems no more difficult a question than the validity of school segregation in general. Both require a look at the concrete historical setting to figure out who is doing what to whom at whose behest. *Compare* Fiss, *supra* note 34, at 116-17.

73. *See* Wasserstrom, *supra* note 8, at 603-15.

74. Consider, for example, Derrick Bell's hypothetical on this issue, in D. BELL, RACE, RACISM AND AMERICAN LAW 572-73 (1973).

75. *See* Swain v. Alabama, 380 U.S. 202, 208 (1965); Hughes v. Superior Court, 339 U.S. 460, 464 (1950).

> The reservation of a proportion of the law school class for members of selected minority groups is fraught with . . . dangers, for one must immedi-

The color-blind theory has never become the law; the Supreme Court has in fact explicitly upheld the remedial use of racial classifications on a number of occasions.[76] Nevertheless, the theory does share certain features with something that is part of the law—the perpetrator perspective. Among these features is the emphasis on negating specific invalid practices rather than affirmatively remedying conditions, with a consequent inability to deal with ostensibly neutral practices.[77] In addition, the color-blind theory exerts an insistent pressure on antidiscrimination law to produce special justifications for deviations from its norm and to limit their duration to facilitate a quick return to the comfortable, abstract world of color-blindness.[78]

2. *Equality of Educational Opportunity*

Brown can also be viewed as a case concerned with equality of educational opportunity. This approach corresponds with the fundamental right concept of equal protection. Under this view, *Brown* did not merely outlaw segregation in public schools; it also guaranteed that black children would have an affirmative right to a quality of education comparable to that received by white children. The Court in its opinion stressed the importance of education, calling it the "very foundation of good citizenship,"[79] and "a principal instrument in awakening the child to cultural values, in preparing him for later

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ately determine which groups are to receive such favored treatment and which are to be excluded . . . . [F]irst the schools, and then the courts, will be buffeted with the competing claims.

. . . .

Nor . . . will the problem be solved if next year the Law School included only Japanese and Chinese, for the Norwegians and Swedes, Poles and Italians, Puerto Ricans and Hungarians, and all other groups which form this diverse Nation would have just complaints.

DeFunis v. Odegaard, 416 U.S. 312, 338, 340 (1974) (Douglas, J., dissenting).

But one should not underestimate the force of ideology. Consider the actual "ethnicity" movement that has emerged in recent years through which such demands are actually being asserted. *See, e.g.*, ETHNICITY (N. Glazer & D. Moynihan eds. 1975); THE REDISCOVERY OF ETHNICITY (paperback ed. S. TeSelle 1974); Stein & Hill, *The Limits of Ethnicity*, 46 AM. SCHOLAR 181 (1977).

76. *See, e.g.*, United Jewish Organizations v. Carey, 430 U.S. 144 (1977); Wright v. Council of Emporia, 407 U.S. 451 (1972); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971). *See also* Monroe v. Board of Comm'rs, 391 U.S. 450 (1968).

77. For a discussion of how antidiscrimination law has dealt with ostensibly neutral practices, see text accompanying note 132 *infra*; notes 180-203 *infra* and accompanying text.

78. *See* Brest, *supra* note 17, at 15; Fiss, *supra* note 34, at 129-35; Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role*, 42 U. CHI. L. REV. 653, 675-81 (1975).

79. 347 U.S. at 493.

professional training, and in helping him to adjust normally to his environment."[80] The Court added that where a state undertakes to provide public education, it "is a right which must be made available to all on equal terms."[81]

By way of hindsight, the case stood for both more and less than a guarantee of equal educational quality. It came to stand for more insofar as its holding was quickly extended to other forms of state-imposed segregation.[82] But it stood for a great deal less insofar as black children today have neither an affirmative right to receive an integrated education[83] nor a right to equality of resources for their schools,[84] which, ironically, was a litigable claim under the regime of de jure segregation.[85] While there is no way to prove "objectively" what the opinion in *Brown* meant with respect to a right to educational equality, both a claim for equal resources and a claim for the

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80. *Id.*

81. *Id.* This view is also consistent with the litigation strategy of the lawyers in *Brown*, for whom the case was the culmination of years of effort to obtain a quality education for black children, first within the structure of separate-but-equal and then in open confrontation with that structure. *See* R. KLUGER, SIMPLE JUSTICE 3-540 (1975).

82. *See, e.g.*, Gayle v. Browder, 352 U.S. 903, *aff'g per curiam* 142 F. Supp. 707 (M.D. Ala. 1956) (buses); Holmes v. City of Atlanta, 350 U.S. 879, *vacating per curiam* 223 F.2d 93 (5th Cir. 1955) (municipal golf courses); Mayor of Baltimore v. Dawson, 350 U.S. 877, *aff'g per curiam* 220 F.2d 386 (4th Cir. 1955) (public beaches and bathhouses).

83. *See* Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 436-37 (1976); Milliken v. Bradley, 418 U.S. 717, 744-45 (1974). "The suggestion . . . that schools which have a majority of Negro students are not 'desegregated,' whatever the racial makeup of the school district's population and however neutrally the district lines have been drawn and administered, finds no support in our prior cases." *Id.* at 747 n.22.

84. *See* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 50-51 (1973).

85. The inner core of Detroit is now rather solidly black; and the blacks, we know, in many instances are likely to be poorer, just as were the Chicanos in *San Antonio School District* v. *Rodriguez* . . . . By that decision the poorer school districts must pay their own way. It is therefore a foregone conclusion that we have now given the states a formula whereby the poor must pay their own way.

Today's decision, given *Rodriguez*, means that there is no violation of the Equal Protection Clause though the schools are segregated by race and though the black schools are not only "separate" but "inferior."

So far as equal protection is concerned we are now in a dramatic retreat from the 7-1 decision in 1896 that blacks could be segregated in public facilities, provided they received equal treatment.

Milliken v. Bradley, 418 U.S. 717, 759-61 (1974) (Douglas, J., dissenting) (citation and footnotes omitted).

This is not to suggest that black children were better off under the regime of *Plessy*, inasmuch as "separate-but-equal" did not have to be equal. *See* Cumming v. Richmond County Bd. of Educ., 175 U.S. 528 (1899). On the other hand, the irony is underscored by the successful lawsuits demanding equalization in the years immediately prior to *Brown I*. *See* R. KLUGER, *supra* note 81, at 543-81, and cases cited therein.

choice of an integrated education can be supported from the text of the opinion. The Court assumed for its opinion that the black and white schools in the cases under review "have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other 'tangible' factors."[86] With respect to the fact of integration, the Court quoted a finding of one of the lower courts: " 'Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group.' "[87] To the extent the text suggests that the detrimental effect, with its attendant denotation of inferiority, would persist even in the absence of state sanction, the case may be read as addressing not the *practice* but the *fact* of racial separation.

For the Court to have recognized affirmative claims to resources or integrated classrooms would have been to adopt explicitly a victim perspective on racial discrimination. Essential to this perspective is the conferral upon the members of the formerly oppressed group a choice that is real and not merely theoretical with respect to conditions over which they had no control under the regime of oppression. Instead, under the perpetrator perspective, the Court recognizes only the right of the black children to attend schools that are not intentionally segregated by the jurisdiction that runs them. This right, it is argued, is all that *Brown* stands for anyway, since all the case did was outlaw de jure segregation. And the famous "social science footnote"[88] of *Brown* is today turned inside-out to make the question of whether integration can be compelled nothing more than a matter of empirical study of educational "outputs."[89]

3. *White Oppression of Blacks*

On this view, the *Brown* case was a straightforward declaration that segregation was unlawful because it was an instance of majoritarian oppression of black people, a mechanism for maintaining

86. 347 U.S. at 492.

87. *Id.* at 494 (quoting "a finding in the Kansas case").

88. *See id.* at 494 n.11.

89. *See, e.g.*, C. JENCKS, INEQUALITY 97-106 (1972); Fiss, *School Desegregation: The Uncertain Path of the Law*, 4 PHILOSOPHY & PUB. AFF. 3, 36-39 (1974); Kaplan, *Equal Justice in an Unequal World: Equality for the Negro—The Problem of Special Treatment*, 61 NW. U.L. REV. 363, 401-04 (1966); Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CALIF. L. REV. 275, 436-37 (1972); *cf.* Castaneda v. Partida, 430 U.S. 482, 515-16 (1977) (Powell, J., dissenting) (commenting on empirical assumptions underlying jury discrimination law). *But see* Yudof, *Equal Educational Opportunity and the Courts*, 51 TEX. L. REV. 411, 459-64 (1973). *See generally* SCHOOL DESEGREGATION (F. Levinsohn & B. Wright eds. 1976).

blacks as a perpetual underclass. This approach, which begins and ends with historical fact instead of trying to find a neutral abstraction from which one can deduce the invalidity of segregation, was eloquently stated by Charles Black in 1960:

> First, the equal protection clause of the fourteenth amendment should be read as saying that the Negro race, as such, is not to be significantly disadvantaged by the laws of the states. Secondly, segregation is a massive intentional disadvantaging of the Negro race, as such, by state law. No subtlety at all. Yet I cannot disabuse myself of the idea that that is really all there is to the segregation cases.[90]

That this was the "explanation" for the "segregation cases" was self-evident to Professor Black on the basis of both American history and his own boyhood experience in Texas.[91] The striking feature of Professor Black's approach is that it makes sense not as the presentation of another "neutral principle" that can be separated from its factual context and given a life of its own,[92] but as a method for taking a hard look at the truth and describing it as one knows it to be. It is the same method that the Supreme Court used, in a more candid opinion than *Brown,* to outlaw Virginia's criminal miscegenation statute:

> There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy.[93]

As a method, the white oppression of blacks approach would ask in each case whether the particular conditions complained of, viewed in their social and historical context, are a manifestation of racial oppression. Such an approach would reflect adoption of the victim perspective. It is not an approach congenial to a system of law that wishes to rationalize continued discrimination just as much as it wants to outlaw it.[94] That goal, if it is to be accomplished through a practice that can be convincingly described as "law," requires a gap between social reality and legal intervention, with that gap mediated

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90. Black, *The Lawfulness of the Segregation Decisions,* 69 YALE L.J. 421 (1960); *accord,* Cahn, *Jurisprudence,* 30 N.Y.U. L. REV. 150, 159-60 (1955).

91. *See* Black, *supra* note 90, at 424.

92. The penchant for neutral principles is reflected in Fiss, *supra* note 34. The classic is Wechsler, *Toward Neutral Principles of Constitutional Law,* 73 HARV. L. REV. 1 (1959).

93. Loving v. Virginia, 388 U.S. 1, 11 (1967) (footnote omitted).

94. *See* notes 215-23 *infra* and accompanying text.

by an abstract, objective principle against which particular instances of discrimination can be tested and upheld or struck down depending on the results.

Regarded as a principle, Professor Black's formulation is ambiguous, however, and can lead just as easily to a perpetrator perspective. One can argue that he said nothing more than that "Southern" segregation is illegal, that the violation is simply the practice of intentional, de jure segregation. So formulated, the principle does not speak to the problem of remedying that practice, nor does it indicate which other practices or conditions might be regarded as sufficiently similar to "Southern" segregation to be deemed unlawful. That the version of substantive equal protection described by Professor Black is the explanation for *Brown* seems obvious, but it took some years to transform his method into an abstraction, largely under the influence of the color-blind theory.

4. *Freedom of Association*

The "freedom of association" view sees *Brown* not as an equal protection case at all, but as a case dealing with the due process right of people to associate with one another free of state interference.[95] While it is clear that this was not the actual rationale of the *Brown* opinion, as the Court specifically eschewed reliance on any due process theory[96] and later cases specifically rejected the freedom of association viewpoint,[97] it nevertheless seems worth discussing. For one thing, the freedom of association theory may be a more accurate explanation of the limits of *Brown* in its historical context. Second, the freedom of association theory exemplifies the rationalization that serves to legitimize discrimination and therefore provides an early model for the contemporary perpetrator perspective. Third, it is still

95. *See* D. BELL, *supra* note 74, at 452; Wechsler, *supra* note 92, at 34.

96. "[W]e hold that the plaintiffs . . . are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. This disposition makes unnecessary any discussion whether such segregation also violates the due process clause of the Fourteenth Amendment." 347 U.S. at 495 (footnote omitted).

97. The Court rejected the freedom of association interpretation of *Brown I* by holding that school desegregation plans that did no more than allow students free associational choice were constitutionally inadequate. *See* Monroe v. Board of Comm'rs, 391 U.S. 450, 457-58 (1968); Green v. County School Bd., 391 U.S. 430, 440-42 (1968). In *Green,* the Court stressed that the goal of *Brown I* and *Brown II* was the creation of unitary school systems. *See id.* at 436. Desegregation plans that relied purely on associational choice were acceptable only where they offered "real promise of aiding a desegregation program." *Id.* at 440-41. "On the other hand, if there are reasonably available other ways . . . promising speedier and more effective conversion to a unitary, nonracial school system, 'freedom of choice' " was "unacceptable." *Id.* at 441.

a living principle, although one operating in a narrow context, that does serve to explain some contemporary decisions. Finally, the theory shares some significant features with the color-blind theory and further exposes the abstract world view associated with color-blindness.

The freedom of association theory is as much a statement about the right to discriminate as it is about the right not to be discriminated against. All it outlaws is state action. The autonomous individual remains free to discriminate, or not, according to personal preference. Racial discrimination is thus wrenched from its social fabric and becomes a mere question of private, individual taste. This theory serves to explain the few Supreme Court interventions against racial discrimination during the otherwise racist hegemony of *Plessy v. Ferguson*.[98] But it also sheds light on *Brown*, since the ethical norm reflected in national antidiscrimination law at the time of the *Brown* decision was one that recognized the legitimacy of private discrimination. Because of the constraints of the state-action principle, there was nothing illegal, as a matter of *national* law, about blatant and explicit discrimination in employment, housing, or public accommodations, so long as such practices were "private."[99] The freedom of association theory legitimizes that tolerance of racial discrimination by transforming it into a freedom to discriminate. It thus speaks directly to the needs of an era that had not yet fully developed even the perpetrator perspective, inasmuch as only one perpetrator—the state—could be held accountable for racial discrimination.

On its own terms, the theory became moot with the subsequent

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98. 163 U.S. 537 (1896).

> [V]oluntary adherence [to a racially restrictive covenant] would constitute individual action only. When, however, the parties cease to rely upon voluntary action to carry out the covenant and the state is asked to step in and give its sanction to the enforcement of the covenant, . . . it becomes not respondent's voluntary choice but the state's choice that she observe the covenant or suffer damages. The action of a state court . . . to sanction the validity of the restrictive covenant . . . constitute[s] state action [violative of the Equal Protection Clause].

Barrows v. Jackson, 346 U.S. 249 (1953); *see* Shelley v. Kraemer, 334 U.S. 1, 19-20 (1948); Buchanan v. Warley, 245 U.S. 60, 80-81 (1917).

99. "[C]ivil rights, such as are guaranteed by the constitution against state aggression, cannot be impaired by the wrongful acts of individuals, unsupported by state authority. . . . The wrongful act of an individual, unsupported by any such authority, is simply a private wrong . . . ." The Civil Rights Cases, 109 U.S. 3, 17 (1883). For a particularly blatant example, see Dorsey v. Stuyvesant Town Corp., 299 N.Y. 512, 542-45, 87 N.E.2d 541, 553-57 (1949) (Fuld, J., dissenting) (exclusion of Negroes from a $90,000,000 housing project occupying some eighteen city blocks and housing some 25,000 people deemed a private action not violative of equal protection, despite significant state involvement with the project), *cert. denied*, 339 U.S. 981 (1950).

demise of the state-action doctrine through legislation[100] and constitutional decisions[101] expanding the list of responsible perpetrators. It serves to explain only those contemporary decisions that do affirm a right to discriminate in the limited areas that are still beyond the reach of the perpetrator principle.[102] But the presence of even those few areas of permissible discrimination does keep alive the idea that racial discrimination is ethically proper, as long as it is restricted to private life.

Where it does apply, the freedom of association theory implies a notion of racial equivalence similar to the color-blind theory's idea that blacks and whites have equal grounds for complaint about instances of racial discrimination. In this sense, the two theories share a world view—the abstract utopia where racial discrimination has never existed and where, ironically, both theories would probably be irrelevant. The only way that discriminations by whites against blacks can become ethically equivalent to discriminations by blacks against whites is to presuppose that there is no actual problem of racial discrimination. It is just like saying today that the principles of freedom of association and color-blindness govern relationships between long- and short-ear-lobed people.[103]

5. *The Integrated Society*

This view is not so much another way of explaining the *Brown* decision as it is an additional perspective from which to regard all of the other theories and explanations. It begins with the assumption that a decision like *Brown*, which merely outlaws a particular practice, nevertheless implies that the practice is being outlawed to achieve a desired end-state where conditions associated with the outlawed practice will no longer be evident. If particular practices are to be outlawed as deviations from a norm, then the norm must in-

100. *See, e.g.*, Civil Rights Act of 1964, 42 U.S.C. §§ 2000a to 2000h-16 (1970). Although formally relying on the commerce clause, the legislation was a practical circumvention of the state-action doctrine insofar as it applied to congressional legislative authority and has been so recognized in more candid later opinions. *Compare* Katzenbach v. McClung, 379 U.S. 294 (1964), *with* Fitzpatrick v. Bitzer, 427 U.S. 445, 453 n.9 (1976).

101. *See, e.g.*, Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) (Congress can outlaw private discrimination under the thirteenth amendment, which has no state-action limitation); United States v. Guest, 383 U.S. 745 (1966) (six Justices agreeing that Congress has the power under section 5 of the fourteenth amendment to reach private conspiracies to deprive persons of civil rights); Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961) (state involvement transforms private into public conduct).

102. *See, e.g.*, Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972); Civil Rights Act of 1964 § 201(e), 42 U.S.C. § 2000a(e) (1970) (private club exemption from public accommodations statute).

103. *See generally* Wasserstrom, *supra* note 8, at 585-86.

clude within it a vision of society where there would not be such deviations. It should then be possible to test current conditions against the desired end-state to decide whether progress is being made. The end-state usually associated with antidiscrimination law is some version of the "integrated society."[104] This ambiguous phrase, however, contains within it a number of possibilities as to the content of the end-state, the extent to which it has already been achieved, and in whose interest it is to achieve it.

The most complete version of the integrated society can be found in the science-fiction story where it is the year 2200 and everybody is a creamy shade of beige.[105] Race has not only become irrelevant, it has disappeared altogether under the guiding hand of genetic entropy. A second and slightly less extreme version of the utopia posits a society where racial identification is still possible, but no longer relevant to anyone's thinking or generalizations about anyone else. In this world of racial irrelevance, the sensory data employed in making a racial identification would still be available, but would have returned to the domain of other similar human identification data in such a way as to obliterate the cultural concept of race. Race would have become functionally equivalent to eye-color in contemporary society. In a third version of the integrated society, racial identification persists as a cultural unifying force for each group, equivalent to an idealized model of religious tolerance.[106] Each group respects the diverse character of every other group, and there are no patterns of domination or oppression between different groups.

Each of these visions of the future reflects the achievement of a casteless, if not classless, society in which there is no hierarchy of status that corresponds with racial identification. The essential defect in the color-blind theory of racial discrimination is that it presupposes the attainment of one of these futures. It is a doctrine that at the same time declares racial characteristics irrelevant and prevents any affirmative steps to achieve the condition of racial irrelevance. The freedom of association theory, to the extent it is antidiscrimination at all, also presupposes an already existing future, but it is the tolerance model that it contemplates.

These theories are not alone in presupposing the goal that one is supposedly working toward. Suppose one were to visit the future

104. *See id.* at 603-15. Although I stress different aspects of the "future society" concept, I gained much insight from and acknowledge a debt to Richard Wasserstrom for his clarification of the similar dichotomy between "social reality" and "ideal."

105. *See, e.g.*, Brown & Reynolds, *Dark Interlude*, in NIGHTMARES AND GEEZENSTACKS 74 (paperback ed. 1961) (male unirace visitor from the future travels to the South of the 1950's, marries a white woman, and is subsequently murdered by the woman's father after revealing his mixed racial background).

106. *See* Wasserstrom, *supra* note 8, at 604-05.

society of racial irrelevance and discover conditions that in any other society might be regarded as corresponding with a pattern of racial discrimination. Among such conditions might be that one race seems to have a hugely disproportionate share of the worst houses, the most demeaning jobs, and the least control over societal resources. For such conditions to be fair and accepted as legitimate by the disfavored race in future society, they would have to be perceived as produced by accidental, impartial, or neutral phenomena utterly disassociated from any racist practice. Otherwise the future society would fail to meet its claim of racial irrelevance and would not be a future society at all.

Any theory of antidiscrimination law that legitimizes as nondiscriminatory substantial disproportionate burdens borne by one race is effectively claiming that its distributional rules are already the ones that would exist in future society. From the perspective of a victim in present society, where plenty of explicitly racist practices prevail, the predictable and legitimate demand is that those ostensibly neutral rules demonstrate themselves to be the ones that would in fact exist in future society. The legitimacy of the demand is underscored by the fact that those very rules appealed to by the beneficiaries to legitimize the conditions of the victims were created by and are maintained by the dominant race. From the perpetrator perspective, however, those practices not conceded to be racist are held constant; they are presumed consistent with the ethics of future society, and the victims are asked to prove that such is not the case. This is a core difference between the victim and perpetrator perspectives.

A vision of the future also bears on the question of whom attainment of the integrated society benefits. To introduce this issue more precisely, one might ask whether the integrated society is an end in itself, or just a symbolic measure of the actual liberation of an oppressed racial group from the conditions of oppression. To say that the integrated society is an end in itself, apart from the interest of the oppressed group in its own liberation, is basically to say that the goal is in the interest of society at large, or in the interest of the dominant group as well as the oppressed one. It is hardly controversial to contend that integration is for everyone's benefit, or even that it is in some sense for the benefit of the dominant group.[107] Problems arise when interests diverge and the dominant group's desire for integration supersedes the victim group's demand for relief.

Although rarely litigated, this issue did arise in *Otero v. New York City Housing Authority*.[108] The Second Circuit there upheld in

107. *See, e.g.*, Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972); *cf.* HEGEL, THE PHENOMENOLOGY OF MIND 228-40 (paperback ed. J. Baillie trans. 1967) (1st ed. Bamberg 1807) (lordship and bondage).

108. 484 F.2d 1122 (2d Cir. 1973).

principle the notion of a benign "integration quota" to be imposed on black residents of a housing project so as to limit their numbers.[109] The purpose of such a quota is to keep the number of black people below the level where, according to social scientists, a "tipping point" will be reached where the white majority, presumably motivated by racism, will leave the area.[110] The net result of this approach is both to keep the black group as a small minority witin the project and to deny the benefit to blacks otherwise eligible for it, all for the sake of producing an "integrated result." In such a situation, it is really unclear whose interests the integrated result serves.

The potential conflict of interest raised by the "integration quota" problem is a powerful metaphor for some of the deeper problems of antidiscrimination law. Such a quota admits a token number of black people to a more desirable condition of existence, thereby illustrating progress toward the integrated society, while making sure they remain outnumbered by the whites so as to be powerless and nonthreatening. And at the same time the deprivation imposed on those blacks who are denied admission is rationalized as being in everybody's interest since an integrated society is the goal to be attained.

C. POST-*Brown* DEVELOPMENTS

The remainder of the era of uncertainty offered almost no occasions for resolving any of the ambiguities of *Brown* or exposing the difference between the perpetrator and victim perspectives. Instead, the major task for that era, which put off the question of remedy,[111] was to increase the list of perpetrators against whom antidiscrimination law might be directed. This was accomplished largely through the systematic demolition of the state-action doctrine, a process involving liberal interpretation,[112] partial abolition,[113] judicial[114] and leg-

109. *See id.* at 1134-36.

110. On the subject of "tipping points," see Ackerman, *Integration for Subsidized Housing and the Question of Racial Occupancy Controls,* 26 STAN. L. REV. 245, 254-60 (1974).

111. *See* Brown v. Board of Educ., 349 U.S. 294, 300-01 (1955).

112. *See, e.g.,* Reitman v. Mulkey, 387 U.S. 369, 376-77 (1969); Griffin v. Maryland, 378 U.S. 130, 133, 136-37 (1964); Burton v. Wilmington Parking Auth., 365 U.S. 715, 723-24 (1961).

113. *See* United States v. Guest, 383 U.S. 745 (1966) (six Justices agreeing that Congress had power under the fourteenth amendment to reach private conspiracies that interfere with constitutional rights).

114. Griffin v. Breckinridge, 403 U.S. 88, 105-07 (1971) (no need to reach state-action issue because the alleged and arguably private violation trenched on the constitutional right to travel); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 438-44 (1968) (no need to reach state-action issue because the private violation was within the purview of congressional power under thirteenth amendment).

islative circumvention,[115] and a great deal of human effort.[116]

On one of the few occasions that the Court did have a chance to elaborate on the emerging antidiscrimination principle, it opted for steadfast adherence to the perpetrator perspective. In *Swain v. Alabama*,[117] a black man in Talladega County, Alabama, who had been convicted of rape and sentenced to death, brought to the Supreme Court a claim of jury discrimination.[118] He offered three facts in support of this claim: first, that while blacks accounted for 26% of the relevant local population, only ten to fifteen percent of the grand and petit jury panels had been black since 1953; second, that in the immediate prosecution, the prosecutor had used his peremptory challenges to exclude all blacks from the jury that tried the defendant; and, third, that no black had ever served on an actual petit jury in a civil or criminal case in the county.

The Supreme Court denied the claim, rationalizing all three facts into irrelevance and invoking much of the doctrine associated with the perpetrator perspective. The Court began by acknowledging that purposeful exclusion of blacks from juries had been unconstitutional since *Strauder v. West Virginia*[119] had been decided in 1880, but then reminded the defendant that "purposeful discrimination may not be assumed or merely asserted. . . . It must be proven . . . ."[120] As for the statistical disparity, the Court concluded: "We cannot say that purposeful discrimination based on race alone is satisfactorily proved by showing that an identifiable group in a community is underrepresented by as much as 10%."[121] Why not? Was it a matter of mere accident or random factors? Perhaps that would be the case in the future color-blind society, but this was Alabama in the 1950's and 1960's.[122]

With respect to the peremptory challenges, the Court found

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115. Congressional utilization of the commerce clause power to reach private discriminatory acts was upheld in Katzenbach v. McClung, 379 U.S. 294 (1964), and Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

> [T]he action of the Congress in the adoption of the [Civil Rights] Act [of 1964] as applied here to a motel which concededly serves interstate travelers is within the power granted it by the Commerce Clause of the Constitution . . . . It may be argued that Congress could have pursued other methods to eliminate the obstructions it found in interstate commerce caused by racial discrimination. But this is a matter of policy . . . .

Id. at 261.

116. *See, e.g.*, 2 T. EMERSON, D. HABER, & N. DORSEN, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES (1967); R. KLUGER, *supra* note 81.

117. 380 U.S. 202 (1965).

118. *See id.* at 203, 205, 210, 222-23.

119. 100 U.S. 303 (1880).

120. 380 U.S. at 205 (citations omitted).

121. *Id.* at 208-09.

122. *See id.* at 203, 205.

merit in Alabama's contention that the practice "affords a suitable and necessary method of securing juries which in fact and in the opinion of the parties are fair and impartial."[123] Again adopting the perspective of future society, the Court justified the actual results of the peremptory challenges in the case before it by deeming those results the product of a fair, neutral, and impartial system of selection. And in typical fashion the Court dragged out the color-blind theory to support this conclusion, approving Alabama's position that "[t]his system, it is said, in and of itself, provides justification for striking any group of otherwise qualified jurors in any given case, whether they be Negroes, Catholics, accountants or those with blue eyes."[124]

On the final claim that no black had ever served on a petit jury in the county, the Court invoked the principle of causation, reasoning that while such proof might support a prima facie case that "the peremptory system is being used to deny the Negro the same right and opportunity to participate in the administration of justice enjoyed by the white population,"[125] in this case the mere fact that no blacks had served on juries was not a prima facie case of anything since there was no showing that the result was directly attributable to the peremptory system.[126]

Thus an affirmative claim for representation directed against a *system* that was obviously denying that representation was neatly transformed into a burdensome and elusive hunt for the particular villains within that system who were "causing" the result. Necessarily, the Court ignored the results of the system and presumed, despite the obvious fact that blacks were not represented, that the system was operating impartially. To answer what was the core of the defendant's claim—that regardless of causes, it was the results that were the problem—the Court again appealed to the color-blind theory:

> But a defendant in a criminal case is not constitutionally entitled to demand a proportionate number of his race on the jury which tries him nor on the venire of jury roll from which petit jurors are drawn. . . . "Obviously the number of races and nationalities appearing in the ancestry of our citizens would make it impossible to meet a requirement of proportional representation."[127]

123. *Id.* at 212.

124. *Id.* at 211-12.

125. *Id.* at 224.

126. *See id.*

127. *Id.* at 208 (citations omitted) (quoting Cassell v. Texas, 339 U.S. 282, 286-87 (1950)). On the issue of proportional participation, see Hughes v. Superior Court, 339 U.S. 460 (1950).

Swain points up a deep contradiction in antidiscrimination law that sees no absurdity in legitimizing the precise result that would occur under the regime of de jure exclusion struck down in *Strauder*. Strict adherence to the perpetrator form makes results irrelevant; a concern with results violates the form. For a time, in the next era of antidiscrimination law, the Court violated the form, while pretending not to, to produce some results. In the third and present era, the Court returns to strict adherence, pretending never to have deviated from it, while pretending to have produced some results in the interim.

III. 1965-1974: THE ERA OF CONTRADICTION, OR THE JURISPRUDENCE OF REMEDY

A. An Overview

A growing tension between the concepts of violation and remedy characterized the second era of modern antidiscrimination law. While the form of the law, with one possible exception,[128] remained squarely within the perpetrator perspective, its content began to create expectations associated with the victim perspective. The perpetrator perspective remained the basic model for a violation, without which there could be no occasion for remedy. Given that finding, however, remedial doctrine took over and, in so doing, subtly changed the concept of violation by addressing itself to substantive conditions beyond the scope of the original violation.

One kind of case that gave rise to this development might be termed the "infinite series" problem. Suppose a jurisdiction that had previously been nearly all white in population experienced a sudden wave of black migration into the area, to the point where its population became sixty percent white and forty percent black. Suppose further that, in response to this population change, the jurisdiction redistricted its legislative body so that each of its ten districts had a population that was sixty percent white and forty percent black.[129] Even under the perpetrator perspective, this action would clearly violate an antidiscrimination principle, whether on the basis of evidence of purposeful racial exclusion or simply on the basis of an effect explicable only in terms of discriminatory purpose. Thus we have a

128. *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971), *discussed at* notes 183-203 *infra* and accompanying text. The Court has since moved to contain and weaken *Griggs*. *See* notes 271-98 *infra* and accompanying text.

129. *Cf.* Gomillion v. Lightfoot, 364 U.S. 339, 341 (1960) ("Prior to Act 140 the City of Tuskegee was square in shape; the Act transformed it into a strangely irregular twenty-eight-sided figure . . . . The . . . inevitable effect . . . is to remove from the city all save four or five of its 400 Negro voters while not removing a single white voter or resident.").

traditional "violation." Because the perpetrator perspective refuses to recognize any claims of racial proportionality or for relief from the plain fact of political powerlessness, however, all that can be done with a violation of the type described is to call it one and declare the reapportionment invalid.

Now suppose that the same jurisdiction, perhaps because required by local law,[130] again redistricts, this time coming up with a plan that calls for one district that is 100% black and nine districts that are two-thirds white and one-third black. If there is evidence of purposeful discrimination,[131] a court could again declare the practice a violation and send it back again in the hopes that a clean version of the plan will reappear without any evidence of "purpose." If there is no evidence of purpose, however, how do we decide if the plan itself gives rise to an inference of purposeful discrimination? The perpetrator perspective is powerless. To decide whether the second plan is discriminatory requires a comparison of that plan with a hypothetical state of affairs in a community where race is irrelevant. But that comparison is impossible as an abstract matter since, in a community where race was really irrelevant, neither of the plans described would seem odd; there would be no perceived relationship between race and political power.

In a community where race is relevant, however, the second plan must be compared with a scheme that produces racial proportionality, even if this is done only for the limited purpose of deciding whether the second plan is a violation or not. At the moment when the *condition* of racial political power, with its implicit affirmative claim for such power, becomes relevant, the victim perspective enters into the analysis. Without taking the victim perspective into account, there can never be, in this kind of case, either a finding of violation absent explicit evidence of purpose or any remedy for either the initial or any subsequent violation. But once the question of racial political power becomes relevant in a community that once committed a traditional "violation," it is difficult to see why it is not equally relevant in a community where, although no specific violation has been found, race is relevant, and there is extensive racial discrimination in all areas of life. At this point, what arose as remedy in one

130. *See, e.g.*, Beer v. United States, 425 U.S. 130, 134 (1976), *discussed at* notes 224-35 *infra* and accompanying text.

131. Purposeful discrimination, of course, means something more than either motive on the part of some decisionmakers or one of several explanations for the action. *See* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265-66 (1977); City of Richmond v. United States, 422 U.S. 358, 373-74 (1975); Palmer v. Thompson, 403 U.S. 217, 224-26 (1971). *See generally* Brest, Palmer v. Thompson: *An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95.

case threatens to define violation in another, unless the new community can be so severed from the society in which both communities exist as to be hurled by semantic fiat into the future society described earlier.

A second kind of problem case is the "no results" situation. Suppose that for many years a community maintained a blatant de jure system of school segregation by race that was finally declared unconstitutional. Further suppose that despite the ruling of unconstitutionality, no remedial efforts occurred or were required for a number of years, with the result that when those efforts were finally undertaken, the resultant school system looked like one that was still substantially segregated. Why? Because the new basis of school assignment, neighborhood, for example, while itself not a manifestation of discriminatory purpose, nevertheless amplified an existing pattern of pervasive discrimination.

The problem here is embarrassment; it is difficult to call these schools "desegregated" because there has been substantially no change since the era of explicit segregation. To cover the embarrassment requires some integrated schools even though, under the perpetrator perspective, there is no affirmative right to have such schools, nor is it the condition of segregation, as opposed to the practice, that is the violation. By going after the conditions, ostensibly to remedy the original violation, the victim perspective is incorporated, and one wonders whether the very same conditions are equally remediable elsewhere regardless of the remote presence of a no longer existent violation.

A third example is the case of the ostensibly neutral and rational practice. Suppose an employer who for years simply refused to hire any black workers at all suddenly, in response to recently enacted antidiscrimination law, adopts an aptitude test for prospective employees that just happens to exclude all black applicants.[132] There is an inescapable inference that the employer is trying to do implicitly what can no longer be done explicitly, but there is no plausible evidentiary link between the prior *practice* and the current one. If one wants either to remedy what looks like a continuation of the earlier violation or avoid the no results dilemma, the neutral practice must be the target of inquiry. At that point, however, the analysis again shifts to the victim perspective, demanding that neutral practices producing conditions of discrimination at the very least justify themselves in terms of their own claims to rationality. Here again the plausible contention arises that the very same practices, as well as a lot of similar ones, should be required to justify themselves wherever they appear.

132. *See* Griggs v. Duke Power Co., 401 U.S. 424, 427-28 (1971).

The patterns illustrated by these typical cases, occurring either singly or in combination, are characteristic of the era of contradiction. The following sections will describe the appearance and operation of these patterns in three substantive areas: voting, education, and employment.

B. VOTING

It is not surprising that the contradictions of the perpetrator perspective first began to appear in the area of voting rights. Voting had already passed through the era of merely identifying violations, beginning with the fifteenth amendment itself, which brought racial discrimination in voting explicitly within the perpetrator principle.[133] Although the Court had punctuated its efforts with enormous time-lags, it had occasionally even struck down particular practices as unconstitutional.[134] But none of these efforts had resulted in any significant participation of black voters in twentieth-century Southern political life.[135] While a massive litigation offensive persisted well into the 1960's, it was met by continuing frustrations of the "infinite series" variety, which in turn produced a serious "no results" problem.[136] Thus, for voting, something more than repeated outlawry of particular practices was needed if the fifteenth amendment was ever to make any practical difference.

Voting was a sensible starting place for other reasons as well. Lack of results in voting rights has a particularly noxious symbolic effect, given the key role of political participation in sustaining the form of liberal democracy. To deny a substantial racial minority the

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133. Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

U.S. CONST. amend. XV.

134. *See, e.g.*, Louisiana v. United States, 380 U.S. 145, 149-50, 153 (1965) (holding unconstitutional a voting registration device that required the applicant to give a reasonable interpretation of any section of the state or federal constitution read to her or him by the registrar and that had been used to deprive otherwise qualified blacks of the right to vote); Terry v. Adams, 345 U.S. 461, 462, 470 (1953) (holding unconstitutional a private primary election that excluded black voters); Smith v. Allwright, 321 U.S. 634, 656-57, 664 (1944) (holding unconstitutional a state-run primary election where the Democratic party was allowed to exclude black voters); Lane v. Wilson, 307 U.S. 268, 271, 275 (1939) (holding unconstitutional an Oklahoma voter registration scheme that inordinately burdened potential black voters by providing a grandfather clause to protect previously registered white voters while offering a sixty-day, one-time-only chance for otherwise qualified voters to register).

135. *See, e.g.*, U.S. COMM'N ON CIVIL RIGHTS, VOTING IN MISSISSIPPI (1965).

136. *See* South Carolina v. Katzenbach, 383 U.S. 301 (1966); United States v. Duke, 332 F.2d 759 (5th Cir. 1964).

right to vote is, whatever the rationalizations offered to support it,[137] a failure to offer even formal, much less substantive, equality. The conferral of voting rights is not only symbolically useful, but it need not impose any serious systemic costs, since voting will only make a difference, if at all, when translated into effective political power.

Confronted with a massive record of systematic deprivations of the right to vote and the apparent inability of the courts to remedy the problem by outlawing specific practices, Congress chose to make the operative provisions of the Voting Rights Act of 1965[138] depend on the presence of *conditions,* which, though suggestive of actual violations, were not in themselves violations or even causally linked to violations through any process of proof.[139] Thus the basic triggering provisions of the Act depended only on the litigation-proof facts of nonparticipation, or nonregistration, in a presidential election,[140] plus the existence of a "test or device," broadly defined.[141] The second-level triggering provisions leading to the employment of federal registrars similarly depended on straightforward conclusive administrative facts.[142] Thus, however much the intent of the Act was just remedial in the sense of finally dealing with those years of actual violations,[143] the effect of the Act was to create an affirmative right to vote, with the functional violation being the conditions associated with the absence of that right.

Once the affirmative right to vote had been conferred on the vast numbers of previously disenfranchised black people,[144] section 5 of the Act[145] became the most important provision. Under section 5, a triggered jurisdiction must demonstrate that any proposed change in voting practice or procedure will not have the purpose or effect of

137. For example, in Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 53 (1959), the Supreme Court upheld the use of a literacy test as a voter registration device. The Court ignored the commonly known fact that such tests were used to exclude black voters: "[T]he ability to read and write likewise has some relation to standards designed to promote intelligent use of the ballot. Literacy and illiteracy are neutral on race, creed, color, and sex . . . ." *Id.* at 51.

138. Pub. L. No. 89-110, §§ 2-19, 79 Stat. 437 (current version at 42 U.S.C. §§ 1973-1973p (Supp. V 1975)).

139. *See id.* § 4 (current version at 42 U.S.C. § 1973b (Supp. V 1975)), *construed in* South Carolina v. Katzenbach, 383 U.S. 301, 327-28 (1966).

140. *See* Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(b), 79 Stat. 437 (current version at 42 U.S.C. § 1973b(b) (Supp. V 1975)).

141. *See id.* § 4(c) (current version at 42 U.S.C. § 1973b(c) (Supp. V 1975)).

142. *See id.* §§ 3, 6 (current version at 42 U.S.C. §§ 1973a, 1973d (Supp. V 1975)).

143. *See* South Carolina v. Katzenbach, 383 U.S. 301, 309 (1966).

144. *See* U.S. COMM'N ON CIVIL RIGHTS, THE VOTING RIGHTS ACT: TEN YEARS LATER (1975).

145. Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437 (current version at 42 U.S.C. § 1973c (Supp. V 1975)).

discriminating on the basis of race or color with respect to voting.[146] In the remedial scheme of the Act, this provision made sense as a way of preventing future violations, since jurisdictions so inclined might otherwise creatively manipulate their voting laws to leave black voters formally enfranchised but practically disenfranchised.[147] Without section 5, endless litigation of the "infinite series" variety might have resulted.

A jurisdiction can effectively neutralize the political power of its black voters by altering its geographic boundaries to change the overall racial composition, by switching from ward to at-large systems to decrease minority power, or simply by gerrymandering districts to maximize the political strength of the white population. The Supreme Court itself had deemed an extreme version of the latter to be a constitutional violation in *Gomillion v. Lightfoot*,[148] decided prior to the enactment of the Voting Rights Act. To have said that section 5 did not apply to these practices would have been to invite their use to achieve renewed discrimination. Thus the Court, even from within the confines of the perpetrator principle, had no choice but to bring all of these practices under the application of section 5.[149]

By bringing geographic manipulation under substantive scrutiny, the Court was compelled to consider explicit issues of racial proportionality in political power. But since the perpetrator perspective, under the guiding influence of the color-blind theory, is indifferent to affirmative claims for racial political power,[150] it was difficult

146. *See id.*

147. *See, e.g.*, Georgia v. United States, 411 U.S. 526 (1973); Perkins v. Matthews, 400 U.S. 379 (1971); Allen v. State Bd. of Elections, 393 U.S. 544 (1969).

148. 364 U.S. 339 (1960).

149. *See, e.g.*, Beer v. United States, 425 U.S. 130 (1976); City of Richmond v. United States, 422 U.S. 358 (1975); Georgia v. United States, 411 U.S. 526 (1973); Perkins v. Matthews, 400 U.S. 379 (1971); Allen v. State Bd. of Elections, 393 U.S. 544 (1969).

150. *See* Whitcomb v. Chavis, 403 U.S. 124, 163 (1971), *rev'g* 305 F. Supp. 1364 (S.D. Ind. 1969).

> The District Court's holding, although on the facts of this case limited to guaranteeing one racial group representation, is not easily contained. It is expressive of the more general proposition that any group with distinctive interests must be represented in legislative halls if it is numerous enough to command at least one seat and represents a majority living in an area sufficiently compact to constitute a single-member district. This approach would make it difficult to reject claims of Democrats, Republicans, or members of any political organization in Marion County who live in what would be safe districts in a single-member district system but who in one year or another, or year after year, are submerged in a one-sided multi-member district vote. There are also union oriented workers, the university community, religious or ethnic groups occupying identifiable areas of our heterogeneous cities and urban areas. Indeed, it would be difficult for a great many, if not most,

to ascertain the substantive validity of such practices. These difficulties became evident in *City of Richmond v. United States*,[151] the Court's first substantive confrontation with geographic manipulation under section 5. The case dealt with the racial impact of Richmond's annexation of a large, predominantly white, suburban area. On that issue, the Court simultaneously applied section 5 to an annexation and made section 5 inapplicable to annexations. In fact, with respect to the annexation issue, the decision is more typical of the third "era," to be discussed below. The importance of *Richmond* for the present discussion, however, is that while legitimizing annexation as a means of diluting minority voting strength, the Court implied a right to proportional political power within any given geographical unit of government.

The only useful sense in which an annexation of territory may be evaluated with respect to its discriminatory impact is in terms of the racial population mix before and after annexation, since all the annexation itself does is add people and territory to an existing jurisdiction. To say that section 5 applies to an annexation, then, would seem to imply an inquiry into the percentage population of the minority race in the expanded jurisdiction to see whether its political power has been diluted. *Richmond*, for example, involved the annexation of 23 square miles of territory with a population of 45,705 whites and 1,557 blacks, which changed the racial mix of the entire city from 52% black and 48% white to 42% black and 58% white.[152] If the annexation were tested as to discriminatory *impact*, it would seem to present a clear violation, since a black majority had been transformed into a black minority. The Court avoided that conclusion only by confusing the issue of the annexation's discriminatory impact with the separate issue of the validity of an at-large system of representation. Thus the Court held that the relegation of the black population to minority political status was not a discriminatory "effect" within the meaning of section 5.[153] This is the sense in which the Court nullified the application of section 5 to annexations, since if the change in racial percentage from majority to minority is not discrimination, then the annexation itself becomes immune from scrutiny on that ground.

At the same time, the Court did require Richmond to switch from at-large representation to a ward system, but regarded as sufficient a plan that gave the black population majorities in four of the

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multi-member districts to survive analysis under the District Court's view

. . . .

Id. at 156 (footnotes omitted).

151. 422 U.S. 358 (1975).

152. *See id.* at 363.

153. *See id.* at 371.

nine council districts, rejecting a request for control of five districts.[154] Thus, while upholding the basic political effect of the annexation, the reassertion of white political control, the Court guaranteed the black minority a proportional share of political power in the expanded community.[155] That decision would seem to create, despite the perpetrator perspective, an affirmative expectation that the antidiscrimination principle applicable to voting implies a right to proportional political power. That expectation arises quickly if one makes three plausible assumptions about the *Richmond* decision.

The first assumption is that the issue of at-large versus ward representation is separable from the question of annexation. If, as the Court said, an annexation is valid notwithstanding its reversal of majority power, then unless there is a right to proportional representation, it should make no difference whether the black minority can command control of four seats or none in the expanded community. Since the Court required the four-seat guarantee, it thus becomes difficult to differentiate the case of annexation from a case where geography has remained constant but the black community is underrepresented because of gerrymandering or use of at-large representation with a white majority. In all three situations, the evil is precisely the same—underrepresentation of the black community. The cases can only be distinguished by the rather embarrassing "principle" that a black community has a right to be paid off with proportional power if forced to submit to an annexation that dilutes its power, but has no such right if its power is effectively minimized without a boundary change.

The second assumption is that, apart from the question of burden of proof,[156] the standard mandated by section 5—that the particular practice "not have the purpose [or] . . . effect of denying or abridging the right to vote on account of race or color"[157]—is substan-

154. *See id.* at 371-72.

155. *Cf.* City of Petersburg v. United States, 410 U.S. 962, *aff'g mem.* 354 F. Supp. 1021 (D.D.C. 1973) (effect of annexation on black voting power in at-large voting districts). The trial court acceded to the annexation, as was done in *Richmond,* but stated,

> [T]his annexation, insofar as it is a mere boundary change and not an expansion of an at-large system, is not the kind of discriminatory change which Congress sought to prevent; but . . . this annexation can be approved only on the condition that modifications calculated to neutralize to the extent possible any adverse effect upon the political participation of black voters are adopted, i.e., that the [City] shift from an at-large to a ward system of electing its city councilmen.

354 F. Supp. at 1031.

156. Section 5 imposed the burden of proof on the political subdivision seeking to have the practice validated. *See* Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437 (current version at 42 U.S.C. § 1973c (Supp. V 1975)).

157. *Id.*

tively identical to the standard set by the Constitution with respect to the same practice. Under this assumption, the only difference in a jurisdiction not subject to section 5 would be that instead of being able to rely on preclearance review to test the substantive issue, an aggrieved person would have to commence litigation to challenge the practice. And a showing of substantial underrepresentation would presumably be sufficient to make out a prima facie case of discrimination.

The assumption that the standards are the same is rooted in the absence of any rational reason for their being different. Whatever its worth, semantic scrutiny yields no significant difference.[158] Nor does the distinction between remedy and violation suggest a difference if, as common sense would dictate, the notion of remedy refers to the mandatory review part of section 5 rather than its substantive content. The original violation that triggered application of the Voting Rights Act provides little explanatory help, since that violation was merely the occasion for invoking the Act, and there is no pretense of any causal linkage between the practice reviewed under section 5 and the original triggering conditions. To apply different standards would make sense only if it could be said that the kinds of communities subject to section 5 are really ones where race is perceived as more relevant or significant than in those not subject to the statute. The argument would be that even if section 5 creates a right to proportional representation, that right does not pertain in American communities not subject to that law, because in such communities substantial black underrepresentation is hardly indicative of anything. Here again, the argument is essentially that future society already exists, that race is irrelevant. That argument again amounts to no more than a denial of reality.

The third assumption about the *Richmond* opinion, which merely reinforces the other two, is that the Court itself recognized a claim of proportionality not only in what it did, but also in what it said. In rejecting the black community's request for control of five seats in the larger community, the Court said that it could not approve a "requirement that the city allocate to the Negro community in the larger city the voting power or the seats on the city council in excess of its proportion in the new community and thus permanently to underrepresent other elements in the community."[159] The Court's own use of the word "underrepresent" as applied to the white major-

158. Section 5 addresses itself to practices whose "purpose" or "effect" is "denying or abridging the right to vote on account of race or color." *Id.* The fifteenth amendment provides that the right to vote "shall not be denied or abridged on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV.

159. 422 U.S. at 373.

ity implies an expectation of racial proportionality and speaks to a world where race is very relevant to political representation. In the color-blind world, a racial group, black or white, could not be regarded as underrepresented. And as a matter of pure gerrymandering, the enlarged Richmond with its population of 58% white and 42% black, could be districted so as to give as many as seven seats to the black community or as few as none. The color-blind world would be indifferent to either extreme. But the *Richmond* opinion is concerned about white underrepresentation, a concern that is inconsistent with the color-blind model. If the concept of racial underrepresentation is applicable at all, it should be equally applicable to the black community, which should also be able to claim at least proportional representation. But the Court's comment has today become more than a little ironic,[160] since the solicitous concern expressed for the almost-beleaguered white citizens of "greater" Richmond has hardly given rise to a similar concern for claims of black citizens anywhere.[161]

C. EDUCATION PRIOR TO *Swann*[162]

For education, the era of contradiction begins with the Supreme Court's decision in *Griffin v. County School Board.*[163] In *Griffin,* the Court faced a thorough and continuous pattern of resistance to its decision in *Brown I.* To avoid compliance with the Court's desegregation mandate, Prince Edward County had closed its schools and facilitated the operation of private segregated schools through a combination of state and local financial aid. The facts of the case make clear that the county intended to maintain a segregated system of public education, attempting to insulate the program from constitutional scrutiny by disguising it in an ostensibly private form. From within the safe confines of the perpetrator perspective, the Court could have simply told the county and state to stop facilitating or supporting segregated public education.[164] Instead, perhaps motivated by the county's recalcitrance, the Court went a step further and told the district court that it "may, if necessary to prevent further racial

160. The Court's concern that the white community might be underrepresented also seems more than a bit racist, especially in light of its indifference, one year later, to a far more severe underrepresentation of blacks. *See* Beer v. United States, 425 U.S. 130 (1976), *discussed at* notes 224-35 *infra* and accompanying text.

161. *See* notes 224-35 *infra* and accompanying text.

162. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1970). I am greatly indebted to Owen Fiss for the careful and persuasive analysis of *Green, Monroe, Swann, Keyes,* and *Milliken I, discussed at* notes 204-14 & 242-55 *infra* and accompanying text, which he offered in Fiss, *School Desegregation: The Uncertain Path of the Law,* 4 PHILOSOPHY & PUB. AFF. 3, 15-35 (1974).

163. 377 U.S. 218 (1964).

164. *See, e.g.,* Norwood v. Harrison, 413 U.S. 455, 463-64 (1973).

discrimination, require the supervisors to exercise the power that is theirs to levy taxes to raise funds adequate to reopen, operate, and maintain without racial discrimination a public school system in Prince Edward County like that operated in other counties in Virginia."[165]

There is a narrow explanation of this curious sentence that is consistent with the perpetrator perspective. The Court might have been saying by way of unstated assumption that so long as public schools remained open throughout the rest of Virginia, any system of private segregated schools in one county would probably be so infected with governmental involvement as to be deemed tantamount to public segregated schools. On this view, to avoid protracted litigation of the infinite series variety with respect to successive forms of "private" segregation, the Court was merely declaring in advance that all such systems would be invalid. While as a logical matter the county could cleanse itself of any violation by having no education whatsoever, either public or private, the Court somehow knew that this alternative would never be chosen and therefore told the county to reopen its public schools.

The sentence nevertheless subtly offered two promises to the black community of Prince Edward County. These promises may be regarded as more or less disingenuous to the extent one ascribes to the Court a secret reason for the sentence, but the promises are there. One is an affirmative right not only to an education, but to an education comparable to that offered throughout Virginia. This view would regard *Griffin* as partially adopting the "equality of educational opportunity" view of *Brown I*,[166] and recognizing that what is important, from the victim's perspective, is not so much whether the violation has been cured but whether the right results are being obtained. The second promise goes to the specifically racial dimension of that education. The Court had not yet suggested, as of 1965, what it might mean to "maintain without racial discrimination a public school system," but the second promise was that whatever that phrase came to mean, the black students of Prince Edward County had an affirmative claim measured by its content.[167] Later cases began to pro-

165. 377 U.S. at 233.

166. *See* notes 79-89 *supra* and accompanying text.

167. *Griffin* can be read to stress purpose more than effect—that a state that has chosen to provide public education cannot cease to provide such services if motivated by hostility to integration, even if, absent such hostility, the services could be terminated. But Palmer v. Thompson, 403 U.S. 217 (1971), casts some doubt on this theory. In *Palmer* it was held that the closing of all municipal swimming pools in the face of an integration order did not violate the constitutional rights of the black plaintiffs. *See id.* at 218-19, 227. At least one commentator has concluded that *Palmer* is inconsistent with *Griffin* in that *Palmer* failed to consider the obvious racist implications of the withdrawal of the service. *See* Brest, *supra* note 17, at 27.

vide that content.

In 1968, the Court decided two cases that began to set standards for the achievement of desegregation and in so doing further widened the gap between the perpetrator perspective and remedies for violation of its norm. In *Green v. County School Board*[168] and *Monroe v. Board of Commissioners,*[169] the Court rejected "freedom of choice" as a sufficient remedy for public school segregation. In terms of the perpetrator perspective, *Green* involved the clearer violation of the two since all the school board had done in that case was to superimpose a system of free choice upon its otherwise unchanged system of segregated schools. Thus the board had in no way ceased to operate the same segregated system that it had always operated, and the burden of opting out of that system was placed upon the students and their families.[170] The Court's rejection of this scheme as constituting neither desegregation nor free choice is hardly surprising.

Monroe was more difficult. There the board had established a new system of geographic zoning to replace the old segregated system. But superimposed on the new system was a scheme of free transfers that permitted students to undo the integrated results of the geographic scheme by reestablishing themselves into a racially concentrated pattern. The Court rejected this scheme as well. Among other things, this decision amounted to a repudiation of the freedom of association theory as applied to public education, under which both black and white students would have had a right to choose not to go to school with the students of the other race. In addition, by focusing its attention on the actual racial percentages in the schools operating under the local plan,[171] the Court partially repudiated the color-blind theory, at least within the narrow context of remedies for de jure segregation. Of even more significance, by emphasizing the degree of actual integration,[172] the Court seemed to be shifting toward a victim perspective, concerned with conditions and results rather than merely with the elimination of offensive practices. Moreover, by directing its remedy not only at the behavior of the school board but also at the private behavior of those whites who chose to leave the integrated schools, the Court seemed to be breaking down the dichotomy between state (or other perpetrator-actor) and the rest of society that is so central to the perpetrator perspective.

Narrowly viewed, both *Green* and *Monroe* were nothing more than cases of remedies for traditional violations. But to the extent the

168. 391 U.S. 430 (1968).
169. 391 U.S. 450 (1968).
170. *See* 391 U.S. at 441-42.
171. *See* 391 U.S. at 453-54.
172. *See id.* at 457.

cases are concerned with, and promise to the black students, an actual condition of integration, they suggest that the absence of integration might be just as remediable in a jurisdiction that had not previously been guilty of de jure segregation. Even apart from this implicit suggestion, the cases must at least stand for the proposition that an established violation will not be deemed remedied until integrated results are achieved. Thus the more the concept of violation could be expanded, the wider the range in which explicit demands for integrated results could be asserted.

The gap between violation and remedy became wider the following year with the decision in *Gaston County v. United States*,[173] an ostensible voting rights case that had more to do with school desegregation. Gaston County, North Carolina, had for many years operated a segregated school system in which the black schools were significantly inferior to the white ones. In March 1966, the county was triggered into the provisions of the Voting Rights Act, which suspended the county's use of a literacy test as a prerequisite to voter eligibility.[174] In August 1966, the county sued to reinstate its literacy test under the provision of the Act that said it could do so if it could prove that the test had not been used during the preceding five years " 'for the purpose or with the effect of denying or abridging the right to vote on account of race or color.' "[175] The Court denied the county's request, on the ground that even a neutrally administered literacy test would serve to perpetuate the effects of the inferior schooling received by the black residents of the county, since the undereducated blacks would more likely fail the test. As the Court said, "It is only reasonable to infer that among black children compelled to endure a segregated and inferior education, fewer will achieve any given degree of literacy than will their better-educated white contemporaries."[176]

Gaston County was the first case to present the problem of the "ostensibly neutral practice." The only practice involved in the case that clearly violated the perpetrator perspective's antidiscrimination principle was the segregated school system. By reaching beyond that violation, under the guise of remedy, to refuse to validate the literacy test, the Court set loose a number of implicit propositions inconsistent with the perpetrator perspective. By using "remedial" law to reach an otherwise valid practice not linked with the original violation, the Court implied that even a neutral governmental practice

173. 395 U.S. 285 (1969).

174. *See id.* at 287.

175. *Id.* (quoting Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(a), 79 Stat. 437 (current version at 42 U.S.C. § 1973b(a) (Supp. V 1975))).

176. *Id.* at 295 (footnote omitted).

may become a violation if it serves to perpetuate the effects of some other discriminatory practice. In this connection, it is significant both that literacy tests, unless suspended by the Voting Rights Act, were still regarded as 1969 as valid techniques for assessing voter eligibility[177] and that the *Gaston County* opinion assumed that school segregation had ceased in the county.[178]

Thus in an important sense the perpetrator whose practice is being outlawed—the 1966-1969 county government—is not the same as the perpetrator whose practice violated antidiscrimination law—the earlier county government that ran the segregated schools. If the effect of one discriminator's activity can serve to invalidate the otherwise valid behavior of a distinct entity, the emphasis seems to shift toward scrutiny of conditions associated with discrimination and away from the particular practices that produce the discrimination. This suggestion is underscored by the Court's own footnote reference to the fact that it was irrelevant whether the present residents of Gaston County had gone to its own segregated schools or to segregated schools in other counties, or even other states.[179]

The footnote is also curiously inconsistent with the Court's characterization of the opinion below, which it was affirming, as premised not on the mere fact that Gaston County had operated segregated schools, "but on substantial evidence that the County deprived its black residents of equal educational opportunities."[180] Since the footnote brings within the opinion all black residents of the county, regardless of where they went to school, it would seem that the substantial evidence was actually irrelevant—either all other segregated schools would be presumed to deny equal educational opportunity, or the evidence of actual inequality was not necessary with respect to Gaston County. Since the footnote speaks more to the fact that some black residents of the county may have gone to school elsewhere than does the text, the practical point of the decision seems to be that where an ostensibly neutral practice operates disproportionately against members of a racial group, which group has been the victim of past discriminatory treatment, that neutral practice cannot be validly applied to members of that group. Viewed this way, there is no longer any strict evidentiary requirement of either causation or victim identification and the neutral practice itself becomes the relevant violation.

177. *See* Oregon v. Mitchell, 400 U.S. 112, 132-34 (1970) (Black, J., announcing the judgment of the Court); *id.* at 144-46 (Douglas, J., concurring in part and dissenting in part); *id.* at 231-32 (Brennan, White, and Marshall, JJ., concurring in part and dissenting in part); *id.* at 282-83 (Stewart, J., joined by Burger, C.J., and Blackmun, J., concurring in part and dissenting in part); South Carolina v. Katzenbach, 383 U.S. 301, 329-31 (1966); Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 51-53 (1959).

178. *See* 395 U.S. at 296.

179. *See id.* at 293 n.9.

180. *Id.* at 291.

Although the neutral practice—the literacy test—seems to have been the relevant violation in *Gaston County*, in the sense that the practice was deemed illegal because of its likely effect on the black residents of the county, in another important sense the Court did not regard the literacy test as a violation. The opinion in no way challenges the validity of a literacy test as a device for assuring voter qualification: the test is not required to justify itself.[181] Instead, the test is held constant, and the would-be black voters are regarded as unfortunately incompetent to pass it because of the inferior education they have received in the past.

In any neutral practice case, two basic approaches are possible. Given a practice with disproportionate racial impact, one can focus on the practice, asking whether it serves any useful purpose or whether it is itself a manifestation of discrimination. Alternatively one can focus, as the Court in *Gaston County* did, on the victims of the practice, asking whether they are or have become inferior human beings who need to be relieved from the onerous effects of an otherwise valid procedure. The difference between these approaches is crucial to the distinction between the victim and perpetrator perspectives. The latter is just another version of the assumption that future society is already here; its emphasis on compensation for the ill effects of discrete "other violations" can easily be transformed into a case of inaction justified by blaming the victim.[182] The former approach, on the other hand, amounts to a demand that institutions or practices oppressive in their effects justify themselves as legitimate. *Gaston County* took a small step toward the victim perspective by implicating an otherwise neutral practice in a separate violation, but it would take another case before such a practice was made to justify itself.

D. EMPLOYMENT: THE *Griggs* CASE

Griggs v. Duke Power Co.,[183] the Court's first substantive decision under title VII of the Civil Rights Act of 1964,[184] is as close as the Court has ever come to formally adopting the victim perspective; it is the centerpiece of the era of contradiction. One tribute to its importance is the amount of effort currently being made to repudiate

181. *See* Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 53-54 (1959).

182. *See generally* W. RYAN, BLAMING THE VICTIM (paperback ed. 1976); *see also* S. GOULD, EVER SINCE DARWIN 243-47 (1977); H. GUTMAN, THE BLACK FAMILY IN SLAVERY AND FREEDOM, 1750-1925, at xvii-xxii (1976).

183. 401 U.S. 424 (1971).

184. Pub. L. No. 88-352, §§ 701-716, 78 Stat. 241 (current version at 42 U.S.C. §§ 2000e to 2000e-15 (Supp. V 1975)).

it.[185] While the actual decision in *Griggs* may be explained in at least two ways that are consistent with the perpetrator principle, the case seems to go beyond that perspective to the extent that it requires neutral practices to justify themselves, radically alters the concept of "intention" in antidiscrimination cases, and implies a demand for results through affirmative action.

The Court posed the issue in *Griggs* as

> whether an employer is prohibited by the Civil Rights Act of 1964, Title VII, from requiring a high school education or passing of a standardized general intelligence test as a condition of employment in or transfer to jobs when (a) neither standard is shown to be significantly related to successful job performance, (b) both requirements operate to disqualify Negroes at a substantially higher rate than white applicants, and (c) the jobs in question formerly had been filled only by white employees as part of a longstanding practice of giving preference to whites.[186]

A unanimous Court, speaking through Chief Justice Burger, answered that question in the affirmative.

That the case was rooted firmly in the perpetrator perspective may be inferred from the behavior of the employer in the case. Prior to July 1965, the employer had blatantly discriminated against black workers, permitting them to work in only one of its five departments, where the highest paying job paid less than the lowest paying job in any of the other four departments. In 1965, the employer abandoned its policy of explicit discrimination. In the same year, however, the employer added a high school diploma requirement for transfer out of the previously "black" department and a requirement that a person had to "register satisfactory scores on two professionally developed aptitude tests, as well as . . . have a high school education"[187] for placement in any department except the previously "black" one. These newly imposed requirements operated to limit severely the opportunities available to black employees and applicants. Thus, the case posed the problem of the "ostensibly neutral practice" introduced as a substitute for blatant racial discrimination and achieving substantially the same results.

By making its rationale dependent on the prior explicit discrimination the Court could have stayed within the perpetrator perspective. But this would have been somewhat disingenuous. For one thing, the prior discriminatory conduct in *Griggs* was legal when it

185. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 348-55 (1977); General Elec. Co. v. Gilbert, 429 U.S. 125, 137-46 (1976); Washington v. Davis, 426 U.S. 229, 238-39, 248-52 (1976).

186. 401 U.S. at 425-26.

187. *Id.* at 427-28.

occurred and could not by itself have given rise to a violation. Moreover, to have made the illegality of the test and diploma requirements dependent upon the prior discrimination would have meant that absent such a history the very same practices would be valid however disproportionate their impact. In any event, the Court chose to sever its rationale from any dependence on the prior discrimination, and in so doing left the perpetrator perspective as explaining, at most, why, but not how, the Court intervened in *Griggs*.

Alternatively, the Court in *Griggs* might have remained closer to, but not clearly within, the perpetrator perspective by straying no further than it had in *Gaston County*. On this view, the tests and diploma requirements were not violations in and of themselves, but only to the extent that they penalized blacks for the inferior educations they had received in segregated schools. Some language in *Griggs* even supports this view: "Basic intelligence must have the means of articulation to manifest itself fairly in a testing process. Because they are Negroes, petitioners have long received inferior education in segregated schools and this Court expressly recognized these differences in *Gaston County v. United States* . . . ."[188] Had this rationale emerged as the dominant one in *Griggs*, the case would have been just another school desegregation case, with the formal violation not the employee selection procedures invalidated but the preexisting system of de jure segregated schools. The *Gaston County* rationale, however, while supportive of the result in *Griggs*, could not be easily transferred to the *Griggs* circumstances.

A straightforward application of *Gaston County* to *Griggs* would have invalidated all test and diploma requirements until the day when black applicants no longer suffered the residual impacts of inferior education. But while the Court was willing to say that all citizens could vote regardless of literacy, they were not equally willing to say that all applicants should be hired, regardless of qualifications.[189] The Court clearly needed a rationale that would describe the instances where tests or other job qualifications could be validly applied even as against black applicants who had suffered inferior educations.[190] To develop such standards, the Court had to take a look

188. *Id.* at 430.

189. [In *Gaston County*], because of the inferior education received by Negroes . . . , this court barred . . . a literacy test for voter registration on the ground that the test would abridge the right to vote indirectly on account of race. Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications.

Id.

190. [Title VII] does not command that any person be hired simply because he was formerly the subject of discrimination . . . . Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of

at the tests on their merits. Almost inadvertently, then, the opinion switched from blaming the victim to scrutinizing the neutral practices themselves with respect to their claims of rationality. At that point, the background of segregated schools became irrelevant, since standards addressed solely to the merits of the neutral practices limit the issue to whether, under title VII, a particular employee selection procedure that disproportionately excludes black applicants is valid, regardless of the educational experience of the applicants.

Thus, the central rationale of *Griggs* is that selection procedures, even ostensibly neutral ones, that disadvantage minority applicants are not valid unless they can demonstrate themselves to be rational: "The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."[191] The standard of rationality set by the Court seemed to be a tough one, demanding a showing of job-relatedness, the removal of "artificial, arbitrary, and unnecessary barriers,"[192] and standards that "measure the person for the job and not the person in the abstract."[193] In short, the opinion amounts to a demand that the myth of a meritocratic scheme of equality of opportunity be transformed into a reality.

Thus for the first time the Court held that a neutral practice, not purposefully discriminatory, that nevertheless failed to admit blacks to jobs had to justify itself or else be declared invalid. Although the opinion was decided under title VII, its logic did not seem easily confined. The Court even took one general swipe at the workings of meritocracy:

> The facts of this case demonstrate the inadequacy of broad and general testing devices as well as the infirmity of using diplomas or degrees as fixed measures of capability. History is filled with examples of men and women who rendered highly effective performance without the conventional badges of accomplishment in terms of certificates, diplomas, or degrees.[194]

Since the case was concerned not with remedy but with the meaning of "violation" under title VII, it seemed reasonable to conclude that a discriminatory practice under title VII would also be a discrimina-

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artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.

Id. at 430-31.

191. *Id.* at 431.

192. *Id.*

193. *Id.* at 436.

194. *Id.* at 433.

tory practice under the fourteenth amendment in areas not subject to title VII.[195] Read this way, the case becomes a generalized demand that all objective selection procedures under the coverage of some antidiscrimination law be required to justify themselves as consistent with the notion of equality of opportunity. *Griggs* in no way contradicts the meritocratic model, but assumes that it can be made to work, that those who are deserving can be objectively separated from those who are not.[196]

In addition to legitimizing the assertion of an affirmative claim directed at a systemic practice, *Griggs* changed the notion of "intentional" in antidiscrimination law. This aspect of the opinion derives from the Court's severance of its rationale from the prior discriminatory practices of the defendant employer. The opinion makes it clear that "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups"[197] and that "Congress directed the thrust of the Act to the *consequences* of em-

195. Indeed, it is counterintuitive that there should be separate standards for constitutional as opposed to statutory violations.

196. For a similar assumption, see DeFunis v. Odegaard, 416 U.S. 312, 340-41 (1974) (Douglas, J., dissenting). *See also* G. WILLS, NIXON AGONISTES 471-89 (paperback ed. 1971).

Whether that model can fulfill its promise depends largely on the selection criteria employed, a subject to be discussed extensively in the sequel to this Article. On the history and ideology of aptitude testing, see C. KARIER, SHAPING THE AMERICAN EDUCATIONAL STATE 127-232, 275-428 (1975); M. KATZ, CLASS, BUREAUCRACY, AND SCHOOLS 147-94 (2d ed. 1975); M. LAZERSON, ORIGINS OF THE URBAN SCHOOL 179-201 (1971); D. TYACK, THE ONE BEST SYSTEM 204-29 (1974); R. Marks, Testers, Trackers and Trustees: The Ideology of the Intelligence Testing Movement in America 1900-1954 (1972) (unpublished Ph.D. dissertation, University of Illinois at Urbana-Champaign).

On what the tests measure or purport to measure, see E. GHISELLI, THE VALIDITY OF OCCUPATIONAL APTITUDE TESTS (1966); Block & Dworkin, *IQ: Heritability and Inequality* (pts. 1 & 2), 3 PHILOSOPHY & PUB. AFF. 331, 4 PHILOSOPHY & PUB. AFF. 40 (1974); *Brief of Law School Admissions Council as Amicus Curiae in DeFunis v. Odegaard,* in 2 DEFUNIS VERSUS ODEGAARD AND THE UNIVERSITY OF WASHINGTON 695 (A. Ginger ed. 1974); Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion,* 82 HARV. L. REV. 1598, 1637-99 (1969); Funkenstein, *Current Problems in the Verbal and Quantitative Ability Subtests of the Medical College Admission Test,* 40 J. MED. EDUC. 1031 (1965); *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964,* 84 HARV. L. REV. 1109, 1120-40 (1971).

On tests and other measures of ability as legitimizing the existing class structure through the internalization of ability concepts, with attendant psychic stress, see R. SENNETT & J. COBB, THE HIDDEN INJURIES OF CLASS (paperback ed. 1973); Bowles & Gintis, *I.Q. in the U.S. Class Structure,* SOC. POL'Y, November-December 1972 & January-February 1973, at 65-96. For a particularly vivid fictionalized account, see T. DISCH, 334, at 11-38 (paperback ed. 1974).

197. 401 U.S. at 432.

ployment practices, not simply the motivation."[198] Under the notion of "intention" that emerges from the opinion, then, one is intentionally discriminating if one continues to use a practice or maintains a condition that disadvantages a minority group without being able to justify the rationality of the practice or condition.[199] This idea, too, did not seem easily confined within the employment area to tests alone,[200] nor easily within the employment area at all.[201]

When applied to ostensibly rational practices, the *Griggs* notion of intention merely demands a showing of rationality. When applied to nonrational practices, such as school or voter districting, jurisdictional boundaries, or zoning decisions, all of which are inherently arbitrary,[202] the *Griggs* notion becomes a demand for results and, therefore, an adoption of the victim perspective. If, for example, there are a number of ways to divide a community into districts for school assignment purposes, and the one currently employed produces a great deal of racial concentration in schools, to perpetuate the existing scheme with the knowledge of the racial concentration produced becomes intentional discrimination—unless there is a sufficiently good reason for having chosen that scheme. To follow out the analogy to *Griggs,* such a reason would have to be one that tells the black children, who are confined to schools segregated in fact, why it is *legitimate* that they be so confined. Absent such a reason, the children would have the right to a redistricting that did not produce

198. *Id.* (emphasis in original).

199. Compare Paul Brest's curious footnote, which, whether one agrees or disagrees with its semantic analysis, may be seen as an effort to buttress the perpetrator perspective against the fierce encroachments of the victim perspective on the terrain of intent:

> A common error is to characterize foreseeable segregation as "intentional" and hence de jure by invoking the saw that "an actor intends the foreseeable or foreseen consequences of his conduct." This not only obliterates the conceptual distinction between de jure and de facto but carries a misleading emotive charge. It does not reflect ordinary usage to say that whenever an actor foresees that his conduct will work to someone's detriment, the actor "intends to injure" that person.

P. BREST, *supra* note 72, at 530 n.81. *See also* Note, *Reading the Mind of the School Board: Segregative Intent and the De Facto/De Jure Distinction,* 86 YALE L.J. 317 (1976).

200. *But see* International Bhd. of Teamsters v. United States, 431 U.S. 324, 348-55 (1977) (rejecting application to seniority despite unanimous lower court precedent); General Elec. Co. v. Gilbert, 429 U.S. 125 (1976) (rejecting application to exclusion of pregnancy from employer disability plan).

201. *See* cases cited in Washington v. Davis, 426 U.S. 229, 244 n.12 (1976); *The Supreme Court, 1975 Term,* 90 HARV. L. REV. 56, 115-16 & nn.16 & 19 (1976).

202. *See* Ely, *Legislative and Administrative Motivation in Constitutional Law,* 79 YALE L.J. 1205, 1231-35 (1970). Ely's characterization of such practices as nonrational leads him to stay with the perpetrator perspective.

racial concentration.

The third outstanding feature of *Griggs* is that it virtually coerces employers (and others affected by its rationale) into adoption of affirmative action programs. The *Griggs* rationale, with its attendant demand for justification, is not even triggered unless the practice complained of produces a disproportionate impact on a minority group. A potential defendant who wishes to avoid litigation, or who wishes to avoid the adoption of different or more cumbersome selection procedures, need only negate the disproportionate impact by adopting different procedures for the minority groups disproportionately excluded. While such an approach in no way legitimizes the original procedure under the rationale of *Griggs*, it does at least neutralize its illegitimacy by offering an alternative. Thus *Griggs* implicitly offers a choice: either make the meritocracy work on its own terms or make up for its flaws through affirmative efforts. That choice also suggests a way of looking at the so-called "reverse" discrimination issue.[203]

E. Education Revisited: *Swann, Wright,* and *Keyes*

In education, the era of contradiction most thoroughly realized itself in three cases decided during the three years following the *Griggs* decision: *Swann v. Charlotte-Mecklenburg Board of Education,*[204] *Wright v. Council of Emporia,*[205] and *Keyes v. School District No. 1.*[206] Each of these cases may be explained by and re-

203. For example, one might justify the adoption of a minority admissions program of the sort at issue in *Bakke* not by claiming to compensate those admitted, or touting the affirmative utilitarian benefits to be gained for society at large, but by simply showing that the existing selection procedure is a prima facie violation under *Griggs* with respect to those disproportionately excluded, that although the procedure cannot be demonstrated to be sufficiently rational, it cannot be replaced without great administrative cost, and that the minority admissions program serves to neutralize for a time the worst effects of an admittedly defective scheme, insofar as that scheme would otherwise operate to exclude those who have been the historical targets of blatant discrimination.

The key to this argument is, of course, the potential applicability of the *Griggs* notion of violation to the existing selection program. Once that potentiality has been neutralized, or greatly reduced, as by limiting the coverage of the *Griggs* rule, or by insisting on a prior adjudication of violation, the argument is easily brushed aside. *See* Regents of the Univ. of Cal. v. Bakke, 98 S. Ct. 2733, 2757-59 & nn.43-45 (1978) (Powell, J., announcing the judgment of the Court). For a discussion of how the Court, two years before the *Bakke* decision, confined the *Griggs* conception of violation, see text accompanying notes 271-87 *infra*. For further discussion of *Bakke*, see note 238 *infra*.

204. 402 U.S. 1 (1971).

205. 407 U.S. 451 (1972).

206. 413 U.S. 189 (1973).

mains formally within the perpetrator perspective, but each, especially when read in light of *Griggs,* creates expectations more consistent with the victim perspective.[207]

All three cases involved explicit findings of de jure segregation. *Swann* and *Wright* involved southern school systems in which the de jure systems were preexisting and remote in time from the actual conditions being litigated;[208] *Keyes* involved a northern city—Denver —where the district court had found de jure segregation in one part of the city. In addition, all three cases involved challenges to neutral practices that operated to produce racially concentrated schools. In *Swann* and *Keyes,* the practice was the neighborhood school; in *Wright,* it was deconsolidation of a combined city-county school system.

In each case, the Court retained formal adherence to the perpetrator perspective by "linking" the current condition under attack to the actual de jure violation. Thus, in *Swann,* while invoking the magic phrase that the "nature of the violation determines the scope of the remedy,"[209] the Court proceeded to show how by inference alone one could conclude either that the prior system of segregation produced segregated neighborhoods, which in turn produced the current condition of segregation, or that the residential segregation led to school siting decisions that continued to produce racial concentration, despite the abolition of de jure segregation.[210] Having linked the current condition to the past violation, the Court was able to conclude that although a prescription of racial balance is not ordinarily within the authority of a federal district court, both an "awareness of the racial composition of the whole school system" and the use of mathematical ratios were appropriate to remedy the current violation.[211]

In *Wright,* the Court could have tied its reasoning to the perpetrator perspective, since the city involved had decided to sever its relationship with the county school system only two weeks after a federal court had ordered pairing of schools. That severance would

207. *See* note 162 *supra.*

208. In *Wright,* the de jure system was less remote in time, inasmuch as the deconsolidation at issue took place only two weeks after the district court in 1969 finally ordered desegregation of the system. Thus, although the Court could have treated the deconsolidation as a present instance of purposeful discrimination, it chose not to rely on that theory of decision. *Cf.* Wright v. Council of Emporia, 442 F.2d 570 (4th Cir. 1971) (focusing on the present conduct but finding no discrimination), *rev'd,* 407 U.S. 451 (1972). In this respect, the case may be viewed as factually analogous to *Griggs* itself. *See* text accompanying notes 186-88 *supra.*

209. 402 U.S. at 16.

210. *See id.* at 20-21.

211. *See id.* at 25.

have changed the racial composition of the system from 66% black and 34% white to 72% black and 28% white (county) and 52% black and 48% white (city). While stressing the factual history and emphasizing that the case involved desegregation rather than lack of racial balance, the Court nevertheless based its decision on the *effect* of deconsolidation: "Thus, we have focused upon the effect—not the purpose or motivation—of a school board's action in determining whether it is a permissible method of dismantling a dual system. The existence of a permissible purpose cannot sustain an action that has an impermissible effect."[212]

In *Keyes,* the Court made a similar effort to tie the condition of segregation to the identified violation. The Court held that proof of a violation with respect to one area of a city, plus racial concentration elsewhere in the system, raised by evidentiary inference (prior similar acts or causal spread) a prima facie case of de jure segregation throughout the system.[213] The school board thereupon became obligated to show that the racial concentration elsewhere was not adventitious, a burden that was not met by a neighborhood school assignment policy.[214]

In all three cases, the Court permitted challenges to neutral practices that produced racial concentration in schools. In none of the cases did the Court demand proof that the original violation caused the challenged racial concentration. In fact, by indulging in causation analysis at least as plausible as that utilized by the Court, one might easily conclude that the real villain in all three cases was discrimination in housing that produced segregated residential patterns. In both *Swann* and *Keyes,* racially concentrated neighborhoods produced the racially concentrated schools; in *Wright,* the relative racial composition of county and city produced the result. Thus regarded, the cases suggest that the de jure segregation merely served as a backdrop for challenges to *conditions* of segregation produced by generalized patterns of discrimination. They further suggest that those same condi-

212. 407 U.S. at 462.

213. *See generally* Fiss, *supra* note 162, at 21-26.

214. 413 U.S. at 208-09. Justices Douglas and Powell, in separate opinions, concurred with the majority on the finding of a violation, but saw no reason to perpetuate the de facto/de jure distinction. *See id.* at 216, 219-20. Justice Powell reasoned that although "some of its language was more expansive," *Brown I*'s holding was "essentially negative," forbidding "state-compelled or authorized segregation of public schools." *Id.* at 220. According to Justice Powell, however, "the concept of state neutrality was transformed into the present constitutional doctrine requiring affirmative action to desegregate school systems" by subsequent decisions. *Id.* at 221. The Powell opinion gains a tongue-in-cheek character, however, when placed in a context with his earlier opinion for the Court in San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973), and his subsequent vote with the majority in Milliken v. Bradley, 418 U.S. 717 (1974), *discussed at* notes 242-55 *infra* and accompanying text.

tions should be equally subject to attack wherever they can be ascribed to patterns of discrimination, which would be anywhere other than the future society.

This conclusion gains much greater force from the fact that the three cases followed the decision in *Griggs,* for two aspects of *Griggs* explain the results in *Swann, Wright,* and *Keyes* much more convincingly than the formal reasoning used in those opinions. One is the notion that ostensibly neutral practices producing racially disproportionate results must justify themselves or be regarded as violations. Alternatively, by employing the *Griggs* corollary, one might conclude that the "intentional" violation in the three cases was adherence to a practice (the neighborhood schools) or a decision (the deconsolidation) that produced results associated with segregation. Under this view, retention of the practice in the face of its known results becomes a prima facie case of discrimination, again giving rise to a demand for rational justification. Under either approach, the rational justification would have to be one that not only explains the action taken, but also makes the condition of discrimination legitimate. Neither the neighborhood school assignments in *Swann* and *Keyes* nor the deconsolidation in *Wright* satisfied those requirements.

Thus by the end of the era of contradiction the Court, while remaining within the perpetrator perspective, had nevertheless managed to offer to black people expectations of proportional racial political power, a working system of equality of opportunity, if not actual jobs, and integrated schools. In the next era, these expectations were systematically defeated and only the perpetrator perspective was preserved.

IV. 1974-?: THE ERA OF RATIONALIZATION, OR THE JURISPRUDENCE OF CURE

A. An Overview

The typical approach of the era of rationalization is to "declare that the war is over,"[215] to make the problem of racial discrimination go away by announcing that it has been solved. This approach takes many forms. Its simplest and most direct version is the declaration that, despite the discriminatory appearance of current conditions, the actual violation has already been cured,[216] or is being remedied, regardless of whether the remedy prescribed can be expected to alleviate the condition.[217] A more sophisticated approach is to declare

215. Phil Ochs tried unsuccessfully with his song, *The War is Over,* to apply the same technique to the Vietnam War.

216. *See* Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 434-35 (1976).

217. *See* Milliken v. Bradley, 433 U.S. 267 (1977); Milliken v. Bradley, 418 U.S. 717 (1974); *id.* at 767-68 (White, J., dissenting).

that what looks like a violation, based on expectations derived from the era of contradiction, is not a violation at all. This has been accomplished by isolating statutory discrimination from constitutional discrimination to prevent the former from infiltrating the latter[218] and by weakening the previously created statutory standards under the guise of statutory interpretation.[219] The same results have been achieved by renewing insistence on the always manipulable requirement of causation,[220] by emphasizing the form rather than the results of earlier cases,[221] by invoking the purpose-motive distinction to insulate neutral nonrational decisions,[222] or by presuming the rationality of neutral decisions instead of demanding their justification.[223]

Central to the era of rationalization is the pretense—associated with the color-blind theory of racial discrimination—that but for an occasional aberrational practice, future society is already here and functioning. The contradictions implicit in the earlier cases are thus resolved largely by pretending they were never there. This resolution has in turn facilitated a quick and easy return to the comfortable and neat world of the perpetrator perspective. As a result, the actual conditions of racial powerlessness, poverty, and unemployment can be regarded as no more than conditions—not as racial discrimination. Those conditions can then be rationalized by treating them as historical accidents or products of a malevolent fate, or, even worse, by blaming the victims as inadequate to function in the good society. The next few sections will describe, in each of the three substantive areas discussed earlier, the decisions that have brought the era of rationalization into being.

B. Voting

In *Beer v. United States*,[224] the Court finished the job, which began with its treatment of the annexation issue in *Richmond*,[225] of

218. *See* Washington v. Davis, 426 U.S. 229, 238-39 (1976).

219. *See* Dothard v. Rawlinson, 433 U.S. 321, 334-35 (1977); International Bhd. of Teamsters v. United States, 431 U.S. 324, 348-55 (1977); General Elec. Co. v. Gilbert, 429 U.S. 125, 133-36 (1976); Washington v. Davis, 426 U.S. 229, 238-39, 248-52 (1976); Beer v. United States, 425 U.S. 130, 138-42 (1976).

220. *See* Rizzo v. Goode, 423 U.S. 362, 376-77 (1976); Warth v. Seldin, 422 U.S. 490, 502-07 (1975).

221. *Compare* Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976), *and* Milliken v. Bradley, 418 U.S. 717 (1974), *with* Keyes v. School Dist. No. 1, 413 U.S. 189 (1973), *and* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

222. *See* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265-66 (1977).

223. *See* Washington v. Davis, 426 U.S. 229, 242, 248 (1976); Milliken v. Bradley, 418 U.S. 717, 744-47, 747 n.22 (1974).

224. 425 U.S. 130 (1976).

225. City of Richmond v. United States, 422 U.S. 358 (1975), *discussed at* notes 151-55 *supra* and accompanying text.

destroying the expectations of political power that the Court itself had generated by bringing districting procedures under section 5 of the Voting Rights Act of 1965 and by its own treatment of the districting aspect of *Richmond*. *Beer* was the first case to present a substantive question of section 5's application to legislative redistricting. The City of New Orleans, a jurisdiction subject to section 5, had a population that was 55% white and 45% black, with registered voters 65% white and 35% black.[226] Under the New Orleans districting scheme, there were seven council seats, two of which were elected on an at-large basis. Of the five remaining districts, four had clear white majorities, and black voters comprised 50.2% of the voting population in the fifth district.[227] No black had ever been elected to the city council.

New Orleans was obligated by local law to redistrict itself after the 1970 census. After the Attorney General of the United States rejected a plan that provided for no black electoral majorities in any district, a substitute was offered that provided for a black voting majority of 52.6% in one district.[228] The validity of this plan was the issue in *Beer*, and the Court had to decide whether the plan had the purpose or effect of discriminating on the basis of race within the meaning of section 5. As suggested above, the determination whether a redistricting plan is racially discriminatory seems to demand a test of that plan against a standard of racial proportionality. Under such a test, a black voting population of 35%[229] should control three of seven council seats. A plan that provides a slight majority in one district would seem to fail the test. The Court's response was to rewrite section 5 to change the appropriate inquiry from one about racial discrimination to one about incremental racial discrimination.

The Court's first step was to narrow the scope of its inquiry from the entire new plan to just that portion of the plan involving the five districted seats. Since there had been two at-large seats under the earlier scheme, retaining at-large seats was not a change within the meaning of section 5.[230] Having severed the at-large seats from the case, the Court proceeded to apply the same logic to the five remaining seats, concluding that the concern of section 5 was fulfilled by asking whether the black population was worse off under the new plan than it had been under the old one. Thus rewritten, the concern of section 5 was changed from discrimination to "retrogression."[231]

226. *See* 425 U.S. at 134.

227. *See* Appendix at 621, Beer v. United States, 425 U.S. 130 (1976).

228. *See* 425 U.S. at 136.

229. The actual percentage of black voters had risen to 38.2% in 1974. *See id.* at 142 n.13.

230. *See id.* at 138-39.

231. *See id.* at 141.

The answer to this narrow question was obvious; the district court, in rejecting the plan, had simply misunderstood the statute.[232]

The opinion did not even allude to the "permanent overrepresentation"[233] of the white community of New Orleans under the approved plan, preferring instead to drag out the color-blind theory to reaffirm that no minority group has any right to proportional representation.[234] The net effect of this decision was to legitimize the status quo by immunizing the preexisting condition of black underrepresentation from statutory or constitutional scrutiny.[235] This implies that the condition of underrepresentation is to be regarded as innocent, fortuitous, unrelated to racial discrimination, and not required to justify itself. It is as if the mighty Voting Rights Act had been set atop a high-heeled shoe, with its awesome force trained upon a tiny, interstitial moment, surrounded by the remainder of a real problem it could no longer touch.

The most recent voting case, *United Jewish Organizations v. Carey*,[236] is a case that, in its relationship to *Beer*, may be characteristic of the era of rationalization: the remedial counterpoint. While *Beer* served to confine the area of legitimate concern by placing a great deal of racial discrimination beyond the concern of the law, *United Jewish Organizations* appears to emphasize the vigorous remedial efforts that will be required, or perhaps tolerated, within that newly-defined area. In *United Jewish Organizations*, the Court upheld a districting plan that self-consciously created 65% nonwhite majorities in enough electoral districts to assure a 35% overall nonwhite population control of 30% of the assembly and senatorial seats in Kings County, New York.[237] In affirming that result, the eight participating Justices produced four opinions containing two statutory rationales, two constitutional rationales, and one dissent, with no more than four Justices agreeing on anything except the result.

The principal illusion created by *United Jewish Organizations* is that the case concerns something significant with respect to racial discrimination. The interplay of rationales and opinions gives the impression of a great intellectual and emotional struggle to find justifications for the employment of powerful remedial devices. The case may come to be seen as an improvisational dress rehearsal for the Court's later performance on the so-called "reverse" discrimination

232. *See id.* at 142.

233. *See* notes 159-61 *supra* and accompanying text.

234. *See* 425 U.S. at 136 n.8.

235. Constitutional voting cases have never made it as far as the era of contradiction, remaining unambiguously imbedded in the perpetrator perspective. *See, e.g.*, Whitcomb v. Chavis, 403 U.S. 124 (1971); Wright v. Rockefeller, 376 U.S. 52 (1964).

236. 430 U.S. 144 (1977).

237. *See id.* at 155-56.

issue in *Regents of the University of California v. Bakke*.[238] And, in this respect, neither *United Jewish Organizations* nor *Bakke* is a very significant case about the real possibilities of remedying racial discrimination. The important cases are the ones that define the violations. For voting rights, *Beer* was the important case, and all that follows must be regarded as confined by and operating within the narrow area of concern left by *Beer*.

From the assortment of opinions in *United Jewish Organizations*, one can infer two main themes of the era of rationalization, both of which are likely to appear in the remedial counterpoint cases. One is the vigorous affirmation of efforts to remedy a violation, with the latter concept having been narrowly defined elsewhere. Two of the "majority" rationales adopt this approach, with their justifications of

238. 98 S. Ct. 2733 (1978). Despite the hoopla surrounding *Bakke* as a media event, the case never promised to be more than a remedial counterpoint inasmuch as the issue was the validity of a *voluntary* affirmative action program. And it turned out to be something less than a remedial counterpoint, although how much less is difficult to predict, given the fragility of the "majority" as well as the juxtaposition in Justice Powell's crucial opinion of reactionary rhetoric with what has been widely received as an implicit invitation to hypocritical practice.

It is interesting in this connection, based on my own experience as both consumer and interviewee at the time, that the media coverage of *Bakke* depicted it as much more of a remedial counterpoint decision than a formal reading would suggest. The public image created was one of a case that had merely outlawed "bad" quotas, while leaving intact the idea of voluntary affirmative action programs that took race into account in admissions decisionmaking. (For an excellent illustration of the persistence of this view, see Footlick & Camper, *New Issues for the Court*, NEWSWEEK, October 9, 1978, at 54, asserting that in *Bakke* the "sharply divided Court struck down a medical-school admissions quota favoring minorities, but upheld the principle of affirmative action.") The formal theory of Justice Powell's opinion is much more hostile to affirmative action programs, invoking the most rigid rhetoric of color-blindness and explicitly rejecting the idea that race may be employed in admissions decisions for reasons having anything to do with securing racial justice or remedying racial discrimination (unless, of course, one has first identified the increasingly elusive "violation"). *See* 98 S. Ct. at 2747-60.

The practical impact of the decision may, however, fit the remedial counterpoint model, by permitting voluntary action to accomplish results not unlike those accomplished under the admissions programs struck down in *Bakke*, while ensuring that strife and cost will precede the achievement of even minimal results. The decision does permit schools to make admissions decisions that take race into account so long as those decisions are part of a "diversity" program (now protected by some quasi-first amendment notion of academic freedom) that is not designed (at least in theory) to promote racial justice and treats race as equivalent to attributes like being a "farm boy from Idaho." *Id.* at 2765 app. Such a program can benefit some minority students if a faculty possesses sufficient will and concern to renew formally its commitment to such results through adoption of an "acceptable" program, tolerate a more complex general admissions process, and risk litigation. And those faculty members who, especially in graduate and professional education, want to further the goals of affirmative action must be willing to pretend to want a "diverse" student body and pretend well enough to earn the protection of Justice Powell's "presumption of legality." *Id.* at 2763 n.53.

the limited use of racial proportionality involved in the case ultimately dependent on the validity and coverage of the Voting Rights Act.[239] The implicit message is one of assurance to white voters generally that, while the remedies upheld look severe, nothing more will be *required* than avoidance of a violation as defined in *Beer*.

The other theme, suggested principally by the constitutional majority rationale joined in by Justices White, Stevens, and Rehnquist is that of voluntary tokenism.[240] The message here is that it is a matter of constitutional indifference if white majorities wish to remedy racial discrimination beyond the extent required by antidiscrimination law.[241] Viewed against the background of the narrowed concept of violation, this approach contains two obnoxious features. First, the possibility of genuine improvement in the condition of the black community is dependent entirely on the benevolence of whites. Thus it becomes unlikely that voluntarism will change very much at all. Second, by relegating significant remedial efforts to the domain of voluntarism, the Court sets up a ferocious ethical debate within the white community. Placing the existing societal institutions and practices beyond the reach of the violation concept tends to legitimize those institutions and practices, making them appear to be the ones that would exist in future society. But color-blindness is the applicable antidiscrimination principle in future society. Thus the battle is joined between those who choose to take seriously the legitimation of existing structures—by mobilizing around the color-blind theory to oppose remedial practices that would not be valid in future society—and those who remain unconvinced that future society has arrived.

C. Education

The era of rationalization began in the same substantive area as modern antidiscrimination law—school desegregation. In *Milliken v.*

239. *See* 430 U.S. at 148-65 (Parts I, II, and III of the opinion of White, J., joined by Blackmun, Brennan, and Stevens, JJ.); *id.* at 168-79 (Brennan, J., concurring in part).

240. *See id.* at 165-68 (White, J., joined by Rehnquist and Stevens, JJ.). The fourth "majority" rationale, that of Justice Stewart, joined by Justice Powell, is also constitutional, but seems to evade the basic issue by misapplying the intent requirement of *Washington v. Davis* to a case that does involve an explicit racial classification. *See id.* at 179-80.

Justice Powell seems to have conceded as much with his quick rejection of the same argument as applied to the *Bakke* case. *See* Regents of the Univ. of Cal. v. Bakke, 98 S. Ct. 2733, 2748 n.27 (1978) (Powell, J., announcing the judgment of the Court).

241. The same message was offered in Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971). *See generally* Brest, *supra* note 17, at 16-17.

Bradley (*Milliken* I),[242] the Court for the first time applied antidiscrimination law to rationalize a segregated result in a case where a constitutional violation had been found to exist.[243] Despite extensive de jure segregation in the City of Detroit, the Court refused to approve a remedy that would consolidate Detroit schools with those of surrounding suburbs for the purpose of achieving an integrated result. In so holding, the Court rendered irrelevant the district court's conclusion that absent such a remedy, the schools of Detroit would become all-black within a few years.[244] Coupled with the decision a year earlier in *San Antonio Independent School District v. Rodriguez,*[245] which rejected a claim of resource equalization among school districts without regard to ability to pay, the message of *Milliken I* is stark and clear: if whites can find a way to leave the inner city, they may legally insulate their finances and schools from the demands of blacks for racial equality.[246] The only additional requirement for that sense of security is the availability of easily manipulated restrictive land-use practices, which the Court has graciously provided in other cases.[247]

To achieve this result, the Court had to emphasize the form of *Swann* and *Keyes* over their substance, make results irrelevant, refuse to recognize the implications of *Griggs,* and renew its insistence on proof of causation. Citing *Swann,* the Court pointed out that "[t]he controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and

242. 418 U.S. 717 (1974).

243. The Court had rationalized segregated results before by refusing to find any violation. *See* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 55 (1973); Jefferson v. Hackney, 406 U.S. 535, 549 (1972); Palmer v. Thompson, 403 U.S. 217, 226-27 (1971); James v. Valtierra, 402 U.S. 137, 143 (1971); Evans v. Abney, 396 U.S. 435, 444 (1970). *Milliken I,* on the other hand, involved an actual violation. *See* 418 U.S. at 738 n.18.

244. 418 U.S. at 735.

245. 411 U.S. 1 (1973).

246. *Milliken I* is typical of a number of Supreme Court cases in recent years, all of which are difficult to reconcile with prior cases in their own narrow doctrinal areas, but which as a group seem consistent and coherent if viewed as designed to insulate and protect the suburbs from the demands or intrusive influences of racial, economic, or political minorities. *See* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977); City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668 (1976); Hudgens v. NLRB, 424 U.S. 507 (1976); Warth v. Seldin, 422 U.S. 490 (1975); Milliken v. Bradley, 418 U.S. 717 (1974); Lehman v. City of Shaker Heights, 418 U.S. 298 (1974); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974); San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973); Lloyd Corp. v. Tanner, 407 U.S. 551 (1972); James v. Valtierra, 402 U.S. 137 (1971).

247. *See* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977); City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668 (1976); Warth v. Seldin, 422 U.S. 490 (1975); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974); James v. Valtierra, 402 U.S. 137 (1971).

extent of the constitutional violation."[248] The district court's mistake had been in proceeding on the erroneous assumption that "the Detroit schools could not be truly desegregated . . . unless the racial composition of the student body of each school substantially reflected the racial composition of the population of the metropolitan area as a whole."[249] That the district court so assumed is hardly surprising, however, if one reads *Swann* and *Keyes* in light of *Griggs*' concept of intentional violation or its treatment of neutral practices. Even if one takes a narrower view and simply analogizes the neighborhood school policy, which seemed to be the real cause of the segregation in *Swann* and *Keyes,* to the district boundaries in *Milliken,* the district court's assumption again seems sensible.

It is not clear why the Court thought district boundaries were sacrosanct while neighborhood school assignments were not. The Court offered no comparative judgment, merely announcing that the boundary lines were a manifestation of the sacred principle of local autonomy: "No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process."[250] But it was not even the principle of local autonomy that the Court was exalting in *Milliken*; it was the precise fact of the district boundaries existing in the Detroit metropolitan area that served to facilitate the operation of virtually all-white suburban schools. The principle of local autonomy may be a fine one as applied to an area of relative equality. In the usual suburb-city context where it is invoked, however, "local autonomy" is a codeword for rationalizing and protecting the prior appropriation of financial resources, environmental amenity, and, in this case, racial homogeneity. In short, it is a principle of vested rights.[251]

Moreover, the local autonomy discussion, although central to the historical meaning of *Milliken I,* was not even relevant to the rationale of the case. Since the Court refused to advance the implicit thrust of *Griggs-Swann-Keyes,* which would have made the conditions of racial concentration produced by the boundary lines at least a prima facie violation, there was no occasion to demand that the boundary lines be justified as either rational or innocently nonrational. The only practice deemed to be a violation at all was the de jure segregation of the City of Detroit. Here, as in the voting cases,

248. 418 U.S. at 744 (citing Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971)).

249. *Id.* at 740; *see* Fiss, *supra* note 162, at 28.

250. 418 U.S. at 741-42.

251. *See* Freeman, *Give and Take: Distributing Local Environmental Control Through Land-Use Regulation,* 60 MINN. L. REV. 883, 956-58 (1976).

the crucial step toward the result was to narrow the concept of violation. To accomplish that step, the Court had to return to the secure world of the perpetrator perspective:

> Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of inter-district segregation. Thus an interdistrict remedy might be in order where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or where district lines have been deliberately drawn on the basis of race. In such circumstances an interdistrict remedy would be appropriate to eliminate the interdistrict segregation directly caused by the constitutional violation.[252]

Under the strict causation requirements of *Milliken I*,[253] the law does not offer even a feeble presumption that the extensive ghettoization of the City of Detroit in relation to its surrounding suburbs has anything to do with racial discrimination. Having rejected the implications of *Swann* and *Keyes*—that results mattered and that school desegregation remedies would be used to counter the effects of residential segregation—the Court insured that residential racial concentration will be subject to scrutiny, if at all, only in the difficult to litigate and virtually impossible to remedy domain of housing discrimination.[254] Under the combined force of *Rodriguez* and *Milliken*, black city residents are thus worse off in terms of legal theory than they were under the "separate-but-equal" doctrine of pre-*Brown* southern school litigation, where a claim of equivalent resources for black schools was at least legally cognizable.[255] And even if it makes

252. 418 U.S. at 744-45. Justice Stewart, in a concurring opinion, suggested that an interdistrict remedy might be appropriate in other situations as well, such as "purposeful racially discriminatory use of state housing or zoning laws." *Id.* at 755. *See generally* Note, *Interdistrict Desegregation: The Remaining Options*, 28 STAN. L. REV. 521 (1976).

253. These requirements were recently reaffirmed in Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977).

254. *See* Austin Independent School Dist. v. United States, 429 U.S. 990, 991-95 (1976) (Powell, J., concurring).

255. This is not to suggest that demands for separate but equal educational facilities were met. *See* Gong Lum v. Rice, 275 U.S. 78, 82-84 (1927); Cumming v. Richmond County Bd. of Educ., 175 U.S. 528, 544-45 (1899). *See also* Berea College v. Kentucky, 211 U.S. 45, 46, 53, 58 (1908). Nevertheless, the irony of the posture of present-day victims is, in comparison to a literal reading of the separate but equal doctrine, inescapable. *See* Milliken v. Bradley, 418 U.S. 717, 759-61 (1974) (Douglas, J., dissenting); note 85 *supra*.

sense within the narrow world of the perpetrator perspective to say that school desegregation should not be a remedy for housing discrimination, the effect of *Milliken I* is far worse than neutral with respect to housing. By offering the lure of suburban isolation, the decision invites "white flight," thereby stimulating even greater racial concentration in housing.

That the Supreme Court had become indifferent to results became clear two years after *Milliken I.* In *Pasadena City Board of Education v. Spangler,*[256] the Court completed the task of rationalizing into obscurity the remaining victim perspective implications of *Swann* and *Keyes. Pasadena* involved a single jurisdiction that had been previously adjudged to have maintained segregated schools. The court-ordered remedial plan, which went into effect for the 1970-1971 school year, mandated a set of pupil assignment practices that would ensure that no school in the system had a majority of minority students.[257] The remedial plan produced that result for only one year, however, and by 1974, five of the 32 schools in the system again had black majorities.[258] The Court attributed this change to a "normal pattern of human migration [that] had resulted in some changes in the demographics of Pasadena's residential patterns"[259] and decided that despite the maldistribution in fact, Pasadena had achieved a unitary school system within the meaning of *Swann.*

Whether or not the actual behavior producing the demographic changes in *Pasadena* should be deemed "white flight,"[260] the message of the case on that point is as clear as it was in *Milliken I.* If the only obligation imposed by desegregation is to produce racially balanced schools for a year, intrajurisdictional white flight becomes as attractive an escape as the interjurisdictional variety offered by *Milliken I.* In another sense, however, *Pasadena* was just a logical corollary of *Milliken I.* If the Court had ordered further racial balance in Pasadena's schools, it would likely have accomplished no more than to stimulate further the kind of white flight already legitimized by *Milliken I.*

Pasadena marks the full restoration of the perpetrator perspective in school desegregation cases, with the substance of *Swann* subdued by its form.[261] If it was a concern for lack of results that permit-

256. 427 U.S. 424 (1976).
257. *See id.* at 428.
258. *See id.* at 435.
259. *Id.* at 436.
260. *See id.* at 435.
261. When the District Court's order in this case . . . is measured against what this Court said . . . in *Swann v. Board of Education* . . . regarding the scope of the judicially created relief which might be available to remedy violations of the Fourteenth Amendment, we think the inconsis-

ted the victim perspective to creep into the jurisprudence at all,[262] it is a brazen indifference to results that has facilitated the current doctrinal restoration. Only from the perpetrator perspective does it make sense to say that segregated schools are "caused" by the "badness" of particular actors, that the ephemeral negation of the conditions associated with that "badness" neutralizes the "badness" itself, and that the reappearance of the very same conditions is as irrelevant as if it were to occur in future society.

The remedial counterpoint to *Milliken I* and *Pasadena* appears in *Milliken II*,[263] where the Court upheld a district court order requiring the State of Michigan to pay one-half the support of various remedial programs[264] that the lower court had made a part of its desegregation plan for Detroit. The case exhibits both of the characteristics typical of remedial counterpoint cases—the illusion of vigorous remedial action, the effect of which has been limited to a narrowly defined violation, and the affirmation of voluntary tokenism. The facts of *Milliken II* are so odd, however, that it is unclear which

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tency between the two is clear. The District Court's interpretation of the order appears to contemplate the "substantive constitutional right [to a] particular degree of racial balance or mixing" which the Court in *Swann* expressly disapproved. . . . It became apparent, at least by the time of the 1974 hearing, that the District Court viewed this portion of its order not merely as a "starting point in the process of shaping a remedy," which *Swann* indicated would be appropriate, . . . but instead as an "inflexible requirement," . . . to be applied anew each year to the school population within the attendance zone of each school.

The District Court apparently believed it had authority to impose this requirement even though subsequent changes to the racial mix in the Pasadena schools might be caused by factors for which the defendants could not be considered responsible. Whatever may have been the basis for such a belief in 1970, in *Swann* the Court cautioned that "it must be recognized that there are limits" beyond which a court may not go in seeking to dismantle a dual school system. . . . These limits are in part tied to the necessity of establishing that school authorities have in some manner caused unconstitutional segregation, for "[a]bsent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis." . . . While the District Court found such a violation in 1970, and while this unappealed finding afforded a basis for its initial requirement that the defendants prepare a plan to remedy such racial segregation, its adoption of the Pasadena Plan in 1970 established a racially neutral system of student assignment in the [district]. Having done that, we think that in enforcing its order so as to require annual readjustment of attendance zones so that there would not be a majority of any minority in any Pasadena public school, the District Court exceeded its authority.

Id. at 433-35 (citations omitted) (quoting Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 24, 25, 28 (1971)).

262. *See* text preceding note 132 *supra.*

263. Milliken v. Bradley, 433 U.S. 267 (1977).

264. *See id.* at 288-91.

of these two features predominates. The oddness stems from the lack of adversity in the case: both the Detroit School Board and the State of Michigan favored the remedial programs, and the only issue before the Court was whether the state could be made to contribute.[265]

From the perspective of the school board, the case may be an exercise in voluntary tokenism, with the crucial fact being the school board's willingness to spend more money than would otherwise be required to make up for the effects of past segregation. This view gains further force from the fact that the state defendant also supported some of the special programs on the merits, objecting only to the expense of implementing the order.[266] Thus read, the case stands for nothing more than the proposition that a local government *may* choose to do more than the Constitution requires in remedying school segregation.

The case may also be read, however, as rejecting a claim, at least on the part of the State of Michigan, concerning the propriety of the remedial order apart from the issue of money.[267] Thus interpreted, *Milliken II* stands for the bold proposition that special remedial programs, even expensive ones, may be required to remedy the effects of past segregation. The most striking aspect of this interpretation is the idea that something more than pupil reassignment may be required to undo a past system of segregation. When read together with the prior cases, however, this proposition loses significance. For one thing, the remedial programs may be the only possible remedy in Detroit, since the one aspect of segregation that will not be remedied after *Milliken I* is racial concentration. Pupil reassignment is unlikely to cure segregation in a school system whose students are nearly all black.[268] Second, the obligation to finance special programs would seem in view of *Pasadena* to last only until a court announces that desegregation has been accomplished in Detroit. In this respect, *Milliken II* remains ambiguous, with the ambiguity analogous to the gap between *Swann* and *Pasadena*. One could either insist that the remedial programs be maintained until the actual effects of segregation on Detroit's students are eliminated or neutralized or be ready to abandon the programs as soon as some barely plausible empirical measure of change is offered.

A third feature of *Milliken II* viewed as an instance of remedial vigor is that the compelled state expenditures upheld in *Milliken II*

265. *See id.* at 270-71.

266. *See id.* at 293-94 (Powell, J., concurring).

267. In considering the validity of this alternative reading, compare the opinions of Chief Justice Burger, *id.* at 269-91, Justice Powell, *id.* at 292-98, and Justice Marshall, *id.* at 291-92.

268. *See* Milliken v. Bradley, 418 U.S. 717, 799-802 (1974) (Marshall, J., dissenting); Bradley v. Milliken, 484 F.2d 215, 245 (6th Cir. 1973), *rev'd*, 418 U.S. 717 (1974).

gain significance from the Court's refusal in the 1973 *Rodriguez* case to adopt any generalized principle of statewide resource equalization for school systems.[269] The combined force of *Rodriguez* and *Milliken I* puts the urban school system in the untenable position of being able to claim neither resources of the state or suburbs on any generalized continuing basis nor student access to the actual suburban school systems. Against that background of "separate-but-unequal," the $5,800,000 in state money disputed in *Milliken II* looks significant. In the larger context, however, the money, just like the ward plan in *Richmond,*[270] looks more like a payoff to the black community to gain its quiet acquiescence in the demise of antidiscrimination law.

D. EMPLOYMENT

If *Griggs* was the most important case of the era of contradiction, the only one offering a genuine threat to the hegemony of the perpetrator perspective, then the major task of the era of rationalization must be the obliteration of *Griggs.* And so it is in the area of employment that one finds the case that will likely become the centerpiece of the era of rationalization: *Washington v. Davis.*[271] While not quite obliterating *Griggs,* the Court has so undermined it that it has ceased to be a credible threat. This overall result has been achieved in three discrete steps: *Griggs'* apparent implications for all of antidiscrimination law have been squelched by limiting its doctrine to title VII; its forceful assault on the system of equality of opportunity from within the structure of title VII has been blunted by softening the scrutiny required; and its apparent application to analogous title VII problems has been denied by refusing to extend it to the other major substantive area where it had been applied by the lower courts for some time—seniority. The first two of these steps appear in *Washington v. Davis*; the third required an additional case.[272]

As noted above, *Griggs* was apparently significant for other than title VII cases insofar as it implied that neutral practices producing racially disproportionate results would have to be justified; that, for the purposes of antidiscrimination law, intent would mean no more than voluntary conduct producing racially disproportionate results; and that the best way to avoid or at least defer the impact of the first

269. *See* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 54-55 (1973). Although there is no general right to resource equalization, *Milliken II* was arguably an instance of partial equalization. This indicates that the *Milliken II* plaintiffs were being paid off, as it were, via the concession of resource equalization, in order to make palatable a solution that may be viewed as no solution at all.

270. *See* text preceding note 156 *supra.*

271. 426 U.S. 229 (1976).

272. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977), *discussed at* text accompanying notes 289-98 *infra.*

two was to initiate a voluntary affirmative action program.[273] In *Washington v. Davis,* the Court explicitly rejected the first two implications, thereby removing any suggestion of obligation from the third and relegating it to the easier world of voluntary tokenism.

Washington v. Davis involved a test that purported to measure verbal ability, vocabulary, reading, and comprehension. The test was challenged in its role as a criterion for admission to the training program for District of Columbia police officers. Given a failure rate that was four times as high for blacks as for whites, the plaintiffs asserted, in an action commenced before title VII became applicable to governmental employment, that the test was prima facie unconstitutional. The Court held that absent direct or inferential proof that the test was employed with a design to produce racially disproportionate results, the disproportionate failure rate was not itself significant enough to create a prima facie case and that there was no requirement that the test demonstrate any rationality at all.[274] Using an intriguing kind of inside-out reasoning, the Court quickly rebutted the common sense notion that racial discrimination under the fifth or fourteenth amendments meant the same thing as racial discrimination under title VII. Mr. Justice White's terse offering was that "[w]e have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today."[275]

To support its position, the Court offered a "parade of horribles" argument that would be embarrassing in a first-year law class: "A [contrary] rule . . . would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white."[276] For precedent, the Court turned to cases like *Wright v. Rockefeller,*[277] which involved electoral districting, but failed to explain why a conclusion that an inherently nonrational decision like districting need not be justified in rational terms compels the conclusion that an ostensibly rational practice like testing is equally secure from scrutiny.

Thus, with quiet efficiency[278] the Court eliminated all extra-title

273. *See* notes 194-203 *supra* and accompanying text.

274. *See* 426 U.S. at 244-48.

275. *Id.* at 239.

276. *Id.* at 248 (footnote omitted).

277. 376 U.S. 52 (1964).

278. Compare public awareness of Washington v. Davis, 426 U.S. 229 (1976), with public awareness of the far less significant case of Regents of the Univ. of Cal. v. Bakke, 98 S. Ct. 2733 (1978).

VII implications of *Griggs*. The alternative holding of *Washington v. Davis* went a step further, softening the severe scrutiny thought to be required by *Griggs* to the point where *Griggs* is no longer much of a threat even in title VII cases. *Griggs* itself had never reached the question of degree of rationality demanded from the tests, since the case offered a strong inference of purposeful discrimination and the employer declined to offer any proof concerning the validity of the test.[279] *Griggs* did, however, use strong language in its insistence on job-relatedness, business necessity, and the elimination of "built-in headwinds" to minority employment.[280] In addition, *Griggs* cited with approval the tough stance on job-relatedness taken by the Equal Employment Opportunity Commission (EEOC) and paid homage to the EEOC as deserving of deference in its administrative interpretations of the statute.[281] This strict insistence on proof of job-relatedness seemed doctrinally secure as late as 1975, when the Court in *Albemarle Paper Co. v. Moody*[282] insisted on genuine proof of job-relatedness and again relied on the EEOC guidelines.[283]

In three respects, the Court in *Washington v. Davis* dropped any pretense of strictness with respect to job-relatedness and simultaneously abandoned its posture of deference to the EEOC: the test was ultimately validated by nothing more than intuitive generalization. There may have been evidence that the challenged test correlated with some degree of significance with another test given to trainees at the end of the training program,[284] but there was no evidence that either the entrance test or the final test in any way related to qualities or abilities relevant to being a police officer.[285] In fact, there was no proof that the test given at the end of the training program measured anything taught in that program, even assuming that the program was related to future performance as a police officer. The most that was established was that the test correlated with another test, which in itself is hardly surprising. But that other test may or may not measure something, which something, even if measured, may or may not have anything to do with the job for which the training program is supposed to prepare those who pass the initial test. In this context,

279. *See* Griggs v. Duke Power Co., 401 U.S. 424, 427-28, 432 (1971); notes 186-87 *supra* and accompanying text.

280. 401 U.S. at 431-32.

281. *Id.* at 433-34. The guidelines are set out at *id.* at 433 n.9. *See* 29 C.F.R. §§ 1607.1-.14 (1977).

282. 422 U.S. 405 (1975).

283. *See id.* at 425, 431.

284. *See* 426 U.S. at 251 n.17. But one must go to the court of appeals opinion to see how minimal that significance was. *See* Davis v. Washington, 512 F.2d 956, 962 n.38 (D.C. Cir. 1975), *rev'd*, 426 U.S. 229 (1976).

285. *See* Davis v. Washington, 512 F.2d 956, 963 (D.C. Cir. 1975), *rev'd*, 426 U.S. 229 (1976).

the Court's conclusion, shared with the district court, that "some minimum verbal and communicative skill would be very useful, if not essential, to satisfactory progress in the training regimen"[286] seems little more than an assumption of the desired conclusion.[287]

Thus, while *Griggs* remains good law with respect to title VII cases involving tests and other objective hiring criteria,[288] it has lost a good deal of its force even in those areas. And last Term the Court rejected the unanimous views of eight courts of appeals by refusing to apply the *Griggs* approach to its other major area of application—seniority. In *International Brotherhood of Teamsters v. United States*,[289] the Court conceded that the *Griggs* approach to neutral practices under title VII would serve to invalidate seniority systems that perpetuated the effects of prior racial discrimination even where such discrimination was not proved or provable as a separate violation of the Act.[290] The Justices nevertheless concluded, by a seven-to-two majority, that the qualified exemption clause of section 703(h)[291] insulated such seniority systems from attack as violations in themselves.[292] To reach its result, the Court chose to construe the qualified exemption for seniority contrary to the way it had construed the very similar qualified exemption for tests in *Griggs*. In addition, the Court distinguished as remedy rather than violation its own willingness to uphold awards of retroactive seniority in hiring discrimination cases.[293] That position had been taken just a year earlier in *Franks v. Bowman Transportation Co.*,[294] which turned out to be a remedial counterpoint decided in advance of the case narrowing the violation.[295] The majority relied on the legislative history of the original 1964 Civil Rights Act, which, although seeming to support its position, is difficult to reconcile with equally persuasive arguments

286. 426 U.S. at 250.

287. *See The Supreme Court, 1975 Term*, 90 HARV. L. REV. 56, 122-23 & n.63 (1976). On test validation, see authorities cited note 196 *supra*.

288. *See* Dothard v. Rawlinson, 433 U.S. 321, 328-32 (1977).

289. 431 U.S. 324 (1977).

290. *Id.* at 348-50.

291. 42 U.S.C. § 2000e-2(h) (1970).

292. *See* 431 U.S. at 356-57. *See also* United Air Lines, Inc. v. Evans, 431 U.S. 553, 558-60 (1977).

293. *See* 431 U.S. at 347-56. This separation of remedy issues from violation issues is voiced with even greater force and clarity in United Air Lines, Inc. v. Evans, 431 U.S. 553, 558-60 (1977).

294. 424 U.S. 747 (1976).

295. This same strange juxtaposition of seemingly broad remedy and narrow violation appears in housing discrimination law. *Compare* Hills v. Gautreaux, 425 U.S. 284, 286, 305 (1976) (potentially wide-ranging remedy), *with* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 264-71 (1977) (narrow definition of violation). *See also* Roberts, *The New Segregation*, CORNELL L.F., June 1977, at 2.

based on the legislative history of the 1972 amendment-reenactment of title VII. The latter argument simply presumes some congressional awareness of the numerous and consistent lower court decisions construing section 703(h).[296]

Ultimately, however, the doctrinal intractability of *Teamsters* is irrelevant. The point here is not that *Teamsters* was wrong or that *Griggs* was right. It may even be conceded that as as a purely logical matter *Griggs* could have been decided the other way. The point here is that *Teamsters* is basically inconsistent with *Griggs* and that it amounts to a rigorous reassertion of the perpetrator perspective. To challenge the effects of seniority, which means lay-offs or reduced opportunities for better jobs, it is now necessary, however disproportionate the racial impact, to prove that those suffering the consequences are identifiable victims of post-1965 instances of hiring discrimination. If all you can show is pre-1965 discrimination, however blatant, you have no claim, unlike *Griggs,* where the Court seemed to regard as relevant that the testing scheme was perpetuating the employer's pre-Act discrimination or the effects of years of school segregation.[297] But even for post-1965 hiring discrimination, the effect of *Teamsters* is to place the difficult burdens on the victims, who must identify their perpetrators before being entitled to relief[298] rather than rely on the impact of the seniority system to establish a prima facie case and thereby switch the burden of justifying its results to the defendants. Finally, if the *Griggs* standards continue to be relaxed, it will be that much more difficult to establish the hiring discrimination that is prerequisite to any remedy altering the adverse impact of seniority systems.

V. CONCLUSION

In this Article, I have attempted to describe, with an emphasis on what I have called the "victim perspective," the major developments in antidiscrimination law from the *Brown* case through the present. I do not think the "why" of this development can be an-

296. Until *Teamsters,* the courts of appeals had assumed that title VII did not immunize seniority systems that perpetuated the effects of prior discrimination. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 346 n.28 (1977), and cases cited therein. It is altogether rational to assume that Congress was cognizant of and adopted this viewpoint when it amended and reenacted title VII in 1972. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, §§ 3-8, 86 Stat. 103 (codified at 42 U.S.C. §§ 2000e to 2000e-17 (Supp. V 1975)). *Teamsters,* however, rejected this interpretation of title VII and overruled, sub silentio, those cases it cited. *Compare* 431 U.S. at 346 n.28, *with id.* at 355-56.

297. *See* Griggs v. Duke Power Co., 401 U.S. 424, 427, 430 (1971).

298. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 360-62, 367-71 (1977).

swered with reference to legal doctrine, nor do I think that it is a satisfactory answer merely to invoke the rules that would be appropriate in a future, color-blind society. Despite any implications to the contrary, the preceding pages have not been a critique of the Burger Court, at least not in the sense that I hold that institution responsible for failing to legislate the victim perspective into being. I do believe that the decisions of the era of contradiction created expectations that were subsequently frustrated by Burger Court decisions, but I cannot regard the Court as autonomous and separate from the society that orchestrates it and therefore cannot regard that one institution as the villain of the tale.

In a forthcoming sequel to this Article, I will attempt to explore some of the problems involved in answering the "why" behind the current state of antidiscrimination law and will offer some ways of thinking about antidiscrimination law in the larger context of American society. I will suggest that the developments I have described become more comprehensible when related to class structure in American society, the relationship between problems of race and problems of class, and the special role of the myth of equality of opportunity.