CHAPTER FIVE: JUDICIAL PROTECTION OF MINORITY RIGHTS

I. Chapter Overview

In the Civil War Amendments to the United States Constitution, and in the Constitution Act, 1982, Americans and Canadians acknowledged that each of our histories demonstrated that the democratic majority had not provided sufficient protection of the rights of racial or linguistic minorities, specifically Americans of African descent and Canadians of French descent. One of the critical assumptions about both these significant constitutional provisions was that the creation of rights, to be enforced by a judicial system somewhat insulated from political processes, would provide a significant degree of protection for these minority communities. This debate continues in Australia, whose Constitution currently protects against discrimination only against out-of-state residents (as we saw in Chapter Four), but where there has been a significant call in recent years for a written “bill of rights” entrenching equality rights.

The purpose of this chapter is to explore, through Canadian decisions involving linguistic rights and American decisions involving rights of racial minorities, the extent to which courts are capable of providing the sort of protection envisioned by these constitutional documents. First, we will explore the treatment of linguistic minorities in Canada, dividing our inquiry between the treatment of Anglophones in Quebec and the treatment of Francophones in English-speaking Canada. In this regard, consider the way in which the Supreme Court of Canada has interpreted relevant constitutional provisions according to (1) the literal text, (2) the clear original intent of the drafters, or (3) the broad public purposes that underlie the relevant provision. It is in this specific context that we also consider a uniquely Canadian constitutional provision, section 33, that permits a legislature to enact law for a maximum of five years, notwithstanding its inconsistency with a variety of Charter protections. We will segue into our consideration of the treatment of American racial minorities by reconsidering the famous U.S. Supreme Court phrase “separate educational facilities are inherently unequal” in the Canadian context. Third, the materials explore the evolution over time of judicial and legislative protection for racial minorities in the United States. Finally, we turn to what lessons can be drawn from these experiences for continued judicial interpretation in North American and for adoption of equality provisions in Australia.

The purpose of this organization of these materials is to allow a focus on three critical questions:

[Ed. note: A special introductory note on the Notwithstanding Clause precedes the excerpt of Ford v. Quebec, infra.]
To what extent have the courts been effective protectors of minority rights?

Would American racial minorities be served or harmed if Congress had the power to temporarily enact legislation notwithstanding a determination of unconstitutionality by the courts?

Can constitutions and courts adequately protect minorities and allow the aspirations of minorities to be fulfilled?

**KEY CONCEPTS FOR THE CHAPTER**

- Because the principal political minority in Canada – French Canadians – comprise a majority of a province, there is a serious claim made by Quebecois sovereigntists that the aspirations of minorities are better protected by the political process than through judicial enforcement of entrenched constitutional rights.

- Canadian courts used a variety of ways of interpreting the constitution historically, with the dominant result that Francophones lost.

- Since the 19th century, there has been a tension in American jurisprudence between the notion that the Fourteenth Amendment provided for formal equality and the notion that it was designed to protect from discrimination Americans of African descent.

**II. Canada: Judicial Protection for Linguistic Minorities**

**A. Background**

Paul C. Weiler, Rights and Judges in a Democracy: A New Canadian Version


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Canadians sought a constitutionally entrenched Charter of Rights not just for its own sake, but also as part of a larger effort at constitutional renewal. The hope was that such a Charter would preserve a united Canada in the face of the serious threat posed by French Canadian nationalism within a potentially independent Quebec. In this Article, I comment on those features of the Canadian debate and its denouement that are noteworthy within the Canadian context, as well as those that illustrate some of the universal themes of constitutional theory.

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I. The Significance of Language Rights

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I will focus on the language issue for it has been as central to the Canadian experience with rights and constitutions as race has been in the United States. In fact, securing minority language rights was the principal motivation for Prime Minister Trudeau's making the Charter the centerpiece of his project for constitutional renewal of Canadian federalism.

The peculiar features of the language issue in Canada are vividly illustrated in our most famous civil rights controversy, the Manitoba School Crisis of the 1890's. In that case, the French Catholic minority asserted its right to have "separate but equal" education in its own schools funded out of the public coffers. The French considered oppressive the English-dominated provincial legislature's attempt to force all students, including French Catholics, into a single, "integrated" public school system. Paradoxically, the Manitoba minority lost that struggle largely because Canada's French Catholic Prime Minister, Wilfred Laurier, considered it essential to defend the principle of provincial autonomy just then emerging within the Canadian federal regime. Laurier believed that this constitutional principle was vital to the Quebecois (the French in Quebec), because it would keep the authority over education and other areas of public life in the hands of the provincial government in Quebec City, the only government in North America whose constituency was predominantly French.

In these fateful events of nearly a century ago lie the seeds of the modern Canadian dilemma. In fact, throughout the 1970's Canada witnessed an eerie replay of the contest between the strategy of individual constitutional rights as the ideal technique for protecting the French Canadian minority -- the position of Trudeau and his federal government in Ottawa -- and the alternative of provincial rights (or even more radical forms of Quebecois nationalism) -- now identified with Quebec Premier Rene Levesque and his

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12 This testifies to the differences between race and language. While each constitutes an external badge of identity - thus the basis for invidious discrimination - language poses a rather more profound problem. Not only does it shape the way an individual thinks and views the world, language is also an inherently social activity. It is not enough to have a constitutional right to speak the language of one's choice. One needs to have listeners who can understand.

Those who support linguistic equality, then, are not simply against adverse negative treatment on account of one's mother tongue, but also for the positive social conditions within which one's language and culture can survive and flourish. The key vehicle for resisting assimilation into a "language-blind society" is education, through which not just the language but also the history, culture, and sense of group identity are transmitted to the young. I should note that in Canadian constitutional history, there was an intimate connection between language and religion in the understanding of minority rights, and that is why I refer throughout to the French-Catholic minority.

13 [Ed. note: Under s. 93 of the Constitution Act, 1867, the federal Parliament is authorized to enact remedial laws to correct provincial incursions on minority educational rights. It has never been exercised.] Charles Tupper, the English Protestant leader of the then incumbent Canadian Government, introduced legislation in Ottawa to roll back Manitoba's new education policy, but this measure was opposed by Laurier's Liberals. The Liberals forced and won an election on the issue in 1896 and negotiated a compromise with the Manitoba Premier which effectively denied the French-Catholics their own schools in that province.
The virtues of the individual rights strategy are evident: through a constitutional guarantee of individual language rights, Canada could undo its past injustice towards the French Canadian minority as exemplified by the Manitoba School case. Such measures would, it was hoped, avert the serious threat to Canadian unity posed by the coexistence of two linguistically separate Canadas, the French in Quebec and the English everywhere else. As Trudeau has argued since his days as a constitutional law professor in Montreal, only if effective legal guarantees against unfriendly provincial governments solidify the precarious situation of the French language outside Quebec will the Quebecois be able to consider all of Canada their homeland, throughout which they can travel and live with confidence in governmental support of their linguistic and cultural heritage. Although entrenchment of his Official Languages policy at the federal level was an important constitutional goal for Trudeau, his major aim was to prod provincial governments to provide education rights to their French Canadian minorities.

It required the election in the late 1970's of a separatist government in Quebec for English Canada finally to accept this position. By that time, though, bitter opposition to these federal remedial measures had emerged within Quebec. Sophisticated Quebecois felt that this legal lifeline had come a century too late to make the French language viable outside their province. They believed that the tug of assimilation in an urban industrialized society would inevitably trump whatever legal rights were written into a constitution. They were also concerned that the price of using a constitution in the quixotic quest for

\[\text{Ed. note: Data from the 2000 census paint a similar picture. As summarized in J.E. Magnet, Modern Constitutionalism: Identity, Equality and Democracy 143:}\]

Few Canadians are bilingual. Only 17 per cent speak and understand both English and French. Outside of Quebec, 87 per cent of Canadians speak only English. Inside Quebec, 54 per cent of Canadians speak only French. [Where these unilingual populations meet, bilingual people are found in high concentrations. Most of Canada’s bilingual persons live in this “bilingual belt.”]


\[\text{15 While French Canadians were 25.7% of the Canadian population in 1971, they were 80% of the population of Quebec, and just 4.4% of the rest of Canada. Indeed, if one views the 190,000 Francophones in Northwest New Brunswick and the 270,000 in Eastern Ontario as part of a single Quebec and "contact regions," Francophones comprise only 1.5% of the rest of Canada (which constitutes two-thirds of the Canadian population as a whole). The population figures in this note and in most of those that follow are drawn from R. Lachapelle & J. Henripin, The Demolinguistic Situation in Canada (1982), in particular the comprehensive census tables in the book's Appendix.}\]


\[\text{18 The tug of assimilation became evident in the more elaborate census data of 1971. That year, of 1,421,000 Canadians of French origin living outside of Quebec, 926,000 had the French language as their mother tongue and 676,000 had French as their home language. That meant that more than one-third of the Canadians with French ancestry did not learn French as their first language in their parents' home and, of those who did, more than one-quarter no longer used French in their own home, teaching it to their children. Especially endangered species were those in Western Canada: 11,000 Francophones in British Columbia, 25,000 in Alberta, and 15,000 in}\]
linguistic equality would be reciprocal limitations on the freedom of action of the French inside Quebec.

This issue was not merely symbolic in the 1970's. The Quebecois were alarmed over the incipient decline in the French proportion of the Quebec population, especially in Montreal, the flagship of French Canada. This gloomy trend was attributable to the fact that, given the choice between adopting French or English as a family language, at least twice as many non-English-speaking entrants to Quebec were choosing English. This trend was most pronounced in Montreal. The economic dominance of the anglophone community in Quebec and the consequent fact that proficiency in English was more advantageous to one's prospects than was proficiency in French made English the preferred language of the newcomers to the province, and their children flocked to the English schools rather than to the French écoles. Thus, although the individual choices were eminently reasonable for each family concerned, cumulatively they posed a profound threat to the continuing existence of French language and culture in what had been considered its sole safe harbor in North America.

From this situation emerged a comprehensive language policy in Quebec which culminated in passage of the Charter of the French Language in 1977.

[The CFL had several important features which will be discussed in this Chapter. One was a restriction of freedom of choice in the language of education. Related, and in Weiler's view more important, was the requirement that French is the normal language of workplace communication, with the goal of inducing immigrants to realize that speaking French is necessary to advancement. A third was a law requiring public signs to be only in French.]

Given the experience in the United States of states' rights (especially in the South) cast in opposition to equality for blacks, the notion of provincial autonomy as a strategy for protecting a minority group may seem ludicrous to most Americans. The tactic, however, would appear more plausible if, in the United States, ninety-five percent of blacks lived in one large state, where they constituted eighty percent of the population, and if the national constitution prevented the state's government from taking affirmative action to redress what it considered to be the current impact of historic domination by the state's white

Saskatchewan. While there remained 40,000 of French mother tongue in Manitoba, this was only 6.1% of the provincial population, and the same stark process of assimilation had taken place: 8.8% of Manitobans were of French origin, but just 4.0% used it as their home language.

Jacques Henripin, the leading French Canadian demographer, looked at the declining birth rate of the Quebecois and the growing tendency of immigrants to assimilate into the English community in Quebec and projected a drop in the French share of Quebec from 82.5% in 1951 to a range of 71.6%-79.2% by 2001, and in Montreal from 62% in 1961 to a range of 52-62% by 2001. Naturally enough, the concerned Quebecois focused on the lower end of this scale.

In 1971, the average male English worker earned 28% more than the male French worker. Even after controlling for human capital variables, there remained a seven percent differential. In any event, for purposes of language attractiveness to newcomers, gross disparities in income and occupation are likely to be influential. As if to add insult to injury, whereas in 1961 French-speaking Quebecers ranked 12th in average income by ethnic group in the province, ahead of only the Italians and native Canadians, they had dropped to 13th, now trailing the Italians.

Taking the 1970 earnings of the unilingual Francophone as 100, being a bilingual Francophone added 40 points to one's income level. Being bilingual, however, added almost nothing to the Anglophone edge. That figure rose only one point, from 167 to 168.
minority. This hypothetical situation captures the actual situation of Quebec in Canada, giving rise to the major moral ambiguity bedeviling the Canadian quest for a constitutional *Charter of Rights.*

Benoit Aubin, “Bill 101: A gift we never expected,” *Macleans,* Aug. 13, 2007, at 30-31, puts the language law in some perspective. The law’s implementation resulted in the exodus of as many as 150,000 affluent, educated anglophone Montrealers to Toronto. The law’s author, Montreal sociologist Camille Laurin, observed that he “wanted to strike a big blow, and produce a shock therapy, powerful enough to change mentalities.” But while some of the results were as designed, others were unforeseen by the PQ government:

- Although Laurin sought to “make Montreal as French as Toronto is English,” Montreal today boasts the highest proportion of tri-lingual people in North America [French, English, and native language]
- Although criticized as “akin to ethnic cleansing,” the law “is creating a multicultural melting pot out of the old, homogenous, and claustrophobic *cultere québecoise*”
- The law checked the reality that “bilingualism was a one-sided burden for francophones, and immigrants were assimilating massively into English”; today 66% of anglophones who remained or migrated since speak French;
- The “language of work” requirement has effectively narrowed the income gap based on language
- Many jobs have been created by a new language industry based on translation and correction software, terminology banks, linguistic planning, etc.

In short, according to one language expert, “the paradox today is that French has never been stronger and healthier, but English has never been more present and necessary at the same time.”

B. Anglophones in Quebec

The principal litigation concerning the rights of anglophones in Quebec concerns the *Charter of the French Language.* The first challenge decided by the Supreme Court of Canada was *A.G. (QUEBEC) V. BLAIKIE (BLAIKIE I),* [1979] 2 S.C.R. 1016. The Court invalidated provisions of the *Charter of the French Language* that declared (a) French to be the official language of the legislature and the courts in Quebec; (b) artificial persons were required to use French in all judicial or administrative proceedings unless all parties agreed to pleading in English; (c) all judgments of judicial or administrative bodies shall be written or translated into French.

A noted federalist attorney challenged the law, arguing that it was inconsistent with s. 133 of the *British North America Act,* which provides:

> Either the English or the French Language may be used by any Person in the Debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec; and both those Languages shall be used in the respective Records and Journals of those Houses; and either of those Languages may be used by any Person or in any Pleading or Process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec.

The Supreme Court refused to narrowly interpret s. 133 to limit the scope of its conflict with
the Quebec legislation. The Court declared that “the reference in s. 133 to ‘any of the Courts of Quebec’ ought to be considered broadly as including not only so-called s. 96 Courts but also Courts established by the Province and administered by provincially-appointed Judges.” For comparative purposes, Canadians seem to use the phrase “s. 96 judges” in the same way that Americans use the phrase “Article III” judges and Australians use the phrase “Chapter III” judges (and Courts.) In addition, the Court applied s. 133’s bilingual mandate to provincial administrative agencies, although these tribunals did not literally fall within the ambit of s. 133’s language. The court observed that, given “the rudimentary state of administrative law in 1867, it is not surprising that there was no reference to non-curial adjudicative agencies. Today, they play a significant role in the control of a wide range of individual and corporate activities, subjecting them to various norms of conduct which are at the same time limitations on the jurisdiction of the agencies and on the legal position of those caught by them.”

The broad interpretation of s. 133 was justified by two precedents from the Privy Council. In the landmark decision in Edwards v. Attorney General of Canada [[1930] A.C. 124], the Privy Council held that women were eligible for appointment to the Canadian Senate under s. 24, although such a prospect was not contemplated by the framers, because a constitutional statute like the British North America Act needed to be interpreted broadly to account for

* [Ed. note: Section 96 of the British North America Act provides that judges in each province shall be appointed by the Governor General (i.e. the federal cabinet). Sections 99 provide that these judges have life tenure until mandatory retirement at age 75. To prevent provinces from evading these provisions, under their s. 92(14) power to legislate for the administration of justice, by creating provincially-appointed tribunals to substitute for federally-appointed judges, the Supreme Court of Canada has held that “inferior” provincially-appointed courts must “broadly conform a type of jurisdiction generally exercised” by these inferior courts prior to confederation. Re Adoption Act, [1938] S.C.R. 398, 421. Similar constitutional limits exist in the United States. See Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 102 S.t. 2858 (1982) (assignment of power to adjudicate common law claims to bankruptcy judges appointed without life tenure held unconstitutional). In Australia, all judges of federal courts (including the High Court) must be appointed in conformity with s 72 of the Constitution - appointed by the Governor-General in Council (that is, on the advice of the executive government), holding office subject to removal for ‘proved misbehavior or incapacity’, and (since 1977) a retirement age of 70. “Courts” or Tribunals that are not constituted under the Constitution’s provisions have been ruled invalid (eg, where the members were not appointed with life tenure: Waterside Workers’ Federation of Australia v JW Alexander (1918) 25 CLR 434) or where there was an attempt to exercise judicial power by a non-Chapter III Court (for example, the Inter-State Commission, in NSW v Commonwealth (1915) 20 CLR 54). In 1956, in the “Boilermakers’” case - R v Kirby; Ex parte Boilermakers’ Society of Australia (1956) 94 CLR 254 - the High Court held that only Chapter III Courts can exercise “the judicial power of the Commonwealth” (s 71), and that Chapter III Courts cannot exercise non-judicial power. Among other examples, a scheme to have a Tribunal’s orders ‘registered’ with the Federal Court of Australia was ruled invalid under this principle (Brandy v Human Rights and Equal Opportunity Commission (1995) 183 CLR 245). As ‘exceptions to the Boilermakers’ case’, the exercise of administrative powers by individual judges is permitted, so long as these powers are only conferred on the individual, persona designata, not the Court itself; and so long as the power do not interfere with the performance of the judicial function, or involve the judge in political matters, or undermine public confidence in the independence of the judiciary or the Courts (Grollo v Palmer (1995) 184 CLR 348; Wilson v Minister for Aboriginal and Torres Strait Islander Affairs (1996) 189 CLR 1).
changing circumstances. Lord Sankey’s famous line was that the Act “planted in Canada a living tree capable of growth and expansion within its natural limits”. Id. at 136. The Court also cited Attorney General of Ontario v. Attorney General of Canada [1947] A.C. 127, 154, (the Privy Council Appeals Reference), where Viscount Jowitt wrote that “To such an organic statute the flexible interpretation must be given which changing circumstances require.”

In subsequent litigation, [1981] 1 S.C.R. 312 (Blaikie II), the Court further expounded on its approach of broad interpretation, declaring that the “ordinary meaning of the words ‘Acts … of the Legislature’ in s. 133 must be departed from to prevent the requirements of the section from being frustrated,” although the words cannot be “stretched beyond what is necessary to accomplish this purpose.” Thus, the Court held that s.133 applied to Court rules of practice, even those these too were not literally “Acts of the Legislature,” based on the continuous use of French and English in Quebec courts since 1774 and the justices’ view that “litigants have the fundamental right to choose either French or English and would be deprived of this freedom of choice should such rules and compulsory forms be couched in one language only.”

The jurisprudential significance of the reasoning in the Blaikie litigation lies in the Court’s view that times change and that s. 133 of the BNA Act a constitutional mandate, that requires a broad and purposive interpretation. Indeed, the Court used an alternative approach - original intent - in A.G. (Quebec) v. Quebec Protestant School Boards, [1984] 2 S.C.R. 66, 10 D.L.R. (4th) 321. This case involved a provision in the Charter of the French Language (also known as “Bill 101”) that required all new residents of Quebec, whether immigrants or Canadian citizens from other provinces, to send their children to French-language schools. The provincial statute permitted Anglophone Quebecers to continue to send their children to English schools. This provision was assailed as contrary to s. 23 of the federal Charter, entitled “Minority Language Educational Rights” which specifically protects the right of any Canadian citizen to have their child educated in English or French where they are a linguistic minority. This provision had been identified by Premier Rene Levesque as his government’s principal objection to ratifying the Charter of Rights and Freedoms.

The PQ government defended the statute as a reasonable limit under s.1 of the Charter, in view of factors such as demographic patterns, the physical mobility (migration) and linguistic mobility (“assimilation”) of individuals and the regional distribution of interprovincial migrants. It was further argued that other free and democratic societies such as Switzerland and Belgium, which have sociolinguistic situations comparable to that in Quebec, have adopted stricter linguistic measures than Bill 101, and these measures have been held to be reasonable and justified by the Swiss and European courts. Finally, it was argued that the collective right of the Anglophone minority in Quebec to cultural survival is not threatened by Bill 101, which establishes a system providing access to English schooling which is not unreasonable.

The Court refused to even consider whether the statute was a reasonable limit. It found that s.23 was not a codification of universal rights, but a “unique set of constitutional provisions, quite peculiar to Canada.”

This set of constitutional provisions was not enacted by the framers in a vacuum. When it was adopted, the framers knew, and clearly had in mind the regimes governing the Anglophone and Francophone linguistic minorities in various provinces in Canada so far as the language of instruction
was concerned. They also had in mind the history of these regimes, both earlier ones such as Regulation 17, which for a time limited instruction in French in the separate schools of Ontario—\textit{Ottawa Separate Schools Trustees v. Mackell}, [1917] A.C. 62—as well as more recent ones such as Bill 101 and the legislation which preceded it in Quebec. Rightly or wrongly, and it is not for the courts to decide, the framers of the Constitution manifestly regarded as inadequate some—and perhaps all—of the regimes in force at the time the \textit{Charter} was enacted, and their intention was to remedy the perceived defects of these regimes by uniform corrective measures, namely those contained in s. 23 of the \textit{Charter}, which were at the same time given the status of a constitutional guarantee. The framers of the Constitution unquestionably intended by s. 23 to establish a general regime for the language of instruction, not a special regime for Quebec; but in view of the period when the \textit{Charter} was enacted, and especially in light of the wording of s. 23 of the \textit{Charter} as compared with that of ss. 72 and 73 of Bill 101, it is apparent that the combined effect of the latter two sections seemed to the framers like an archetype of the regimes needing reform, or which at least had to be affected, and the remedy prescribed for all of Canada by s. 23 of the \textit{Charter} was in large part a response to these sections.

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Although the fate reserved to the English language as a language of instruction had generally been more advantageous in Quebec than the fate reserved to the French language in the other provinces, Quebec seems nevertheless to have been the only province where there was then this tendency to limit the benefits conferred on the language of the minority. In the other provinces at the time, either the earlier situation had remained unchanged, at least so far as legislation was concerned, as in Newfoundland and British Columbia which have no legislation on the language of instruction, or else relatively recent statutes had been adopted improving the situation of the linguistic minority, as in New Brunswick, Nova Scotia and Prince Edward Island: see Alfred Monnin, then a puisne judge of the Manitoba Court of Appeal, "L'égalité juridique des langues et l'enseignement: les écoles francaises hors-Quebec", (1983) 24 C. de D. 157.

Thus, the Court found it clear that this specific statute “was very much in the minds of the framers of the Constitution when they enacted s.23 of the \textit{Charter}.” In these circumstances, the limits on s.23 rights imposed by Bill 101 “cannot possibly have been regarded by the framers of the Constitution as coming within ‘such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.’”

**Comparative Note on Original Intent as an Approach to Constitutional Interpretation**

In contrast to the broad and purposive approach in \textit{Blaikie}, the Court in \textit{Quebec Protestant School Boards} used an approach faithful to the original intent of the drafters, finding that the minority language education provisions of the \textit{Charter of the French Language} conflicted with minority language education rights guaranteed in s. 23 of the Charter, because the evidence was clear that the Charter’s drafters specifically intended to proscribe the very legislation

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* [Ed. note: The concept that Courts can manageably distinguish between “limits” on rights to which s.1 applies and “denials” to which s.1 does not apply was sharply criticized, see Hogg §35.6, and has been effectively overruled in the \textit{Ford} case excerpted below. It is interesting to speculate as to why the Court reached that holding, in light of the decision by the Quebec trial court that the infringement of s.23(1)(b) – that is, the requirement that anglophone Canadians who move to Quebec must send their children to French language schools – would make such a trivial contribution to Quebec’s cultural and linguistic objectives that it could not be regarded as reasonable under s.1. See (1982) 140 D.L.R. (3d) 33, 71-90 (Que. S.C.)]
under review.

In the area of constitutional interpretation, there is no direct analog in American constitutional law to this approach. The Supreme Court controversially interpreted the Fourteenth Amendment narrowly in the post-Civil War period, and scholars disagree about whether this reading was inconsistent with the intent of the radical Republican drafters of that Amendment. Usually, the interpretive question is whether in today's world a practice should be held unconstitutional even if apparently tolerated by the drafters. *Cf.* Bolling v. Sharpe, 347 U.S. 497, 74 S.Ct. 693 (1954) (companion case to Brown v. Board of Education, which is excerpted below, holding that racially segregated schools in the District of Columbia were unconstitutional despite existence of segregated D.C. schools contemporaneous with adoption of 14th Amendment); Marsh v. Chambers, 463 U.S. 783, 103 S.Ct. 3330 (1983) (upholding use of legislative chaplains against Establishment Clause claim based on use of chaplains at time of 1st Amendment's adoption).

The High Court of Australia has rarely relied on evidence of the original intention of the Constitution’s framers in interpretation, although (as we saw in Chapter One) it adopted a historical approach to determine the meaning of section 92 (providing for ‘absolutely free’ trade and commerce among the States (Cole v Whitfield (1988) 165 CLR 503). The Court insisted, however, that this interpretation related to the historical context, not the subjective intentions of the framers.

**Note on Notwithstanding Clause**

The next excerpted case, *Ford v. Quebec*, involved a host of significant constitutional issues. The litigation was a challenge to another provision of the *Charter of the French Language*, s. 58, that required that all public signs, posters, commercial advertising, and legal names of corporations must to be in French, subject to administrative waivers prescribed by regulations issues by the *Office de la langue francaise*.

These provisions were challenged as violating rights to free expression guaranteed by s. 2(b) of the Canadian Charter. However, *Ford* involved the unusual exercise of an extraordinary provision of the Canadian Charter: the Notwithstanding Clause. Section 33 of the Charter allows a legislature to declare, for a period of five years, that a law shall remain in effect although a Court has held (or may hold) that it violates of the Charter. It was seen as a compromise between the British system of parliamentary supremacy and the American system of judicial supremacy. The Notwithstanding Clause is uniquely Canadian -- there is no American or Australian parallel.

To date, Parliament has never sought to implement a federal statute notwithstanding the Charter. The Clause has been exercised in only a few instances by provincial legislatures:

(1) Prime Minister Pierre Trudeau brought the *Constitution Act, 1982* into effect with assent of the federal Parliament and all the provinces except for Quebec. The Quebec National Assembly, with a majority from the separatist Parti Quebecois, responded in 1982 with legislation providing that *all* Quebec statutory law took effect notwithstanding ss. 2 and 7-15 of the *Federal Charter of Rights and Freedoms*. Subsequently, the Quebec National Assembly added a “notwithstanding” provision to every single Act in passed during the tenure
of Premier Rene Levesque’s PQ government. Pointedly, to emphasize that it was not seeking to impinge on civil liberties, the Quebec National Assembly did not invoke a similar clause in the Quebec Charter of Human Rights, except on 8 specific occasions not applicable here.

In 1985, the Parti Quebecois was defeated in provincial elections by the Liberal Party under Premier Robert Bourassa, who did not re-enact the wholesale invocation of the Notwithstanding Clause. This meant that by 1987, all pre-1982 Quebec law was again subject to the federal Charter. Acts passed between 1982-5 became subject to federal constitutional review five years after enactment.

(2) The Liberal Bourassa government did, however, invoke the Clause to preclude a modification of the sign law - permitting bilingual signs with larger French lettering - that it enacted following the Ford decision.

(3) Saskatchewan invoked the clause following a Saskatchewan Court of Appeals decision that the right to strike was constitutionally protected. (The holding was subsequently overruled in another case by the Supreme Court of Appellate Court.)

(4) The Yukon territorial government invoked the clause to address concerns that legislation allocating seats on various land use planning bodies to nominees of the Council for Yukon Indians might violate equality rights.

(5) The Alberta Marriage Act was amended in 2000 to expressly limit marriage to those of the opposite sex, and the Notwithstanding Clause was invoked to shield the law against equality challenge. (Subsequently, the federal government, exercising its power over “Marriage and Divorce” in s. 91(26) of the Constitution Act, 1867, legalized same-sex marriages.)

Some have decried the evolution of a political climate that makes it very difficult for politicians to invoke the Clause. One factor is that the media, with a vested institutional interest in protecting its own constitutional rights, is quite hostile to any override for fear that it could be turned on the press. Another is the significant popular acceptance within Canada of the Charter. The Liberal government of Prime Minister Jean Chretien rejected the call by opposition and backbench parliamentarians to invoke the Clause after a B.C. Supreme Court justice struck down Criminal Code provisions on child pornography. (Most of these provisions were subsequently upheld by the Supreme Court of Canada in the Sharpe case discussed in Chapter Three.) After significant consideration, the conservative Alberta government rejected the call to invoke the Clause after the Supreme Court of Canada held that the province must protect gays and lesbians as well as other listed minority groups in its statutory ban on unlawful employment discrimination; the government announced that henceforth it would reserve the right to call a referendum on whether to invoke the clause, and as noted above did use the clause to seek to proscribe same-sex marriages. In 1998, public furor forced the Alberta government to withdraw legislation introduced to invoke the clause to limit compensation payable to claimants suing the province for unlawful sterilization. One of the principal issues that emerged from the campaign was the suggestion by Conservative leader Stephen Harper that he would use the Clause in some cases (he cited child pornography as one), while Liberal leader Paul Martin expressed the fear that the Conservatives would invoke the power to legislate in numerous areas (most notably with
regard to abortion) and unequivocally claimed that his Liberal government would never use the Clause “to take away a right that had been enshrined in the Charter. I believe that rights are rights, and the Supreme Court is there to protect them.” See generally Barbara Billingsley, ‘Section 33: The Charter’s Sleeping Giant,’ (2002) 21 Windsor Y.B. Access Just. 331, which in turn draws upon Tsvi Kahana, ‘The Notwithstanding Mechanism and Public Discussion: Lessons from the Ignored Practice of section 33 of the Charter,’ 44 Can. Pub. Admin. 255.

FORD V. QUEBEC (ATTORNEY-GENERAL)

SUPREME COURT OF CANADA

[Before Dickson C.J.C., Beetz, Estey, McIntyre, Lamer, Wilson and Le Dain JJ. (Estey and Le Dain JJ. did not take part in the judgment.)]

BY THE COURT:-- The principal issue in this appeal is whether ss. 58 and 69 of the Quebec Charter of the French Language, R.S.Q. 1977, c. C-11, which require that public signs and posters and commercial advertising shall be in the French language only and that only the French version of a firm name may be used, infringe the freedom of expression guaranteed by s. 2(b) of the Canadian Charter of Rights and Freedoms and s. 3 of the Quebec Charter of Human Rights and Freedoms, R.S.Q. 1977, c. C-12. There is also an issue as to whether ss. 58 and 69 of the Charter of the French Language infringe the guarantee against discrimination based on language in s. 10 of the Quebec Charter of Human Rights and Freedoms.

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[Section 58, the sign law, had been re-enacted in 1983. The statutory amendment contained a section declaring that “This Act shall operated notwithstanding the provisions of section 2 and 7 to 15 of the Constitution Act, 1982.” Thus, at the time of the litigation, the federal Charter did not apply to section 58. However, the Quebec National Assembly had deliberately not exempted these provisions of the Charter of the French Language from the Quebec human rights charter. Thus, the Court reviewed s. 58 under relevant provisions of the provincial charter. These were sections 3, 9.1, and 10:

3. Every person is the possessor of the fundamental freedoms, including freedom of conscience, freedom of religion, freedom of opinion, freedom of expression, freedom of peaceful assembly and freedom of association.

9.1 In exercising his fundamental freedoms and rights, a person shall maintain a proper regard for democratic values, public order and the general well-being of the citizens of Quebec. In this respect, the scope of the freedoms and rights, and limits to their exercise, may be fixed by law.

10. Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on race, colour, sex, pregnancy, sexual orientation, civil status, age except as provided by law, religion, political convictions, language, ethnic or national origin, social condition, a handicap or the use of any means to palliate a handicap.

Discrimination exists where such a distinction, exclusion or preference has the effect of nullifying or impairing such right.

Initially, the Court rejected an interpretation of the Quebec Court of Appeal that the invocation of the notwithstanding Clause was improper because it failed to specific precisely which rights or freedoms the
legislation was intended to override. Instead, the Court held that s. 33 simply is a formal requirement and the language quoted above was sufficient.]

**VII WHETHER THE FREEDOM OF EXPRESSION GUARANTEED BY S. 2(b) OF THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS AND BY S. 3 OF THE QUEBEC CHARTER OF HUMAN RIGHTS AND FREEDOMS INCLUDES THE FREEDOM TO EXPRESS ONESELF IN THE LANGUAGE OF ONE'S CHOICE**

[First, the Court held that the words "freedom of expression" in s. 2(b) of the Canadian Charter and s. 3 of the Quebec Charter should be given the same meaning. Second, the Court reaffirmed that Charter-protected expression includes the freedom to express oneself in the language of one's choice. The Court referred, in this regard, to its decision in *Reference re Language Rights under Manitoba Act, 1870* (1985), 19 D.L.R. (4th) 1 at p. 19, [1985] 1 S.C.R. 721, at p. 744:

The importance of language rights is grounded in the essential role that language plays in human existence, development and dignity. It is through language that we are able to form concepts; to structure and order the world around us. Language bridges the gap between isolation and community, allowing humans to delineate the rights and duties they hold in respect of one another, and thus to live in society.

The Court further explained:] Language is so intimately related to the form and content of expression that there cannot be true freedom of expression by means of language if one is prohibited from using the language of one's choice. Language is not merely a means or medium of expression; it colours the content and meaning of expression. It is, as the preamble of the Charter of the French Language itself indicates, a means by which a people may express its cultural identity. [The Court then quoted from the Preamble: “Whereas the French language, the distinctive language of a people that is in the majority French-speaking, is the instrument by which that people has articulated its identity...”]

[Next, the Court rejected the Quebec Attorney-General’s argument that the express guarantees of language rights in s. 133 of the Constitution Act, 1867, and ss. 16 to 23 of the Canadian Charter of Rights and Freedoms imply that linguistic expression is not protected by s. 2(b).]

[In part VIII of the decision, the Court concluded that the free expression guarantee extends to commercial expression.]


The issues raised in this part are as follows: (a) the meaning of s. 9.1 of the Quebec Charter and whether its role and effect are essentially different from that of s. 1 of the Canadian Charter; (b) whether the requirement of the exclusive use of French by ss. 58 and 69 of the Charter of the French Language is a limit within the meaning of s. 9.1 and s. 1; (c) whether the material (hereinafter referred to as the s. 1 and s. 9.1 materials) relied on by the Attorney-General of Quebec in justification of the limit is properly before the Court; and (d) whether the material justifies the prohibition of the use of any language other than French.
A. The meaning of s. 9.1 of the Quebec Charter of Human Rights and Freedoms

The issue here is whether s. 9.1 is a justificatory provision similar in its purpose and effect to s. 1 of the Canadian Charter and, if so, what is the test to be applied under it. Section 9.1 is worded differently from s. 1, and it is convenient to set out the two provisions again for comparison, as well as the test under s. 1.

Section 9.1 of the Quebec Charter of Human Rights and Freedoms, which was added to the Charter by An Act to amend the Charter of Human Rights and Freedoms and entered into force by proclamation on October 1, 1983, reads as follows:

9.1. In exercising his fundamental freedoms and rights, a person shall maintain a proper regard for democratic values, public order and the general well-being of the citizens of Quebec.
In this respect, the scope of the freedom and rights, and limits to their exercise, may be fixed by law.

Section 1 of the Canadian Charter provides:

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

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It was suggested in argument that because of its quite different wording s. 9.1 was not a justificatory provision similar to s. 1 but merely a provision indicating that the fundamental freedoms and rights guaranteed by the Quebec Charter are not absolute but relative and must be construed and exercised in a manner consistent with the values, interests and considerations indicated in s. 9.1 -- "democratic values, public order and the general well-being of the citizens of Quebec". In the case at bar the Superior Court and the Court of Appeal held that s. 9.1 was a justificatory provision corresponding to s. 1 of the Canadian Charter and that it was subject, in its application, to a similar test of rational connection and proportionality. This court agrees with that conclusion. The first paragraph of s. 9.1 speaks of the manner in which a person must exercise his fundamental freedoms and rights. That is not a limit on the authority of government but rather does suggest the manner in which the scope of the fundamental freedoms and rights is to be interpreted. The second paragraph of s. 9.1, however -- "In this respect, the scope of the freedoms and rights, and limits to their exercise, may be fixed by law" -- does refer to legislative authority to impose limits on the fundamental freedoms and rights. The words "In this respect" refer to the words "maintain a proper regard for democratic values, public order and the general well-being of the citizens of Quebec". Read as a whole, s. 9.1 provides that limits to the scope and exercise of the fundamental freedoms and rights guaranteed may be fixed by law for the purpose of maintaining a proper regard for democratic values, public order and the general well-being of the citizens of Quebec. That was the view taken of s. 9.1 in both the Superior Court and the Court of Appeal. As for the applicable test under s. 9.1, Boudreault J. in the Superior Court quoted with approval from a paper delivered by Raynold Langlois, Q.C., entitled "Les clauses limitatives des Chartes canadienne et quebecoise des droits et libertes et le fardeau de la preuve", and published in Perspectives canadiennes et europeennes des droits de la personne (Cowansville: Yvon Blais Inc. 1986), in which the author expressed the view that under s. 9.1 the government must show that the restrictive law is neither irrational nor arbitrary and that the means chosen are proportionate to the end to be served. In the Court of Appeal, Bisson J.A. adopted essentially the same test. He said that under s. 9.1 the government has the onus of demonstrating on a balance of probabilities that the impugned means are proportional to the object sought. He also spoke of the necessity that the government show the absence of an irrational or arbitrary character in the limit imposed by law and that there is a rational link between the means and the end pursued. We are in general agreement with this approach. The Attorney-General of Quebec submitted that s. 9.1 left more scope to
the legislature than s. 1 and only conferred judicial control of "la finalite des lois", which this court understands to mean the purposes or objects of the law limiting a guaranteed freedom or right, and not the means chosen to attain the purpose or object. What this would mean is that it would be a sufficient justification if the purpose or object of legislation limiting a fundamental freedom or right fell within the general description provided by the words "democratic values, public order and the general well-being of the citizens of Quebec". It cannot have been intended that s. 9.1 should confer such a broad and virtually unrestricted legislative authority to limit fundamental freedoms and rights. Rather, it is an implication of the requirement that a limit serve one of these ends that the limit should be rationally connected to the legislative purpose and that the legislative means be proportionate to the end to be served. That is implicit in a provision that prescribes that certain values or legislative purposes may prevail in particular circumstances over a fundamental freedom or right. That necessarily implies a balancing exercise and the appropriate test for such balancing is one of rational connection and proportionality.

B. Whether the prohibition of the use of any language other than French by ss. 58 and 69 of the Charter of the French Language is a "limit" on freedom of expression within the meaning of s. 1 of the Canadian Charter and s. 9.1 of the Quebec Charter

[In Quebec Association of Protestant School Boards, supra, the Court held that the Charter of the French Language could not be defended as a reasonable limit on minority language educational rights created by s. 23 of the Canadian Charter because the Quebec law was intended to deny, rather than limit, those rights. Here, the plaintiffs likewise claimed that the sign law was a denial rather than a limit on rights and thus s.1 did not apply. The Court distinguished the precedent, holding that the prior case was “a rather unique example of truly complete denial of guaranteed rights.”]

D. Whether the s. 1 and s. 9.1 materials justify the prohibition of the use of any language other than French

[Here, the Court discusses the materials offered to justify the statute’s limitation on expression. The Court acknowledged that “the material amply establishes the importance of the legislative purpose reflected in the Charter of the French Language and that it is a response to a substantial and pressing need.”] The causal factors for the threatened position of the French language that have generally been identified are: (a) the declining birth rate of Quebec francophones resulting in a decline in the Quebec francophone proportion of the Canadian population as a whole; (b) the decline of the francophone population outside Quebec as a result of assimilation; (c) the greater rate of assimilation of immigrants to Quebec by the anglophone community of Quebec; and (d) the continuing dominance of English at the higher levels of the economic sector. These factors have favoured the use of the English language despite the predominance in Quebec of a francophone population. Thus, in the period prior to the enactment of the legislation at issue, the "visage linguistique" of Quebec often gave the impression that English had become as significant as French. This "visage linguistique" reinforced the concern among francophones that English was gaining in importance, that the French language was threatened and that it would ultimately disappear. It strongly suggested to young and ambitious francophones that the language of success was almost exclusively English. It confirmed to anglophones that there was no great need to learn the majority language. And it suggested to immigrants that the prudent course lay in joining the anglophone community. The aim of such provisions as ss. 58 and 69 of the Charter of the French Language was, in the words of its preamble, "to see the quality and influence of the French language assured". The threat to the French language demonstrated to the government that it should, in particular, take steps to assure that the "visage linguistique" of Quebec would reflect the predominance of the French language.
The s. 1 and s. 9.1 materials establish that the aim of the language policy underlying the *Charter of the French Language* was a serious and legitimate one. They indicate the concern about the survival of the French language and the perceived need for an adequate legislative response to the problem. Moreover, they indicate a rational connection between protecting the French language and assuring that the reality of Quebec society is communicated through the "visage linguistique". The s. 1 and s. 9.1 materials do not, however, demonstrate that the requirement of the use of French only is either necessary for the achievement of the legislative objective or proportionate to it. That specific question is simply not addressed by the materials. Indeed, in his factum and oral argument the Attorney-General of Quebec did not attempt to justify the requirement of the exclusive use of French. He submitted that [statutory provisions for administrative exemptions] exceptions to the requirement of the exclusive use of French indicate the concern for carefully designed measures and for interfering as little as possible with commercial expression. The qualifications of the requirement of the exclusive use of French in other provisions of the *Charter of the French Language* and the regulations do not make ss. 58 and 69 any less prohibitions of the use of any language other than French as applied to the respondents. The issue is whether any such prohibition is justified. In the opinion of this court it has not been demonstrated that the prohibition of the use of any language other than French in ss. 58 and 69 of the *Charter of the French Language* is necessary to the defence and enhancement of the status of the French language in Quebec or that it is proportionate to that legislative purpose. Since the evidence put to us by the government showed that the predominance of the French language was not reflected in the "visage linguistique" of Quebec, the governmental response could well have been tailored to meet that specific problem and to impair freedom of expression minimally. Thus, whereas requiring the predominant display of the French language, even its marked predominance, would be proportional to the goal of promoting and maintaining a French "visage linguistique" in Quebec and therefore justified under s. 9.1 of the Quebec *Charter* and s. 1 of the Canadian *Charter*, requiring the exclusive use of French has not been so justified. French could be required in addition to any other language or it could be required to have greater visibility than that accorded to other languages. Such measures would ensure that the "visage linguistique" reflected the demography of Quebec: the predominant language is French. This reality should be communicated to all citizens and non-citizens alike, irrespective of their mother tongue. But exclusivity for the French language has not survived the scrutiny of a proportionality test and does not reflect the reality of Quebec society. Accordingly, we are of the view that the limit imposed on freedom of expression by s. 58 of the *Charter of the French Language* respecting the exclusive use of French on public signs and posters and in commercial advertising is not justified under s. 9.1 of the Quebec *Charter*. In like measure, the limit imposed on freedom of expression by s. 69 of the *Charter of the French Language* respecting the exclusive use of the French version of a firm name is not justified under either s. 9.1 of the Quebec *Charter* or s. 1 of the Canadian *Charter*.

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The critical holding of *Ford v. Quebec* was that the complete prohibition on English language signs was not necessary to achieve the "visage linguistique" sought by the *Charter of the French Language*. The Court’s reasoning seems much stronger if the purpose of the bill was simply to create a "visage linguistique" that made it clear that Quebec was a predominantly-French province. Consider, however, an alternative purpose -- to recognize the injustice that, to succeed and flourish in North America, francophone Quebecois needed to learn English, but that, even after seven generations, many anglophone Quebeckers simply did not need to learn French. As Prof. Weiler notes, *supra*, the provisions requiring that French be the language of work significantly eroded this ability of unilingual anglophones, who had maintained their success despite their linguistic limitations by hiring bilingual francophones to communicate to their unilingual francophone workers. Focusing on anglophones as consumers, the wholesale elimination of English signs might well be necessary
and minimally tailored to promote a pressing and substantial interest if that interest were reconceptualized as intending to force all citizens of Quebec to possess at least a minimal knowledge of French sufficient to comprehend public signs and follow up with verbal inquiries in English. On the other hand, it is not clear, since Quebec's government has no interest in requiring francophones to become bilingual, whether the Court would find such an asymmetrical interest to be legitimate.

C. Francophones in English Canada

The next set of decisions interpret minority education provisions of the Manitoba Act and the BNA Act – which entrench “any right or privilege with respect to denominational schools which any class of persons have” at the time of admission to the Union. Consider whether the courts are using purposive, intentional, or textual reasoning.

It is important to understand the historic context in which the first case arose. Both prior to and after union with Canada, Manitoba’s educational system was entirely private and sectarian, albeit state-funded. Taxes supported English Protestant schools and French Catholic schools. The suit challenged Manitoba legislation that created tax-supported public schools, to be taught solely in English, while allowing French Catholics the right to continue to support unsubsidized private schools if they so desired.

It is worth emphasizing that s. 93 grants are collective or group rights. In contrast, in Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625 (1923), the Court held that a state law prohibiting education in a foreign language unconstitutionally violated individual rights of parents with regard to their children’s education. (The statute, passed in the wake of World War I, was directed at German immigrants.) Section 93 grants no such rights -- only the collective rights of the predominantly francophone Catholics and the predominantly Anglophone Protestants to maintain pre-existing rights and privileges.

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† The basic issue in Barrett was that “a tax to support public education levied on all rate payers made it difficult if not impossible for those who desired denominational education for their children to finance it.” Gordon Bale, “Law, Politics and the Manitoba School Question: Supreme Court and Privy Council” (1985), 63 Can. Bar. Rev. 461, 474. The points made by Manitoba Catholics concerning the significant adverse impact of public schools on their ability to instruct their children according to their own religion can also be made by American Catholics. The issue has never been seriously considered by the U.S. Supreme Court however. Direct public aid to religious schools would violate the Establishment Clause of the First Amendment to the U.S. Constitution. Canada, in contrast, has no such constitutional provision. Indeed, s. 93 of the Constitution Act, 1867 actually requires public funding for Catholic and Protestant denominational schools if, as was the case in Ontario, such funding existed at confederation. Because the U.S. Supreme Court uses separate tests to analyze whether governmental conduct offends the conflicting goals of the Establishment and Free Exercise Clauses of the First Amendment, a serious inquiry into whether the resulting doctrine strikes the appropriate balance between the two clauses has not been made. Section 116 of the Australian Constitution prohibits laws ‘for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion...’ In the only case to date on the establishment “limb”, state funding for religious schools was held not to breach s 116 (Attorney-General (Vic); Ex rel Black v Commonwealth (1981) 145 CLR 559), since funding did not amount to elevating a nationally recognized religion. Regarding the “free exercise” limb, the HCA held that compulsory military service did not prohibit the free exercise of a pacifist religion (Krygger v Williams (1912) 15 CLR 366) since ‘[t]o require a man to do a thing which has nothing at all to do with religion is not prohibiting him from a free exercise of religion.’ As in the U.S., therefore, this test is not related to the ‘establishment’ test. (There is no case law on the ‘imposing religious observance’ limb.)
Most of the province of Manitoba was previously part of a large area called Rupert's Land, owned outright by the Hudson Bay Company. To foreclose feared western expansion by the U.S., which had just purchased Alaska, Prime Minister Sir John MacDonald arranged to purchase Rupert's Land from the Hudson Bay Co. for $1.5m + 5% of fertile land. When Canadian surveyors along the Red River ignored property rights of Métis Indians, Louis Riel (a Franco-Manitoban) and armed horsemen broke up the party, organized the Métis, prevented the Lt. Gov.-designate from entering the province, seized a fort, put down an attempted overthrow by a pro-Canadian group, assumed the provincial presidency, and carried out death sentence on Anglo-Protestant rebel who tried to kill him (fueling anti-Catholic sentiment in Ontario). Apparently, the only quick way to send Canadian troops into Manitoba was through the U.S., and because of national pride MacDonald didn't want to get U.S. approval. So he agreed to deal with Riel, who sent a delegation to Ottawa with demands, which were agreed to and incorporated into *Manitoba Act*. In 1871, when Manitoba was admitted to Canada, its population was 5700 francophone mixed; 4000 Anglophone mixed; 1600 "white" [presumably Anglo]. The 1891 census: 152,500, of whom only 10,000 were francophone. Although some suggest Franco-Manitobans anticipated the dramatic change in demographics, others suggest that it was a surprise: while Ontarians moved west as expected, Quebeccois instead moved south to New England.

During legislative debate twenty years later on the legislation challenged in this case, the provincial Attorney General demanded to know what right francophones had to use their language officially. When francophones responded that they had the same right as Anglophones had to use English in Quebec, the proponents retorted that Quebec was different because English was the language of the British Empire to which Canada belonged. After the bill's passage, Franco-Manitobans implored the federal government to use the power specifically provided in the *Manitoba Act* to disallow the legislation. Conservative leader Charles Tupper, who had just become Prime Minister amidst continuing dissarray among the Tories following the long tenure recently deceased founding PM Sir John A. McDonald, was inclined to support the Franco-Manitobans, but before legislation could be passed he had to call an election. Liberal leader Wilfrid Laurier, from Quebec, opposed the use of the disallowance power, which he feared would come back to haunt Quebec. A compromise was agreed to between Laurier and Manitoba Premier Greenway in 1896 allowed some public schools to teach Catholicism in French. This deal was abrogated, with no federal response, in 1916. (Laurier’s position is consistent with the traditional view of many Quebec politicians -- prior to Pierre Trudeau and his vision of a strong, bilingual, national government -- that federal intervention to prevent francophone minorities in English Canada created too grave a risk that Ottawa would then turn its attention to Quebec City and potentially interfere with Quebec’s treatment of its anglophone minority.)
BARRETT v. CITY OF WINNIPEG

SUPREME COURT OF CANADA
(1891) 19 S.C.R. 374

Sir W. J. RITCHIE C.J. – This is an application to quash two by-laws of the municipal corporation of the city of Winnipeg, which were passed for levying a rate for municipal and school purposes in that city for the year 1890, and they assess all real and personal property in the city for such purpose. It is asked that these by-laws be quashed for illegality on the following among other grounds: That because by the said by-laws the amount to be levied for school purposes for the Protestant and Roman Catholic schools are united, and one rate levied upon Protestants and Roman Catholics alike for the whole sum.

[The relevant statute, s. 22 of the Manitoba Act, which was the federal statute creating the new province and thus analogous to the American Northwest Ordinance in creating a basic charter for the province, provided that the provincial legislature “may exclusive make laws in relation to education,” subject, however, to the condition that “Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law or practice in the province at the Union.”]

It must be assumed that in legislating with reference to a constitution for Manitoba the Dominion Parliament was well acquainted with the conditions of the country to which it was about to give a constitution, and they must have known full well that at that time there were no schools established by law, religious or secular, public or sectarian. In such a state of affairs, and having reference to the condition of the population, and the deep interest felt and strong opinions entertained on the subject of separate schools, it cannot be supposed that the legislature had not its attention more particularly directed to the educational institutions of Manitoba, and more especially to the schools then in practical operation, their constitution, mode of support and peculiar character in matters of religious instruction. To have overlooked considerations of this kind is to impute to parliament a degree of short-sightedness and indifference which, in view of the discussions relating to separate schools which had taken place in the older provinces, or some of them, and to the extreme vigilance with which educational questions are scanned and the importance attached to them, more particularly by the Catholic Church as testified to by Monseigneur Tache, cannot to my mind be for a moment entertained. Read in the light of considerations such as these we must not conclude that the legislature well weighed its language and intended that every word it used should have force and effect.

The British North America Act confers on the local legislature the exclusive power to make laws in relation to education, provided nothing in such laws shall prejudicially affect any right or privilege, with respect to denominational schools, which any class of persons had by law in the province at the union, but the Manitoba Act goes much further and declares that nothing in such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons had by law or practice in the province at the union. We are now practically asked to reject the words “or practice” and construe the statute as if they had not been used, and to read this restrictive clause out of the statute as being inapplicable to the existing state of things in Manitoba at the union, whereas on the contrary, I think, by the insertion of the words “or practice” it was made practically applicable to the condition at the time of the educational institutions, which were, unquestionably and solely as the evidence shows, of a denominational character. It is clear that at the time of the passing of the Manitoba Act no class of persons had by law any rights or privileges secured to them; so if we reject the words “or practice” as meaningless or inoperative we shall be practically expunging the whole of the restrictive clause from the statute. I know of no rule of construction to justify such a proceeding unless the clause is wholly
unintelligible or incapable of any reasonable construction. The words used, in my opinion, are of no
doubtful import, but are, on the contrary, plain, certain and unambiguous, and must be read in their
ordinary grammatical sense. Effect should be given to all the words in the statute, nothing adding thereto,
nothing diminishing therefrom.

* * *

It is a settled canon of construction that no clause, sentence or word, shall be construed superfluous,
void or insignificant if it can be prevented.

While it is quite clear that at the time of the passing of this act there were no denominational or other
schools established and recognized by law, it is equally clear that there were at that time in actual
operation or practice a system of denominational schools in Manitoba well established and the de facto
rights and privileges of which were enjoyed by a large class of persons. What then was there more
reasonable than that the legislature should protect and preserve to such class of persons those rights and
privileges they enjoyed in practice, though not theretofore secured to them by law, but which the
Dominion Parliament appears to have deemed it just should not, after the coming into operation of the
new provincial constitution, be prejudicially affected by the action of the local legislature?

* * *

The only questions, it strikes me, we are now called upon to consider is: Does this Public School Act
prejudicially affect the class of persons who in practice enjoyed the rights and privileges of
denominational schools at the time of the union? * * *

But it is said that the Catholics as a class are not prejudicially affected by this act. Does it not
prejudicially, that is to say injuriously, disadvantageously, which is the meaning of the word
"prejudicially," affect them when they are taxed to support schools of the benefit of which, by their
religious belief and the rules and principles of their church, they cannot conscientiously avail themselves,
and at the same time by compelling them to find means to support schools to which they can
conscientiously send the children, or in the event of their not being able to find sufficient means to do
both to be compelled to allow their children to go without either religious or secular instruction? In other
words, I think the Catholics were directly prejudicially affected by such legislation, but whether directly
or indirectly the local legislature was powerless to affect them prejudicially in the matter of
denominational schools, which they certainly did by practically depriving them of their denominational
schools and compelling them to support schools the benefit of which Protestants alone can enjoy.

In my opinion the Public Schools Act is ultra vires and the by-laws of the city of Winnipeg, Nos. 480
and 483, should be quashed and this appeal allowed with costs.

STRONG J.–I have read the judgment prepared by the Chief Justice, and entirely concur in the
conclusion at which he has arrived as well as in the reasons he has given therefor. I have nothing to add
to what he has said.

FOURNIER, J.:–[Translated.]

* * *

By the Act 53 Vic. C. 38, the system of separate schools, Catholic and Protestant which had been
established in accordance with the constitutional Act of Manitoba, 33 Vict. C. 3, was completely
abolished after having been in force for nineteen years.

It is important for the decision of this question to carry oneself back to the circumstance which
preceded the entrance of that Province into the Canadian confederation. We remember that it was at the
close of a rebellion which had thrown the population into a profound and violent agitation, aroused
religious and national passions, and occasioned great disorders, necessitating the intervention of the Federal Government. It was with the object of re-establishing public peace and conciliating the population that the Federal government granted to them the constitution which they have until now enjoyed.

The principle of separate schools introduced into the British North America Act by sect. 93 was also introduced into the constitution of Manitoba, and declared to be applicable to the separate schools which existed in fact in this territory before its organization into a Province. The population was then divided almost equally between Catholics and Protestants.

* * *

[In an affidavit, the Catholic] Archbishop asserts that the Church considers the schools established in virtue of the Public Schools Act as unfit for the education of Catholic children, and that the children will not attend them; that rather than encourage these schools the Catholics will prefer to return to the system existing before the Manitoba Act, and will establish and maintain schools in conformity with the principles of their faith; that the Protestants are satisfied with the system of education established by the Public School Act because these schools resemble those which they maintained before the repeal of the former Acts introducing the system of separate schools over which they had absolute control.

* * *

What was the reason for the introduction of that restriction in sect. 93 and for what reasons was it extended to the right which was based only on the practice in Manitoba at the time of the passage of the Act 33 Vict. C. 3?

[Justice Fournier traced the history of constitutional protection of denominational rights. Section 93 clearly applied to Ontario and Quebec, where the law allowed minorities the right to have separate schools. In establishing those schools the minorities were exempt from contributing to the support of the public schools and had a right to a share of the public grant. In New Brunswick, by contrast, there was no legal right to separate state-supported schools. Legislation creating a unified public school system was thus upheld as consistent with s. 93 of the BNA Act. Justice Fournier concluded: “the words ‘by practice’ had been introduced into the Manitoba Act in order to prevent the difficulties which had arisen in New Brunswick.”]

It would be absurd to pretend that the privilege guaranteed to Catholics by the words “by practice” should be understood as that of having separate schools like private schools supported by themselves. This privilege existing of common right would not require any legislation and the expression “by practice” would be then altogether useless and without any meaning. The Federal Parliament, knowing of the existence in the territory of separate schools and the fact that there was no law authorizing them, while it desired to secure their legal existence after the union understood that the provisions alone of the British North America Act would not suffice for this object. It was without doubt for this reason that sect. 93 was modified by the addition of the words “by practice.” It is then a provision which instead of not having any meaning wisely fills an important gap which existed in the organization of the Province. It is in this case proper to apply the rule which requires that when the language of the law admits of two interpretations one of which would be absurd, and the other reasonable and salutary the latter should be adopted as in accordance with the intention of the legislator.

* * *

It is not difficult to see which of these two constructions is the more reasonable and the more just. If the construction of the words “by practice” was not sufficient to give them the right to maintain their separate schools the Catholics would be taxed for schools which they would not be able to attend and of which the Protestants alone would have the benefit. While on the other hand if we give to the words “by practice” their true construction the schools of the Catholics will be recognized by law. These words “by
practice” have without doubt been introduced into the Manitoba Act only for the purpose of assuring th
those who should desire it the right to maintain their separate schools and of sanctioning their legal
existence.

* * *

TASCHEREAU, J.—[Translated.]

* * *

The law of 1890, says the respondent, does, it is true, oblige Catholics to contribute to free schools,
but it does not oblige them to send their children to them. It does not forbid them either from having
separate schools; it does not then prejudice in any way any of the rights and privileges conferred on them
by custom before the union, consequently it is *intra vires*. I think this reasoning altogether erroneous. In
fact I should have been disposed not to believe it serious if it had not received the sanction of the
provincial tribunal. To what in effect does it amount? To cause to be said by the non-Catholic majority
to the Catholic minority: “you have the privilege of having your schools; we leave it to you provided you
help us to support ours. You cannot send your children to our schools, but we do not oblige you to do so
all that we demand of you is to pay for instructing ours.” I seek in vain in the record proof that this was
the custom before the union. I find there quite the opposite.

Is it possible moreover to imagine a system like that which the respondent would wish to enforce in
Manitoba, and at the same time to recognize the right of the minority to separate schools, a right which
the respondent could not deny in face of sect. 22 of the constitutional Act of 1870? It is plain that the
legislator foreseeing that in the future one or other of the two classes, Protestant or Catholic must of
necessity prevail by number in the projected Province makes by this section an enactment for both cases.
They were then almost equally divided, to judge by the first legislation of the new Province on the subject
in 1871, when it appears that the board of education was composed equally of Catholics and of
Protestants with a superintendent for each of these two classes and with an equal division of the
government grant. In that state of things Parliament by sect. 22 of the Act provides for both of these
results. The first sub-section which I have cited at length assures to the minority, whether Catholic or
Protestant, the rights up to that time conferred on them by practice, and the second sub-section gives them
the right of appeal to the Governor-General in Council from all legislation affecting any of their rights in
the matter. Had the Protestant population happened to be in the minority they could not have been
compelled to contribute to the support of Catholic schools. They would have claimed the same right to
their own schools as their co-religionists enjoy in the Province of Quebec complete and unfettered, that is
to say, free from taxation for Catholic schools. To-day the Catholics forming the minority claim only the
same right and the free exercise of that right. I am of opinion that their claim is well founded. They have
a right to their system of schools such as their co-religionists enjoy in Ontario or on the same principle. It
is with this object, and with this object alone, at least I am unable to view the matter otherwise, that this
special provision relative to separate schools taken from the British North America Act was inserted in
the constitutional Act of 1870 with the addition of the words “or by practice,”—words rendered necessary
as I have said, to fully express the intention of the legislator, and to accomplish his purpose, owing to the
well known fact that there did not then exist on the subject in these regions any law,m and that the whole
matter was there governed by practice and by practice alone.

* * *

PATTERSON, J.—[opinion omitted]
CITY OF WINNIPEG V. BARRETT

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL
[1892] A.C. 445

The judgment of their Lordships was delivered by—

LORD MACNAGHTEN:—

* * *

The controversy which has given rise to the present litigation is, no doubt, beset with difficulties. The result of the controversy is of serious moment to the province of Manitoba, and a matter apparently of deep interest throughout the Dominion. But in its legal aspect the question lies in a very narrow compass. The duty of this Board is simply to determine as a matter of law whether, according to the true construction of the Manitoba Act, 1870, having regard to the state of things which existed in Manitoba at the time of the Union, the provincial legislature has or has not exceeded its powers in passing the Public Schools Act, 1890.

[Manitoba initially argued that because, like s. 93 of the BNA Act, subsection 3 of the Manitoba Act allowed Parliament to disallow provincial legislation that violated section 22, there was no basis for judicial review of the political remedy. The Privy Council first determined that the case was justiciable.]

* * *

Now, if the state of things which the archbishop describes as existing before the Union had been a system established by law, what would have been the rights and privileges of the Roman Catholics with respect to denominational schools? They would have had by law the right to establish schools at their own expense, to maintain their schools by school fees or voluntary contributions, and to conduct them in accordance with their own religious tenets. Every other religious body, which was engaged in a similar work at the time of the Union, would have had precisely the same right with respect to their denominational schools. Possibly this right, if it had been defined or recognized by positive enactment, might have had attached to it as a necessary or appropriate incident the right of exemption from any contribution under any circumstances to schools of a different denomination. But, in their Lordships’ opinion, it would be going much too far to hold that the establishment of a national system of education upon an unsectarian basis is so inconsistent with the right to set up and maintain denominational schools that the two things cannot exist together, or that the existence of the one necessarily implies or involves immunity from taxation for the purpose of the other. It has been objected that if the rights of Roman Catholics, and of other religious bodies, in respect of their denominational schools, are to be so strictly measured and limited by the practice which actually prevailed at the time of the Union, they will be reduced to the condition of a “natural right” which “does not want any legislation to protect it.” Such a right, it was said, cannot be called a privilege in any proper sense of the word. If that be so, the only result is that the protection which the Act purports to extend to rights and privileges existing “by practice” has no more operation than the protection which it purports to afford to rights and privileges existing “by law.” It can hardly be contended that, in order to give a substantial operation and effect to a saving clause expressed in general terms, it is incumbent upon the Court to discover privileges which are not apparent of themselves, or to ascribe distinctive and peculiar features to rights which seem to be of such a common type as not to deserve special notice or require special protection.

* * *

Notwithstanding the Public Schools Act, 1890, Roman Catholics and members of every other religious body in Manitoba are free to establish schools throughout the province; they are free to maintain their schools by school fees or voluntary subscriptions; they are free to conduct their schools according to their
own religious tenets without molestation or interference. No child is compelled to attend a public school. No special advantage other than the advantage of a free education in schools conducted under public management is held out to those who do attend. But then it is said that it is impossible for Roman Catholics, or for members of the Church of England (if their views are correctly represented by the Bishop of Rupert’s Land, who has given evidence in Logan’s case), to send their children to public schools were the education is not superintended and directed by the authorities of their Church, and that therefore Roman Catholics and members of the Church of England who are taxed for public schools, and at the same time feel themselves compelled to support their own schools, are in a less favourable position than those who can take advantage of the free education provided by the Act of 1890. That may be so. But what right or privilege is violated or prejudicially affected by the law? It is not the law that is in fault. It is owing to religious convictions which everybody must respect, and to the teaching of their Church, that Roman Catholics and members of the Church of England find themselves unable to partake of advantages which the law offers to all alike.

Consider, in a similar vein, the decision in Ottawa Separate School Trustees v. Mackell, [1917] A.C. 62, 32 D.L.R. 1 (1916) (P.C.), upholding a regulation issued by the Ontario provincial department of education mandating Catholic education in English. The Court narrowly construed s. 93 to protect the rights of Catholics to attend denominational schools but not the rights of francophone Catholics to provide the denominational education in French.

The extent to which judges continued to use purposive, textual, and intentional approaches is reflected in these earlier opinions. Once again in Charter jurisprudence regarding minority language rights, we see the same “flexibility” in interpretive approaches.

Sections 16-20 of the Charter made the federal government and the government of New Brunswick officially bilingual. (It was Pierre Trudeau’s fervent wish that all provinces would similarly commit to bilingualism, and s. 43 of the Charter provides a mechanism for other provinces to do so in the future. There has been no recent movement in this regard.) The provisions go further than s. 133 of the British North America Act (English in Quebec) and s. 22 of the Manitoba Act (French in Manitoba). Specifically, s. 19(2) provides that either English or French may be used in any New Brunswick court. In Société des Acadiens v. Association of Parents, [1986] 1 S.C.R. 549, the Supreme Court of Canada held that s. 19(2) did not disqualify unilingual Anglophone judges from hearing a case, providing that translators were used. The case was entirely manufactured by all parties in order to litigate symbolically important issues, and the result could have been justified under several less controversial

+ The interpretation of the Charter’s provisions regarding New Brunswick’s bilingual status were ancillary to pending litigation over whether the local school board could offer French-immersion programs to francophone students in English schools. (One suspects the plaintiffs feared that these programs would detract from the popularity and viability of French-language schools that francophones had the right to attend under s.23 of the Charter.) The respondent association of anglophone parents (who presumably favoured French-immersion programs to increase the numbers and diversity of English schools as well as to provide stronger opportunities for some anglophone students to learn French) sought to intervene in the Court of Appeal to defend the controversial program’s legality. The three-judge panel hearing the motion included Judge Stuart Stratton, whose knowledge of French was limited. Although a New Brunswick statute gives all francophones the right to be heard in French in
approaches. The case was significant, however, because Justice Beetz, for the majority, rejected the “liberal interpretative approach” that, as the dissent noted, is the usual interpretive method in interpreting the Charter. Rather, the majority distinguished language rights:

Unlike language rights which are based on political compromise, legal rights tend to be seminal in nature because they are rooted in principle. Some of them, such as the one expressed in s. 7 of the Charter, are so broad as to call for frequent judicial determination.

Language rights, on the other hand, although some of them have been enlarged and incorporated into the Charter, remain nonetheless founded on political compromise.

This essential difference between the two types of rights dictates a distinct judicial approach with respect to each. More particularly, the courts should pause before they decide to act as instruments of change with respect to language rights. This is not to say that language rights provisions are cast in stone and should remain immune altogether from judicial interpretation. But, in my opinion, the courts should approach them with more restraint than they would in construing legal rights.

The majority also employed an originalist methodology in bolstering its narrow approach to Charter language rights:

It is public knowledge that some provinces other than New Brunswick--and apart from Quebec and Manitoba--were expected ultimately to opt into the constitutional scheme or part of the constitutional scheme prescribed by ss. 16 to 22 of the Charter, and a flexible form of constitutional amendment was provided to achieve such an advancement of language rights. But again, this is a form of advancement brought about through a political process, not a judicial one.

If however the provinces were told that the scheme provided by ss. 16 to 22 of the Charter was inherently dynamic and progressive, apart from legislation and constitutional amendment, and that the speed of progress of this scheme was to be controlled mainly by the courts, they would have no means to know with relative precision what it was that they were opting into. This would certainly increase their hesitation in so doing and would run contrary to the principle of advancement contained in s. 16(3).

This approach, in turn, was reversed by the Court, again in dicta, in Beaulac v. The Queen, [1999] 1 S.C.R. 768. The case did not involve the Charter but rather the interpretation of s. 530(4) of the Criminal Code, which gives the accused the right to a trial in his own language, even if not timely requested, if the judges is “satisfied that it is in the best interests of New Brunswick courts, the Supreme Court of Canada decided the Charter issue anyway.

Section 13(1) of the Official Languages of New Brunswick Act, R.S.N.B. 1973, c. O-1, provides that a litigant “may be heard in the official language of his choice and such choice is not to place that person at any disadvantage,” so the Court could have disposed of the issue on statutory grounds. Even if the Court felt it necessary to reach the Charter issue, the Court could have held that s. 19(2) needed to be construed more narrowly because its wording - “French may be used” - is less sweeping than the language applicable to communications with government bureaucrats in s. 20 of the Charter (granting New Brunswickers the “right to communicate with” a provincial office in French).
justice.” Beaulac was accused of first-degree murder in British Columbia, and his first trial ended in mistrial with the second conviction overturned because of otherwise improper jury instructions. Based on the difficulty of composing a francophone jury in Vancouver and Beaulac’s fluency in English, the trial judge denied his request that his third trial be conducted in French. The majority reversed, construing the statute broadly and rejecting administrative costs as a valid reason to reject the request. Again, this decision could have been based on a variety of sound principles of statutory interpretation, but the majority (over the objection of two justices) expressly rejected the reasoning of Societe des Acadiens, holding that language rights “must in all cases be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada.” Writing for the majority, Justice Michel Bastarache* cited with approval a law review article that argued that other Charter rights, including those in ss. 7 and 15, were the result of political compromise and that “there is no basis in the constitutional history of Canada for holding that any such political compromises require a restrictive interpretation of constitutional guarantees.”

III. Segue: Is Separate But Equal Inherently Unequal?

BROWN v. BOARD OF EDUCATION OF TOPEKA

SUPREME COURT OF THE UNITED STATES
347 U.S. 483; 74 S. Ct. 686; 98 L. Ed. 873 (1954)

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

These cases come to us from the States of Kansas, South Carolina, Virginia, and Delaware. They are premised on different facts and different local conditions, but a common legal question justifies their consideration together in this consolidated opinion.34

* Bastarache, appointed to the Supreme Court of Canada by the Chretien government in 1997, is a francophone from New Brunswick (a province that is formally bilingual and has the largest francophone minority in the country). He argued a number of language rights cases in the Supreme Court of Canada, including the Manitoba Language Rights cases cited herein and the Mahe case excerpted in Part III of this Chapter, and is the coauthor of a text on language rights in Canada.

34 In the Kansas case, Brown v. Board of Education, the plaintiffs are Negro children of elementary school age residing in Topeka. * * * The three-judge District Court, convened under 28 U. S. C. §§ 2281 and 2284, found that segregation in public education has a detrimental effect upon Negro children, but denied relief on the ground that the Negro and white schools were substantially equal with respect to buildings, transportation, curricula, and educational qualifications of teachers. 98 F.Supp. 797. The case is here on direct appeal under 28 U. S. C. § 1253.

In the South Carolina case, Briggs v. Elliott, the plaintiffs are Negro children of both elementary and high school age residing in Clarendon County. They brought this action in the United States District Court for the Eastern District of South Carolina to enjoin enforcement of provisions in the state constitution and statutory code which require the segregation of Negroes and whites in public schools. S. C. Const., Art. XI, § 7; S. C. Code § 5377 (1942). The three-judge District Court, convened under 28 U. S. C. §§ 2281 and 2284, denied the requested relief. The court found that the Negro schools were inferior to the white schools and ordered the defendants to begin immediately to equalize the facilities. But the court sustained the validity of the contested provisions and denied the
In each of the cases, minors of the Negro race, through their legal representatives, seek the aid of the courts in obtaining admission to the public schools of their community on a nonsegregated basis. In each instance, they had been denied admission to schools attended by white children under laws requiring or permitting segregation according to race. This segregation was alleged to deprive the plaintiffs of the equal protection of the laws under the Fourteenth Amendment. In each of the cases other than the Delaware case, a three-judge federal district court denied relief to the plaintiffs on the so-called "separate but equal" doctrine announced by this Court in *Plessy v. Ferguson*, 163 U.S. 537. Under that doctrine, equality of treatment is accorded when the races are provided substantially equal facilities, even though these facilities be separate. In the Delaware case, the Supreme Court of Delaware adhered to that doctrine, but ordered that the plaintiffs be admitted to the white schools because of their superiority to the Negro schools.

The plaintiffs contend that segregated public schools are not "equal" and cannot be made "equal," and that hence they are deprived of the equal protection of the laws. Because of the obvious importance of the question presented, the Court took jurisdiction. Argument was heard in the 1952 Term, and reargument was heard this Term on certain questions propounded by the Court.

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

In the Delaware case, *Gebhart v. Belton*, the plaintiffs are Negro children of both elementary and high school age residing in New Castle County. * * * The Chancellor gave judgment for the plaintiffs and ordered their immediate admission to schools previously attended only by white children, on the ground that the Negro schools were inferior with respect to teacher training, pupil-teacher ratio, extracurricular activities, physical plant, and time and distance involved in travel. 87 A. 2d 862. The Chancellor also found that segregation itself results in an inferior education for Negro children (see note 10, infra), but did not rest his decision on that ground. *Id.*, at 865. The Chancellor's decree was affirmed by the Supreme Court of Delaware, which intimated, however, that the defendants might be able to obtain a modification of the decree after equalization of the Negro and white schools had been accomplished. 91 A. 2d 137, 152. The defendants, contending only that the Delaware courts had erred in ordering the immediate admission of the Negro plaintiffs to the white schools, applied to this Court for certiorari. The writ was granted, 344 U.S. 891. The plaintiffs, who were successful below, did not submit a cross-petition.
An additional reason for the inconclusive nature of the Amendment's history, with respect to segregated schools, is the status of public education at that time. In the South, the movement toward free common schools, supported by general taxation, had not yet taken hold. Education of white children was largely in the hands of private groups. Education of Negroes was almost nonexistent, and practically all of the race were illiterate. In fact, any education of Negroes was forbidden by law in some states. Today, in contrast, many Negroes have achieved outstanding success in the arts and sciences as well as in the business and professional world. It is true that public school education at the time of the Amendment had advanced further in the North, but the effect of the Amendment on Northern States was generally ignored in the congressional debates. Even in the North, the conditions of public education did not approximate those existing today. The curriculum was usually rudimentary; ungraded schools were common in rural areas; the school term was but three months a year in many states; and compulsory school attendance was virtually unknown. As a consequence, it is not surprising that there should be so little in the history of the Fourteenth Amendment relating to its intended effect on public education.

In the first cases in this Court construing the Fourteenth Amendment, decided shortly after its adoption, the Court interpreted it as proscribing all state-imposed discriminations against the Negro race. The doctrine of "separate but equal" did not make its appearance in this Court until 1896 in the case of Plessy v. Ferguson, supra, involving not education but transportation. American courts have since labored with the doctrine for over half a century. In this Court, there have been six cases involving the "separate but equal" doctrine in the field of public education. In Cumming v. County Board of Education, 175 U.S. 528, and Gong Lum v. Rice, 275 U.S. 78, the validity of the doctrine itself was not challenged. In more recent cases, all on the graduate school level, inequality was found in that specific benefits enjoyed by white students were denied to Negro students of the same educational qualifications. Missouri ex rel. Gaines v. Canada, 305 U.S. 337; Sipuel v. Oklahoma, 332 U.S. 631; Sweatt v. Painter, 339 U.S. 629; McLaurin v. Oklahoma State Regents, 339 U.S. 637. In none of these cases was it necessary to re-examine the doctrine to grant relief to the Negro plaintiff. And in Sweatt v. Painter, supra, the Court expressly reserved decision on the question whether Plessy v. Ferguson should be held inapplicable to public education.

In the instant cases, that question is directly presented. Here, unlike Sweatt v. Painter, there are findings below that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other "tangible" factors. Our decision, therefore, cannot turn on merely a comparison of these tangible factors in the Negro and white schools involved in each of the cases. We must look instead to the effect of segregation itself on public education.

\[5\] Slaughter-House Cases, 16 Wall. 36, 67-72 (1873); Strauder v. West Virginia, 100 U.S. 303, 307-308 (1880):

"It ordains that no State shall deprive any person of life, liberty, or property, without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? The words of the amendment, it is true, are prohibitory, but they 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."
In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

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

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

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

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

Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority. [Numerous social science citations omitted.] Any language in *Plessy v. Ferguson* contrary to this finding is rejected.

We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. * * *
MAHE v. ALBERTA

SUPREME COURT OF CANADA

[Before Dickson C.J. and Wilson, La Forest, L'Heureux-Dube, Sopinka, Gonthier and Cory JJ.]

The judgment of the Court was delivered by THE CHIEF JUSTICE--

The litigation is an outgrowth of continuing dissatisfaction with the provision of French language education in Alberta, particularly in Edmonton. The appellants desire a French-language elementary school in Edmonton, which would have the following features: (1) it would instruct Francophone children exclusively in the French language and in a totally "French" environment; (2) it would be administered by a Committee of Parents under the structure of an autonomous French School Board; and (3) it would have a programme reflecting the French linguistic culture. Initially, appellants were encouraged to address their concerns to the Edmonton Roman Catholic Separate School Board (which receives state funding) or to the Edmonton Public School Board. The primarily Anglophone Catholic board studied the issue and created a new school under its direction. In this new school, French is the language of instruction and administration, the personnel are all Francophone, and the stated aim of the school is "to primarily reflect the cultural heritage of the French linguistic minority in Alberta."

At the heart of this appeal is the claim of the appellants that the term "minority language educational facilities" referred to in s. 23(3)(b) includes administration by distinct school boards. [The provision specifically provides that minority linguistic education rights "includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds."] The respondent takes the position that the word "facilities" means a school building. The respondent submits that the rights of the Francophone minority in metropolitan Edmonton have not been denied because those rights are being met with current Francophone educational facilities.

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Analysis

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There are two general questions which must be answered in order to decide this appeal: (1) do the rights which s. 23 mandates, depending upon the number of students, include a right to management and control; and (2) if so, is the number of students in Edmonton sufficient to invoke this right? I will begin with the first question.

***

(1) The Purpose of s. 23

The general purpose of s. 23 is clear: it is to preserve and promote the two official languages of Canada, and their respective cultures, by ensuring that each language flourishes, as far as possible, in provinces where it is not spoken by the majority of the population. The section aims at achieving this goal by granting minority language educational rights to minority language parents throughout Canada.

My reference to cultures is significant: it is based on the fact that any broad guarantee of language rights, especially in the context of education, cannot be separated from a concern for the culture associated with the language. Language is more than a mere means of communication, it is part and parcel of the identity and culture of the people speaking it. It is the means by which individuals
understand themselves and the world around them. ***

In addition, it is worth noting that minority schools themselves provide community centres where the promotion and preservation of minority language culture can occur; they provide needed locations where the minority community can meet and facilities which they can use to express their culture. ***

In my view the appellants are fully justified in submitting that "history reveals that s. 23 was designed to correct, on a national scale, the progressive erosion of minority official language groups and to give effect to the concept of the 'equal partnership' of the two official language groups in the context of education."

The remedial aspect of s. 23 was indirectly questioned by the respondent and several of the interveners in an argument which they put forward for a "narrow construction" of s. 23. [Ed. note: The Court then quoted at length from the language by Beetz J. in Societe des Acadiens du Nouveau-Brunswick Inc. v. Association of Parents for Fairness in Education to the effect that language rights should not be given a broad construction in light of the political compromise that underlay these constitutional provisions. Here in Mahe, the Court moved away from that comment. As you recall, the Court in Beaulac expressly rejected this language.]

(2) The Context of s. 23(3)(b): An Overview of s. 23

[Here, the Court adopted a “sliding scale” approach, whereby linguistic minorities are entitled to increasing rights as numbers increase, ranging from a separate class within a school to complete control of separate facilities.]

(3) Management and Control Under s. 23(3)(b)-- Introduction

Before directly addressing the question of management and control, I wish to dispose briefly of two arguments raised by the parties. The first, advanced by the appellants, is that s. 23 of the Charter should be interpreted in light of the words of ss. 15 and 27 of the Charter. [Here, the Court holds that s. 23 was a “comprehensive code for minority language educational rights” with “its own method of internal balancing” that constituted, in effect, an exception to ss. 15 and 27 by providing “special status in comparison to all other linguistic groups in Canada,” rather than creating individual rights.]

The second argument, which was advanced by the respondent, is that s. 23 should be interpreted in light of the legislative debates leading up to its introduction. This Court has stated that such debates may be admitted as evidence, but it has also consistently taken the view that they are of minimal relevance (see Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486, at pp. 506-7). In this case, the evidence from the legislative debates contributes little to the task of interpreting s. 23 and, accordingly, I place no weight upon it.*

* [Ed. note: The Motor Vehicle Reference is discussed in Chapter Two. The casual reference to legislative history made in the text in this case referred to statements made by the Minister of Justice, Jean Chrétien, before the special joint parliamentary committee on the Charter, suggesting that management and control of minority language educational facilities was not contemplated by s. 23(3)(b). The matter was more carefully considered, with the same result reached by the Supreme Court here, in Reference re Education Act of Ontario and Minority Language Education Rights (1984), 10 D.L.R. (4th) 491, 529-31 (Ont. C.A.), where the court concluded that these statements should not be given as much weight as the historic context that led to the new provisions, which demonstrated the lack of responsiveness of anglophone school boards to the needs of the francophone minority.]
(4) Management and Control--The Text of s. 23(3)(b)

In my view, the words of s. 23(3)(b) are consistent with and supportive of the conclusion that s. 23 mandates, where the numbers warrant, a measure of management and control. Consider, first, the words of subs. (3)(b) in the context of the entire section. Instruction must take place somewhere and accordingly the right to "instruction" includes an implicit right to be instructed in facilities. If the term "minority language educational facilities" is not viewed as encompassing a degree of management and control, then there would not appear to be any purpose in including it in s. 23. This common sense conclusion militates against interpreting "facilities" as a reference to physical structures. Indeed, once the sliding scale approach is accepted it becomes unnecessary to focus too intently upon the word "facilities". Rather, the text of s. 23 supports viewing the entire term "minority language educational facilities" as setting out an upper level of management and control.

I recognize that the English text of subs. (3)(b) is perhaps ambiguous: the phrase "minority language educational facilities" could either mean the facilities of the minority, or the facilities for the minority. The French text, however, is clearer. It has been stated on several occasions by this Court, that where there is an ambiguity in one version of the Charter, and the other version is less ambiguous, then the meaning of the less ambiguous version should be adopted. The French version of s. 23(3)(b) reads:

"23. ... (3) Le droit ... b) comprend, lorsque le nombre de ces enfants le justifie, le droit de les faire instruire dans des etablissements d'enseignement de la minorite linguistique finances sur les fonds publics."

[Emphasis added.]

The underlined phrase in the French text--which utilizes the possessive "de la"--is more strongly suggestive than the English text that the facilities belong to the minority and hence that a measure of management and control should go to the linguistic minority in respect of educational facilities.

(5) Management and Control--The Purpose of s. 23

The foregoing textual analysis of s. 23(3)(b) is strongly supported by a consideration of the overall purpose of s. 23. That purpose, as discussed earlier, is to preserve and promote minority language and culture throughout Canada. In my view, it is essential, in order to further this purpose, that, where the numbers warrant, minority language parents possess a measure of management and control over the educational facilities in which their children are taught. Such management and control is vital to ensure that their language and culture flourish. It is necessary because a variety of management issues in education, e.g., curricula, hiring and expenditures, can affect linguistic and cultural concerns. I think it incontrovertible that the health and survival of the minority language and culture can be affected in subtle but important ways by decisions relating to these issues. To give but one example, most decisions pertaining to curricula clearly have an influence on the language and culture of the minority students.

Furthermore, as the historical context in which s. 23 was enacted suggests, minority language groups cannot always rely upon the majority to take account of all of their linguistic and cultural concerns. Such neglect is not necessarily intentional: the majority cannot be expected to understand and appreciate all of the diverse ways in which educational practices may influence the language and culture of the minority. In commenting on various setbacks experienced by the Francophone minority in Ontario, the Court of Appeal of that province noted that "lack of meaningful participation in management and control of local school boards by the Francophone minority made these events possible" (Reference Re Education Act of

"It would be foolhardy to assume that Parliament intended to ... leave the sole control of the program development and delivery with the English majority. If such were the case, a majority language group could soon wreak havoc upon the rights of the minority and could soon render such a right worthless."

I agree with the sentiments expressed in these statements. If section 23 is to remedy past injustices and ensure that they are not repeated in the future, it is important that minority language groups have a measure of control over the minority language facilities and instruction.

(6) The Meaning of the Phrase "Management and Control"

[The Court adopted a flexible approach. It cited with approval a concurring opinion below that “the most effective guarantee to prevent assimilation is a facility under the exclusive control” of the linguistic minority, and held that in “some circumstances an independent Francophone school board is necessary to meet the purpose of s.23.” However, when the number of Francophone students is small, the Court observed that the isolation of these students from the physical resources that the majority school district enjoys would frustrate the purposes of s.23. If control is not exclusive, however, the Court decreed that it was essential that the “minority language group have control over those aspects of education which pertain to or have an effect upon their language and culture.” This could be achieved by a variety of governance devices, such as guaranteed minority representation on school boards, delegation to minority representatives of decisions regarding the operation of minority-language instruction, etc. Applying the holding to the case, the Court held that there were sufficient numbers of Franco-Edmontonians to warrant a separate school. However, the Court was not satisfied that the number of students likely to enroll in a Francophone school was sufficient to mandate the establishment of a separate school board.

As a separate issue, provincial educational regulations required at least 20% of classroom instruction to be in English; the plaintiffs sought a declaration that education could entirely be in French. The Court remanded to allow the province to demonstrate, under s.1 of the Charter, that some period of mandatory English instruction was a reasonable limit on the rights of Francophone parents to control their children’s linguistic education.]

Judicial protection for linguistic minorities seems to have come full circle. As the Alberta Court of Appeal noted in the Mahe case, 42 D.L.R. (4th) 514, 532, the Privy Council’s jurisprudence could “hardly be described as an example of purposive, generous, or ‘growing tree’ interpretation. From a strict interpretation by the Privy Council, interpretation continued to evolve in cases seeking to effectuate the “political compromise” of s. 23 of the Charter, such as Societe des Acadiens and Quebec Protestant School Board, excerpted above, and finally in Beaulac, supra, the Supreme Court of Canada embraces a broad and purposive approach to language rights that characterizes its approach to other Charter rights. Since then, Canadian courts have continued to frustrate the traditional answer that “the French always lose” by judicial reasoning protecting francophone minorities. For example, in Arsenault-Cameron v. Prince Edward Island, [2000] 1 SCR 3, 181 DLR (4th) 1, the court, citing Beaulac’s call for broad interpretation, held that s. 23’s protection of rights “wherever in the province” meant that the French-language school board, rather than Education ministry officials, could determine whether to establish a school in the Summerside area rather than
bus francophone students to an adjoining district.

An even more aggressive approach is featured in Lalonde v. Ontario (Commission de Restructuration des Services de Santé) (2001), 56 O.R. (3rd) 505, 208 D.L.R. (4th) 577 (C.A.), a successful challenge to the government’s decision to close Montfort Hospital, the only hospital in Ontario where services were available full-time in French and where health care professionals were trained in French. The court rejected claims that closing the hospital violated the Charter’s equality provisions in s. 15 or access-to-language requirements of s. 16(3). That section, you may recall, authorizes legislatures to grant further protection to linguistic minorities. The court emphatically rejected the argument that once a province extends any rights or services to linguistic minorities, it is constitutionally barred from repealing this grant. However, the court drew upon varied sources of authority, including legislation, academic writing, constitutional texts and precedent, to conclude that the Constitution intends, in the words of Professor J. E. Magnet, Modern Constitutionalism at 160, to protect and promote official language communities “against assimilating forces of linguistic demography” by preventing the forced “immersion in a culture not completely their own.” What the court described as “the Constitution’s structural principle” required the Ontario government to reconsider its decision - without expressly dictating that the hospital remain open. (A check of www.hopitalmontfort.com reveals its recent 50th anniversary celebration.)

The legacy of Brown leads many Americans to look with less favor on the Mahe approach, as illustrated by debates over how southern states that had developed segregated universities ought to offer higher education, in the context where the state typically features one or two flagship and predominantly white universities and other urban, rural, or specialty-focused state colleges that were either historically white or black. In United States v. Fordice, 505 U.S. 717; 112 S. Ct. 2727; 120 L.Ed. 2d 575 (1992), the Court rejected as constitutionally deficient a policy of race neutrality coupled with greater resources and support at the traditionally white flagship universities. Although the fact that an institution remains disproportionately white or black was not unconstitutional per se, the Court declared that “the State may not leave in place policies rooted in its prior officially segregated system that serve to maintain the racial identifiability of its universities if those policies can practicably be eliminated without eroding sound educational policies.” Responding to the arguments of private intervenors that the state should increase funding to historically-black colleges, the Court remanded for the trial court to consider whether such an increase was necessary “to achieve a full dismantlement” of the prior unlawful segregation. However, the Court rejected support for minority educational facilities:

If we understand private petitioners to press us to order the upgrading of Jackson State, Alcorn State, and Mississippi Valley State solely so that they may be publicly financed, exclusively black enclaves by private choice, we reject that request. The State provides these facilities for all its citizens and it has not met its burden under Brown to take affirmative steps to dismantle its prior de jure system when it perpetuates a separate, but "more equal" one.

Justice Thomas concurred, observing:

In particular, we do not foreclose the possibility that there exists "sound educational justification" for maintaining historically black colleges as such. Despite the shameful history of state-enforced segregation, these institutions have survived and flourished. Indeed, they have expanded as
opportunities for blacks to enter historically white institutions have expanded. Between 1954 and 1980, for example, enrollment at historically black colleges increased from 70,000 to 200,000 students, while degrees awarded increased from 13,000 to 32,000. See S. Hill, National Center for Education Statistics, *The Traditionally Black Institutions of Higher Education* 1860 to 1982, pp. xiv-xv (1985). These accomplishments have not gone unnoticed:

"The colleges founded for Negroes are both a source of pride to blacks who have attended them and a source of hope to black families who want the benefits of higher learning for their children. They have exercised leadership in developing educational opportunities for young blacks at all levels of instruction, and, especially in the South, they are still regarded as key institutions for enhancing the general quality of the lives of black Americans." Carnegie Commission on Higher Education, *From Isolation to Mainstream: Problems of the Colleges Founded for Negroes* 11 (1971).

I think it undisputable that these institutions have succeeded in part because of their distinctive histories and traditions; for many, historically black colleges have become "a symbol of the highest attainments of black culture." J. Preer, *Lawyers v. Educators: Black Colleges and Desegregation in Public Higher Education* 2 (1982). Obviously, a State cannot maintain such traditions by closing particular institutions, historically white or historically black, to particular racial groups. Nonetheless, it hardly follows that a State cannot operate a diverse assortment of institutions -- including historically black institutions -- open to all on a race-neutral basis, but with established traditions and programs that might disproportionately appeal to one race or another. No one, I imagine, would argue that such institutional diversity is without "sound educational justification," or that it is even remotely akin to program duplication, which is designed to separate the races for the sake of separating the races. *** Although I agree that a State is not constitutionally required to maintain its historically black institutions as such, I do not understand our opinion to hold that a State is forbidden to do so. It would be ironic, to say the least, if the institutions that sustained blacks during segregation were themselves destroyed in an effort to combat its vestiges.

In *Garrett v. Board of Ed. of School Dist. of Detroit*, 775 F. Supp. 1004 (E.D. Mich. 1991), the court enjoined a plan to create all-male schools for inner-city youth. Neither the Afrocentric curriculum nor the expectation that the school would be overwhelmingly if not exclusively comprised of African Americans was at issue. Rather, the suit was brought by the National Organization for Women and the American Civil Liberties Union because of its single-sex composition. The court reasoned that the school board had failed to show "how the exclusion of females from the Academies is necessary to combat unemployment, dropout and homicide rates among urban males. There is no evidence that the educational system is failing urban males because females attend schools with males. In fact, the educational system is also failing females." *Ibid.* at 1007.

**IV. United States: Judicial Protection of Racial Minorities**

**A. Proof of Unconstitutional Racial Discrimination**

As noted in Chapter Four, the Supreme Court established in *Washington v. Davis*, 426 U.S. 229 (1976), that laws that harm racial minorities can only be challenged under the Fourteenth
Amendment with evidence that the legislative intent was to harm minorities. Statutes passed for race-neutral reasons are not unconstitutional.

B. Race-conscious Policies Designed to Benefit Minorities

REGENTS OF THE UNIVERSITY OF CALIFORNIA v. BAKKE

SUPREME COURT OF THE UNITED STATES
438 U.S. 265; 98 S. Ct. 2733; 57 L. Ed. 2d 750 (1978)

[Before Burger, C.J., and Brennan, Stewart, White, Marshall, Rehnquist, Blackmun, and Stevens, JJ.]

MR. JUSTICE POWELL announced the judgment of the Court.

This case presents a challenge to the special admissions program of the petitioner, the Medical School of the University of California at Davis, which is designed to assure the admission of a specified number of students from certain minority groups. The [California courts] sustained respondent's challenge, holding that petitioner's program violated the California Constitution, Title VI of the Civil Rights Act of 1964, 42 U. S. C. § 2000d et seq., and the Equal Protection Clause of the Fourteenth Amendment. The court enjoined petitioner from considering respondent's race or the race of any other applicant in making admissions decisions. ***

For the reasons stated in the following opinion, I believe that so much of the judgment of the California court as holds petitioner's special admissions program unlawful and directs that respondent be admitted to the Medical School must be affirmed. For the reasons expressed in a separate opinion, my Brothers THE CHIEF JUSTICE, MR. JUSTICE STEWART, MR. JUSTICE REHNQUIST, and MR. JUSTICE STEVENS concur in this judgment.

I also conclude for the reasons stated in the following opinion that the portion of the court's judgment enjoining petitioner from according any consideration to race in its admissions process must be reversed. For reasons expressed in separate opinions, my Brothers MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN concur in this judgment.

[Allan Bakke is a white male who applied to the Davis Medical School in both 1973 and 1974 and was rejected both times. In both years, applicants were admitted under a special program for “disadvantaged students” with grade point averages, MCAT scores, and benchmark scores significantly lower than Bakke's. The program had resulted in the admission over a two year period of 51 African American and Latino students, while none had been admitted in prior years. Bakke then filed suit alleging that the program illegally operated to exclude him from the school on the basis of his race, in violation of his rights under state and federal equality provisions and §601 of the Civil Rights Act of 1964.]

II
***
B

The language of § 601, 78 Stat. 252, like that of the Equal Protection Clause, is majestic in its sweep:

"No person in the United States shall, on the ground of race, color, or national origin, be excluded
from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

The concept of "discrimination," like the phrase "equal protection of the laws," is susceptible of varying interpretations, for as Mr. Justice Holmes declared, "[a] word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." Towne v. Eisner, 245 U.S. 418, 425 (1918). We must, therefore, seek whatever aid is available in determining the precise meaning of the statute before us. Train v. Colorado Public Interest Research Group, 426 U.S. 1, 10 (1976), quoting United States v. American Trucking Assns., 310 U.S. 534, 543-544 (1940). Examination of the voluminous legislative history of Title VI reveals a congressional intent to halt federal funding of entities that violate a prohibition of racial discrimination similar to that of the Constitution. Although isolated statements of various legislators, taken out of context, can be marshaled in support of the proposition that § 601 enacted a purely colorblind scheme,19 without regard to the reach of the Equal Protection Clause, these comments must be read against the background of both the problem that Congress was addressing and the broader view of the statute that emerges from a full examination of the legislative debates.

The problem confronting Congress was discrimination against Negro citizens at the hands of recipients of federal moneys. Indeed, the color blindness pronouncements cited in the margin at n. 19, generally occur in the midst of extended remarks dealing with the evils of segregation in federally funded programs. Over and over again, proponents of the bill detailed the plight of Negroes seeking equal treatment in such programs. There simply was no reason for Congress to consider the validity of hypothetical preferences that might be accorded minority citizens; the legislators were dealing with the real and pressing problem of how to guarantee those citizens equal treatment.

In addressing that problem, supporters of Title VI repeatedly declared that the bill enacted constitutional principles. ***

III
A

Petitioner does not deny that decisions based on race or ethnic origin by faculties and administrations of state universities are reviewable under the Fourteenth Amendment. For his part, respondent does not argue that all racial or ethnic classifications are *per se* invalid. The parties do disagree as to the level of judicial scrutiny to be applied to the special admissions program. Petitioner argues that the court below erred in applying strict scrutiny, as this inexact term has been applied in our cases. That level of review, petitioner asserts, should be reserved for classifications that disadvantage "discrete and insular minorities." See *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n. 4 (1938). Respondent, on the other hand, contends that the California court correctly rejected the notion that the degree of judicial

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19 For example, Senator Humphrey stated as follows:

"Racial discrimination or segregation in the administration of disaster relief is particularly shocking; and offensive to our sense of justice and fair play. Human suffering draws no color lines, and the administration of help to the sufferers should not." *Id.*, at 6547.

See also *id.*, at 12675 (remarks of Sen. Allott); 6561 (remarks of Sen. Kuchel); 2494, 6047 (remarks of Sen. Pastore). But see *id.*, at 15893 (remarks of Rep. MacGregor); 13821 (remarks of Sen. Saltonstall); 10920 (remarks of Sen. Javits); 5266, 5807 (remarks of Sen. Keating).
scrutiny accorded a particular racial or ethnic classification hinges upon membership in a discrete and insular minority and duly recognized that the "rights established [by the Fourteenth Amendment] are personal rights." Shelley v. Kraemer, 334 U.S. 1, 22 (1948).

* * *

The guarantees of the Fourteenth Amendment extend to all persons. Its language is explicit: "No State shall ... deny to any person within its jurisdiction the equal protection of the laws." It is settled beyond question that the "rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights," Shelley v. Kraemer, supra, at 22. The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal. Nevertheless, petitioner argues that the court below erred in applying strict scrutiny to the special admissions program because white males, such as respondent, are not a "discrete and insular minority" requiring extraordinary protection from the majoritarian political process. Carolene Products Co., supra, at 152-153, n. 4. This rationale, however, has never been invoked in our decisions as a prerequisite to subjecting racial or ethnic distinctions to strict scrutiny. Nor has this Court held that discreteness and insularity constitute necessary preconditions to a holding that a particular classification is invidious. See, e.g., Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541 (1942); Carrington v. Rash, 380 U.S. 89, 94-97 (1965). These characteristics may be relevant in deciding whether or not to add new types of classifications to the list of "suspect" categories or whether a particular classification survives close examination. See, e.g., Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 313 (1976) (age); San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (wealth); Graham v. Richardson, 403 U.S. 365, 372 (1971) (aliens). Racial and ethnic classifications, however, are subject to stringent examination without regard to these additional characteristics. We declared as much in the first cases explicitly to recognize racial distinctions as suspect:

"Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." Hirabayashi, 320 U.S., at 100.

"[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny." Korematsu, 323 U.S., at 216.

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

B

This perception of racial and ethnic distinctions is rooted in our Nation's constitutional and demographic history. The Court's initial view of the Fourteenth Amendment was that its "one pervading purpose" was "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 dominion over him." Slaughter-House Cases, 16 Wall. 36, 71 (1873). The Equal Protection Clause, however, was "[v]irtually strangled in infancy by post-civil-war judicial reactionism." It was relegated to decades of relative desuetude while the Due Process Clause of the Fourteenth Amendment, after a short germinal period, flourished as a cornerstone in the Court's defense of property and liberty of contract. See, e.g., Mugler v. Kansas, 123 U.S. 623, 661 (1887); Allgeyer v. Louisiana, 165 U.S. 378 (1897); Lochner v. New York, 198 U.S. 45 (1905). In that cause, the Fourteenth Amendment's "one pervading purpose" was displaced. See, e.g., Plessy v. Ferguson, 163 U.S. 537 (1896). It was only as the era of substantive due process came to a close, see, e.g., Nebbia v. New York [*292] York, 291 U.S. 502
(1934); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), that the Equal Protection Clause began to attain a genuine measure of vitality, see, e. g., *United States v. Carolene Products*, 304 U.S. 144 (1938); *Skinner v. Oklahoma ex rel. Williamson*, supra.

By that time it was no longer possible to peg the guarantees of the Fourteenth Amendment to the struggle for equality of one racial minority. During the dormancy of the Equal Protection Clause, the United States had become a Nation of minorities. Each had to struggle -- and to some extent struggles still -- to overcome the prejudices not of a monolithic majority, but of a "majority" composed of various minority groups of whom it was said -- perhaps unfairly in many cases -- that a shared characteristic was a willingness to disadvantage other groups. As the Nation filled with the stock of many lands, the reach of the Clause was gradually extended to all ethnic groups seeking protection from official discrimination. See *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880) (Celtic Irishmen) (dictum); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (Chinese); *Truax v. Raich*, 239 U.S. 33, 41 (1915) (Austrian resident aliens); *Korematsu*, supra (Japanese); *Hernandez v. Texas*, 347 U.S. 475 (1954) (Mexican-Americans). The guarantees of equal protection, said the Court in *Yick Wo*, "are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws." 118 U.S., at 369.

Although many of the Framers of the Fourteenth Amendment conceived of its primary function as bridging the vast distance between members of the Negro race and the white "majority," *Slaughter-House Cases*, supra, the Amendment itself was framed in universal terms, without reference to color, ethnic origin, or condition of prior servitude. As this Court recently remarked in interpreting the 1866 Civil Rights Act to extend to claims of racial discrimination against white persons, "the 39th Congress was intent upon establishing in the federal law a broader principle than would have been necessary simply to meet the particular and immediate plight of the newly freed Negro slaves." *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 296 (1976). And that legislation was specifically broadened in 1870 to ensure that "all persons," not merely "citizens," would enjoy equal rights under the law. See *Runyon v. McCrary*, 427 U.S. 160, 192-202 (1976) (WHITE, J., dissenting). Indeed, it is not unlikely that among the Framers were many who would have applauded a reading of the Equal Protection Clause that states a principle of universal application and is responsive to the racial, ethnic, and cultural diversity of the Nation.

** * * *

Petitioner urges us to adopt for the first time a more restrictive view of the Equal Protection Clause and hold that discrimination against members of the white "majority" cannot be suspect if its purpose can be characterized as "benign."34 The clock of our liberties, however, cannot be turned back to 1868. *Brown*
v. Board of Education, supra, at 492; accord, Loving v. Virginia, supra, at 9. It is far too late to argue that the guarantee of equal protection to all persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others.35 "The Fourteenth Amendment is not directed solely against discrimination due to a 'two-class theory' -- that is, based upon differences between 'white' and Negro." Hernandez, 347 U.S., at 478.

Once the artificial line of a "two-class theory" of the Fourteenth Amendment is put aside, the difficulties entailed in varying the level of judicial review according to a perceived "preferred" status of a particular racial or ethnic minority are intractable. The concepts of "majority" and "minority" necessarily reflect temporary arrangements and political judgments. As observed above, the white "majority" itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the State and private individuals. Not all of these groups can receive preferential treatment and corresponding judicial tolerance of distinctions drawn in terms of race and nationality, for then the only "majority" left would be a new minority of white Anglo-Saxon Protestants. There is no principled basis for deciding which groups would merit "heightened judicial solicitude "and which would not.36

The breadth of this hypothesis is unprecedented in our constitutional system. The first step is easily taken. No one denies the regrettable fact that there has been societal discrimination in this country against various racial and ethnic groups. The second step, however, involves a speculative leap: but for this discrimination by society at large, Bakke "would have failed to qualify for admission" because Negro applicants -- nothing is said about Asians, cf., e. g., post, at 374 n. 57 -- would have made better scores. Not one word in the record supports this conclusion, and the authors of the opinion offer no standard for unadorned by particularized findings of past discrimination, to establish such a remedial purpose.

35 Professor Bickel noted the self-contradiction of that view:

"The lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society. Now this is to be unlearned and we are told that this is not a matter of fundamental principle but only a matter of whose ox is gored. Those for whom racial equality was demanded are to be more equal than others. Having found support in the Constitution for equality, they now claim support for inequality under the same Constitution." A. Bickel, The Morality of Consent 133 (1975).

36 As I am in agreement with the view that race may be taken into account as a factor in an admissions program, I agree with my Brothers BRENNAN, WHITE, MARSHALL, and BLACKMUN that the portion of the judgment that would proscribe all consideration of race must be reversed. See Part V, infra. But I disagree with much that is said in their opinion.

They would require as a justification for a program such as petitioner's, only two findings: (i) that there has been some form of discrimination against the preferred minority groups by "society at large," post, at 369 (it being conceded that petitioner had no history of discrimination), and (ii) that "there is reason to believe" that the disparate impact sought to be rectified by the program is the "product" of such discrimination:

"If it was reasonable to conclude -- as we hold that it was -- that the failure of minorities to qualify for admission at Davis under regular procedures was due principally to the effects of past discrimination, then there is a reasonable likelihood that, but for pervasive racial discrimination, respondent would have failed to qualify for admission even in the absence of Davis' special admissions program." Post, at 365-366.
courts to use in applying such a presumption of causation to other racial or ethnic classifications. This failure is a grave one, since if it may be concluded on this record that each of the minority groups preferred by the petitioner's special program is entitled to the benefit of the presumption, it would seem difficult to determine that any of the dozens of minority groups that have suffered "societal discrimination" cannot also claim it, in any area of social intercourse. See Part IV-B, infra. Courts would be asked to evaluate the extent of the prejudice and consequent harm suffered by various minority groups. Those whose societal injury is thought to exceed some arbitrary level of tolerability then would be entitled to preferential classifications at the expense of individuals belonging to other groups. Those classifications would be free from exacting judicial scrutiny. As these preferences began to have their desired effect, and the consequences of past discrimination were undone, new judicial rankings would be necessary. The kind of variable sociological and political analysis necessary to produce such rankings simply does not lie within the judicial competence -- even if they otherwise were politically feasible and socially desirable.37

Moreover, there are serious problems of justice connected with the idea of preference itself. First, it may not always be clear that a so-called preference is in fact benign. Courts may be asked to validate burdens imposed upon individual members of a particular group in order to advance the group's general interest. See United Jewish Organizations v. Carey, 430 U.S., at 172-173 (BRENNAN, J., concurring in part). Nothing in the Constitution supports the notion that individuals may be asked to suffer otherwise impermissible burdens in order to enhance the societal standing of their ethnic groups. Second, preferential programs may only reinforce common stereotypes holding that certain groups are unable to

37 Mr. Justice Douglas has noted the problems associated with such inquiries:

"The reservation of a proportion of the law school class for members of selected minority groups is fraught with ... dangers, for one must immediately determine which groups are to receive such favored treatment and which are to be excluded, the proportions of the class that are to be allocated to each, and even the criteria by which to determine whether an individual is a member of a favored group. [Cf. Plessy v. Ferguson, 163 U.S. 537, 549, 552 (1896).] There is no assurance that a common agreement can be reached, and first the schools, and then the courts, will be buffeted with the competing claims. The University of Washington included Filipinos, but excluded Chinese and Japanese; another school may limit its program to blacks, or to blacks and Chicanos. Once the Court sanctioned racial preferences such as these, it could not then wash its hands of the matter, leaving it entirely in the discretion of the school, for then we would have effectively overruled Sweatt v. Painter, 339 U.S. 629, and allowed imposition of a 'zero' allocation. But what standard is the Court to apply when a rejected applicant of Japanese ancestry brings suit to require the University of Washington to extend the same privileges to his group? The Committee might conclude that the population of Washington is now 2% Japanese, and that Japanese also constitute 2% of the Bar, but that had they not been handicapped by a history of discrimination, Japanese would now constitute 5% of the Bar, or 20%. Or, alternatively, the Court could attempt to assess how grievously each group has suffered from discrimination, and allocate proportions accordingly; if that were the standard the current University of Washington policy would almost surely fall, for there is no Western State which can claim that it has always treated Japanese and Chinese in a fair and evenhanded manner. See, e. g., Yick Wo v. Hopkins, 118 U.S. 356; Terrace v. Thompson, 263 U.S. 197; Oyama v. California, 332 U.S. 633. This Court has not sustained a racial classification since the wartime cases of Korematsu v. United States, 323 U.S. 214, and Hirabayashi v. United States, 320 U.S. 81, involving curfews and relocations imposed upon Japanese-Americans.

"Nor obviously will the problem be solved if next year the Law School included only Japanese and Chinese, for then 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, 337-340 (1974) (dissenting opinion) (footnotes omitted).
achieve success without special protection based on a factor having no relationship to individual worth. See DeFunis v. Odegaard, 416 U.S. 312, 343 (1974) (Douglas, J., dissenting). Third, there is a measure of inequity in forcing innocent persons in respondent's position to bear the burdens of redressing grievances not of their making.

By hitching the meaning of the Equal Protection Clause to these transitory considerations, we would be holding, as a constitutional principle, that judicial scrutiny of classifications touching on racial and ethnic background may vary with the ebb and flow of political forces. Disparate constitutional tolerance of such classifications well may serve to exacerbate racial and ethnic antagonisms rather than alleviate them. United Jewish Organizations, supra, at 173-174 (BRENNAN, J., concurring in part). Also, the mutability of a constitutional principle, based upon shifting political and social judgments, undermines the chances for consistent application of the Constitution from one generation to the next, a critical feature of its coherent interpretation. Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 650-651 (1895) (White, J., dissenting). In expounding the Constitution, the Court's role is to discern "principles sufficiently absolute to give them roots throughout the community and continuity over significant periods of time, and to lift them above the level of the pragmatic political judgments of a particular time and place." A. Cox, The Role of the Supreme Court in American Government 114 (1976).

* * *

IV

We have held that in "order to justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary ... to the accomplishment' of its purpose or the safeguarding of its interest." In re Griffiths, 413 U.S. 717, 721-722 (1973) (footnotes omitted); Loving v. Virginia, 388 U.S., at 11; McLaughlin v. Florida, 379 U.S. 184, 196 (1964). The special admissions program purports to serve the purposes of: (i) "reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession," Brief for Petitioner 32; (ii) countering the effects of societal discrimination;43 (iii) increasing the number of physicians who will practice in communities currently underserved; and (iv) obtaining the educational benefits that flow from an ethnically diverse student body. It is necessary to decide which, if any, of these purposes is substantial enough to support the use of a suspect classification.

Racial classifications in admissions conceivably could serve a fifth purpose, one which petitioner does not articulate: fair appraisal of each individual's academic promise in the light of some cultural bias in grading or testing procedures. To the extent that race and ethnic background were considered only to the extent of curing established inaccuracies in predicting academic performance, it might be argued that there is no "preference" at all. Nothing in this record, however, suggests either that any of the quantitative factors considered by the Medical School were culturally biased or that petitioner's special admissions program was formulated to correct for any such biases. Furthermore, if race or ethnic background were used solely to arrive at an unbiased prediction of academic success, the reservation of fixed numbers of seats would be inexplicable.

43 A number of distinct subgoals have been advanced as falling under the rubric of "compensation for past discrimination." For example, it is said that preferences for Negro applicants may compensate for harm done them personally, or serve to place them at economic levels they might have attained but for discrimination against their forebears. Greenawalt, supra n. 25, at 581-586. Another view of the "compensation" goal is that it serves as a form of reparation by the "majority" to a victimized group as a whole. B. Bittker, The Case for Black Reparations (1973). That justification for racial or ethnic preference has been subjected to much criticism. E. g., Greenawalt, supra n. 25, at 581; Posner, supra n. 25, at 16-17, and n. 33. Finally, it has been argued that ethnic preferences "compensate" the group by providing examples of success whom other members of the group will emulate, thereby advancing the group's interest and society's interest in encouraging new generations to overcome the barriers and frustrations of the past. Redish, supra n. 25, at 391. For purposes of analysis these subgoals need not be considered separately.
If petitioner's purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected not as insubstantial but as facially invalid. Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids. E. g., Loving v. Virginia, supra, at 11; McLaughlin v. Florida, supra, at 196; Brown v. Board of Education, 347 U.S. 483 (1954).

We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations. * * * Without such findings of constitutional or statutory violations, it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another. Thus, the government has no compelling justification for inflicting such harm. Petitioner does not purport to have made, and is in no position to make, such findings. Its broad mission is education, not the formulation of any legislative policy or the adjudication of particular claims of illegality. For reasons similar to those stated in Part III of this opinion, isolated segments of our vast governmental structures are not competent to make those decisions, at least in the absence of legislative mandates and legislatively determined criteria.45 Cf. Hampton v. Mow Sun Wong, 426 U.S. 88 (1976); n. 41, supra. [Ed. note: this case is an important but under-cited precedent, holding that the Civil Service Commission could not adopt regulations discriminating against aliens, but suggesting that Congress could enact identical rules as legislation, because of its superior competence to consider immigration policy.] Before relying upon these sorts of findings in establishing a racial classification, a governmental body must have the authority and capability to establish, in the record, that the classification is responsive to identified discrimination. See, e. g., Califano v. Webster, 430 U.S., at 316-321; Califano v. Goldfarb, 430 U.S., at 212-217. Lacking this capability, petitioner has not carried its burden of justification on this issue.

Petitioner identifies, as another purpose of its program, improving the delivery of health-care services to communities currently underserved. It may be assumed that in some situations a State's interest in facilitating the health care of its citizens is sufficiently compelling to support the use of a suspect classification. But there is virtually no evidence in the record indicating that petitioner's special admissions program is either needed or geared to promote that goal.

The fourth goal asserted by petitioner is the attainment of a diverse student body. This clearly is a constitutionally goal for an institution of higher education. Academic freedom, though not a specifically

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45 For example, the University is unable to explain its selection of only the four favored groups -- Negroes, Mexican-Americans, American Indians, and Asians -- for preferential treatment. The inclusion of the last group is especially curious in light of the substantial numbers of Asians admitted through the regular admissions process. See also n. 37, supra.
enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body. ***

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The atmosphere of "speculation, experiment and creation" -- so essential to the quality of higher education -- is widely believed to be promoted by a diverse student body. * * *

Thus, in arguing that its universities must be accorded the right to select those students who will contribute the most to the "robust exchange of ideas," petitioner invokes a countervailing constitutional interest, that of the First Amendment. In this light, petitioner must be viewed as seeking to achieve a goal that is of paramount importance in the fulfillment of its mission.

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V

[Here, Justice Powell found the claim that the only way to promote diversity was to reserve a specific number of seats in each class was "seriously flawed."] It is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, with the remaining percentage an undifferentiated aggregation of students. The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element. Petitioner's special admissions program, focused solely on ethnic diversity, would hinder rather than further attainment of genuine diversity. [Powell, J., took note of Harvard's more nuanced program as demonstration that fixed numbers were unnecessary.]

Opinion of MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN, concurring in the judgment in part and dissenting in part.

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We agree with MR. JUSTICE POWELL that, as applied to the case before us, Title VI goes no further in prohibiting the use of race than the Equal Protection Clause of the Fourteenth Amendment itself. * * *

I

Our Nation was founded on the principle that "all Men are created equal." Yet candor requires acknowledgment that the Framers of our Constitution, to forge the 13 Colonies into one Nation, openly compromised this principle of equality with its antithesis: slavery. The consequences of this compromise are well known and have aptly been called our "American Dilemma." Still, it is well to recount how recent the time has been, if it has yet come, when the promise of our principles has flowered into the actuality of equal opportunity for all regardless of race or color.

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Against this background, claims that law must be "colorblind" or that the datum of race is no longer relevant to public policy must be seen as aspiration rather than as description of reality. This is not to denigrate aspiration; for reality rebukes us that race has too often been used by those who would stigmatize and oppress minorities. Yet we cannot -- and, as we shall demonstrate, need not under our Constitution or Title VI, which merely extends the constraints of the Fourteenth Amendment to private parties who receive federal funds -- let color blindness become myopia which masks the reality that many "created equal" have been treated within our lifetimes as inferior both by the law and by their fellow citizens.
III
* * *
B
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Unquestionably we have held that a government practice or statute which restricts "fundamental rights" or which contains "suspect classifications" is to be subjected to "strict scrutiny" and can be justified only if it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available. See, e. g., San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 16-17 (1973); Dunn v. Blumstein, 405 U.S. 330 (1972). But no fundamental right is involved here. See San Antonio, supra, at 29-36. Nor do whites as a class have any of the "traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegate to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." Id., at 28; see United States v. Carolene Products Co., 304 U.S. 144, 152 n. 4 (1938).

Moreover, if the University's representations are credited, this is not a case where racial classifications are "irrelevant and therefore prohibited." Hirabayashi, supra, at 100. Nor has anyone suggested that the University's purposes contravene the cardinal principle that racial classifications that stigmatize -- because they are drawn on the presumption that one race is inferior to another or because they put the weight of government behind racial hatred and separatism -- are invalid without more.

On the other hand, the fact that this case does not fit neatly into our prior analytic framework for race cases does not mean that it should be analyzed by applying the very loose rational-basis standard of review that is the very least that is always applied in equal protection cases. [Rather, Justice Brennan concluded that affirmative action programs needed to meet the standards for intermediate scrutiny used in gender-discrimination cases: that they "serve important governmental objectives and must be substantially related to achievement of those objectives."]

First, race, like, "gender-based classifications too often [has] been inexcusably utilized to stereotype and stigmatize politically powerless segments of society." Kahn v. Shevin, 416 U.S. 351, 357 (1974) (dissenting opinion). While a carefully tailored statute designed to remedy past discrimination could avoid these vices, we nonetheless have recognized that the line between honest and thoughtful appraisal of the effects of past discrimination and paternalistic stereotyping is not so clear and that a statute based on the latter is patently capable of stigmatizing all women with a badge of inferiority. State programs designed ostensibly to ameliorate the effects of past racial discrimination obviously create the same hazard of stigma, since they may promote racial separatism and reinforce the views of those who believe that members of racial minorities are inherently incapable of succeeding on their own.

Second, race, like gender and illegitimacy, is an immutable characteristic which its possessors are powerless to escape or set aside. While a classification is not per se invalid because it divides classes on the basis of an immutable characteristic, see supra, at 355-356, it is nevertheless true that such divisions are contrary to our deep belief that "legal burdens should bear some relationship to individual responsibility or wrongdoing," and that advancement sanctioned, sponsored, or approved by the State should ideally be based on individual merit or achievement, or at the least on factors within the control of an individual.

Because this principle is so deeply rooted it might be supposed that it would be considered in the legislative process and weighed against the benefits of programs preferring individuals because of their race. But this is not necessarily so: The "natural consequence of our governing processes [may well be]
that the most 'discrete and insular' of whites ... will be called upon to bear the immediate, direct costs of benign discrimination.” *UJO*, *supra*, at 174 (opinion concurring in part). Moreover, it is clear from our cases that there are limits beyond which majorities may not go when they classify on the basis of immutable characteristics. See, e. g., *Weber*, *supra*. Thus, even if the concern for individualism is weighed by the political process, that weighing cannot waive the personal rights of individuals under the Fourteenth Amendment. See *Lucas v. Colorado General Assembly*, 377 U.S. 713, 736 (1964).

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IV

[Justice Brennan and his colleagues would have found UC Davis’ articulated purpose of remedying the effects of past societal discrimination sufficiently important to justify the use of race-conscious admissions programs where there is a sound basis for concluding that minority underrepresentation is substantial and chronic, and that the handicap of past discrimination is impeding access of minorities to the Medical School. They rejected the argument that the program “operates to stigmatize or single out any discrete and insular, or even any identifiable, nonminority group. Nor will harm comparable to that imposed upon racial minorities by exclusion or separation on grounds of race be the likely result of the program.” They emphasized that Bakke’s rejection did not “in any sense stamp [him] as inferior.” Unlike discrimination against racial minorities, “the use of racial preferences for remedial purposes does not inflict a pervasive injury upon individual whites in the sense that wherever they go or whatever they do there is a significant likelihood that they will be treated as second-class citizens because of their color.” Nor was there any evidence that the program discriminates intentionally or unintentionally against any minority group which it purports to benefit.]

MR. JUSTICE WHITE.
[Concurrence on technical issue regarding Title VI omitted.]

MR. JUSTICE MARSHALL.

I agree with the judgment of the Court only insofar as it permits a university to consider the race of an applicant in making admissions decisions. I do not agree that petitioner's admissions program violates the Constitution. For it must be remembered that, during most of the past 200 years, the Constitution as interpreted by this Court did not prohibit the most ingenious and pervasive forms of discrimination against the Negro. Now, when a State acts to remedy the effects of that legacy of discrimination, I cannot believe that this same Constitution stands as a barrier.

I

A

Three hundred and fifty years ago, the Negro was dragged to this country in chains to be sold into slavery. Uprooted from his homeland and thrust into bondage for forced labor, the slave was deprived of all legal rights. It was unlawful to teach him to read; he could be sold away from his family and friends at the whim of his master; and killing or maiming him was not a crime. The system of slavery brutalized and dehumanized both master and slave.36

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The denial of human rights was etched into the American Colonies' first attempts at establishing self-government. When the colonists determined to seek their independence from England, they drafted a unique document cataloguing their grievances against the King and proclaiming as "self-evident" that "all men are created equal" and are endowed "with certain unalienable Rights," including those to "Life, Liberty and the pursuit of Happiness." The self-evident truths and the unalienable rights were intended, however, to apply only to white men. An earlier draft of the Declaration of Independence, submitted by Thomas Jefferson to the Continental Congress, had included among the charges against the King that "[he] has waged cruel war against human nature itself, violating its most sacred rights of life and liberty in the persons of a distant people who never offended him, captivating and carrying them into slavery in another hemisphere, or to incur miserable death in their transportation thither."

Franklin 88.

The Southern delegation insisted that the charge be deleted; the colonists themselves were implicated in the slave trade, and inclusion of this claim might have made it more difficult to justify the continuation of slavery once the ties to England were severed. Thus, even as the colonists embarked on a course to secure their own freedom and equality, they ensured perpetuation of the system that deprived a whole race of those rights. [Justice Marshall catalogued the various provisions of the original constitution perpetuating slavery: counting slaves as 3/5 of a person (Art. I, §2), barring Congress from ending the slave trade until 1808 (Art. I, §9), and requiring the return of fugitive slaves (Art. IV, §2). He concluded that the Framers had "made it plain that 'we the people,' for whose protection the Constitution was designed, did not include those whose skins were the wrong color."]

The status of the Negro as property was officially erased by his emancipation at the end of the Civil War. But the long-awaited emancipation, while freeing the Negro from slavery, did not bring him citizenship or equality in any meaningful way. Slavery was replaced by a system of "laws which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value." Slaughter-House Cases, 16 Wall. 36, 70 (1873). Despite the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments, the Negro was systematically denied the rights those Amendments were supposed to secure. The combined actions and inactions of the State and Federal Governments maintained Negroes in a position of legal inferiority for another century after the Civil War.

The Southern States took the first steps to re-enslave the Negroes. Immediately following the end of the Civil War, many of the provisional legislatures passed Black Codes, similar to the Slave Codes, which, among other things, limited the rights of Negroes to own or rent property and permitted imprisonment for breach of employment contracts. Over the next several decades, the South managed to disenfranchise the Negroes in spite of the Fifteenth Amendment by various techniques, including poll taxes, deliberately complicated balloting processes, property and literacy qualifications, and finally the white primary.

Congress responded to the legal disabilities being imposed in the Southern States by passing the Reconstruction Acts and the Civil Rights Acts. Congress also responded to the needs of the Negroes at the end of the Civil War by establishing the Bureau of Refugees, Freedmen, and Abandoned Lands, better known as the Freedmen's Bureau, to supply food, hospitals, land, and education to the newly freed slaves. Thus, for a time it seemed as if the Negro might be protected from the continued denial of his civil rights.
and might be relieved of the disabilities that prevented him from taking his place as a free and equal citizen.

That time, however, was short-lived. Reconstruction came to a close, and, with the assistance of this Court, the Negro was rapidly stripped of his new civil rights. In the words of C. Vann Woodward: "By narrow and ingenious interpretation [the Supreme Court's] decisions over a period of years had whittled away a great part of the authority presumably given the government for protection of civil rights." Woodward 139.

The Court began by interpreting the Civil War Amendments in a manner that sharply curtailed their substantive protections. See, e. g., Slaughter-House Cases, supra; United States v. Reese, 92 U.S. 214 (1876); United States v. Cruikshank, 92 U.S. 542 (1876). Then in the notorious Civil Rights Cases, 109 U.S. 3 (1883), the Court strangled Congress' efforts to use its power to promote racial equality. In those cases the Court invalidated sections of the Civil Rights Act of 1875 that made it a crime to deny equal access to "inns, public conveyances, theatres and other places of public amusement." Id., at 10. According to the Court, the Fourteenth Amendment gave Congress the power to proscribe only discriminatory action by the State. The Court ruled that the Negroes who were excluded from public places suffered only an invasion of their social rights at the hands of private individuals, and Congress had no power to remedy that. Id., at 24-25. "When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that [*392] state," the Court concluded, "there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws ...." Id., at 25. As Mr. Justice Harlan noted in dissent, however, the Civil War Amendments and Civil Rights Acts did not make the Negroes the "special favorite" of the laws but instead "sought to accomplish in reference to that race ... -- what had already been done in every State of the Union for the white race -- to secure and protect rights belonging to them as freemen and citizens; nothing more." Id., at 61.

The Court's ultimate blow to the Civil War Amendments and to the equality of Negroes came in Plessy v. Ferguson, 163 U.S. 537 (1896). * * *

Nor were the laws restricting the rights of Negroes limited solely to the Southern States. In many of the Northern States, the Negro was denied the right to vote, prevented from serving on juries, and excluded from theaters, restaurants, hotels, and inns. Under President Wilson, the Federal Government began to require segregation in Government buildings; desks of Negro employees were curtained off; separate bathrooms and separate tables in the cafeterias were provided; and even the galleries of the Congress were segregated. When his segregationist policies were attacked, President Wilson responded that segregation was "not humiliating but a benefit" and that he was "rendering [the Negroes] more safe in their possession of office and less likely to be discriminated against." Kluger 91.

The enforced segregation of the races continued into the middle of the 20th century. In both World Wars, Negroes were for the most part confined to separate military units; it was not until 1948 that an end to segregation in the military was ordered by President Truman. And the history of the exclusion of Negro children from white public schools is too well known and recent to require repeating here. That Negroes were deliberately excluded from public graduate and professional schools -- and thereby denied the opportunity to become doctors, lawyers, engineers, and the like -- is also well established. It is of course true that some of the Jim Crow laws (which the decisions of this Court had helped to foster) were struck down by this Court in a series of decisions leading up to Brown v. Board of Education, 347 U.S. 483 (1954). See, e. g., Morgan v. Virginia, 328 U.S. 373 (1946); Sweatt v. Painter, 339 U.S. 629 (1950); McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950). Those decisions, however, did not
automatically end segregation, nor did they move Negroes from a position of legal inferiority to one of equality. The legacy of years of slavery and of years of second-class citizenship in the wake of emancipation could not be so easily eliminated.

II

The position of the Negro today in America is the tragic but inevitable consequence of centuries of unequal treatment. Measured by any benchmark of comfort or achievement, meaningful equality remains a distant dream for the Negro.

[Justice Marshall detailed data on lower life expectancy, infant mortality, median income, employment rates, salary, and percentage of professions for African Americans.]

In light of the sorry history of discrimination and its devastating impact on the lives of Negroes, bringing the Negro into the mainstream of American life should be a state interest of the highest order. To fail to do so is to ensure that America will forever remain a divided society.

III

I do not believe that the Fourteenth Amendment requires us to accept that fate. Neither its history nor our past cases lend any support to the conclusion that a university may not remedy the cumulative effects of society's discrimination by giving consideration to race in an effort to increase the number and percentage of Negro doctors.

A

This Court long ago remarked that

"in any fair and just construction of any section or phrase of these [Civil War] amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy ...." Slaughter-House Cases, 16 Wall., at 72.

It is plain that the Fourteenth Amendment was not intended to prohibit measures designed to remedy the effects of the Nation's past treatment of Negroes. The Congress that passed the Fourteenth Amendment is the same Congress that passed the 1866 Freedmen's Bureau Act, an Act that provided many of its benefits only to Negroes. Act of July 16, 1866, ch. 200, 14 Stat. 173; see supra, at 391. Although the Freedmen's Bureau legislation provided aid for refugees, thereby including white persons within some of the relief measures, 14 Stat. 174; see also Act of Mar. 3, 1865, ch. 90, 13 Stat. 507, the bill was regarded, to the dismay of many Congressmen, as "solely and entirely for the freedmen, and to the exclusion of all other persons ...." Cong. Globe, 39th Cong., 1st Sess., 544 (1866) (remarks of Rep. Taylor). See also id., at 634-635 (remarks of Rep. Ritter); id., at App. 78, 80-81 (remarks of Rep. Chanler). Indeed, the bill was bitterly opposed on the ground that it "undertakes to make the negro in some respects ... superior ... and gives them favors that the poor white boy in the North cannot get." Id., at 401 (remarks of Sen. McDougall). See also id., at 319 (remarks of Sen. Hendricks); id., at 362 (remarks of Sen. Saulsbury); id., at 397 (remarks of Sen. Willey); id., at 544 (remarks of Rep. Taylor). The bill's supporters defended it -- not by rebutting the claim of special treatment -- but by pointing to the need for such treatment:

"The very discrimination it makes between 'destitute and suffering' negroes, and destitute and suffering white paupers, proceeds upon the distinction that, in the omitted case, civil rights and
immunities are already sufficiently protected by the possession of political power, the absence of which in the case provided for necessitates governmental protection." *Id.*, at App. 75 (remarks of Rep. Phelps).

Despite the objection to the special treatment the bill would provide for Negroes, it was passed by Congress. *Id.*, at 421, 688. President Johnson vetoed this bill and also a subsequent bill that contained some modifications; one of his principal objections to both bills was that they gave special benefits to Negroes. 8 Messages and Papers of the Presidents 3596, 3599, 3620, 3623 (1897). Rejecting the concerns of the President and the bill's opponents, Congress overrode the President's second veto. Cong. Globe, 39th Cong., 1st Sess., 3842, 3850 (1866).

Since the Congress that considered and rejected the objections to the 1866 Freedmen's Bureau Act concerning special relief to Negroes also proposed the Fourteenth Amendment, it is inconceivable that the Fourteenth Amendment was intended to prohibit all race-conscious relief measures. It "would be a distortion of the policy manifested in that amendment, which was adopted to prevent state legislation designed to perpetuate discrimination on the basis of race or color," *Railway Mail Assn. v. Corsi*, 326 U.S. 88, 94 (1945), to hold that it barred state action to remedy the effects of that discrimination. Such a result would pervert the intent of the Framers by substituting abstract equality for the genuine equality the Amendment was intended to achieve.

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IV

While I applaud the judgment of the Court that a university may consider race in its admissions process, it is more than a little ironic that, after several hundred years of class-based discrimination against Negroes, the Court is unwilling to hold that a class-based remedy for that discrimination is permissible. In declining to so hold, today's judgment ignores the fact that for several hundred years Negroes have been discriminated against, not as individuals, but rather solely because of the color of their skins. It is unnecessary in 20th-century America to have individual Negroes demonstrate that they have been victims of racial discrimination; the racism of our society has been so pervasive that none, regardless of wealth or position, has managed to escape its impact. The experience of Negroes in America has been different in kind, not just in degree, from that of other ethnic groups. It is not merely the history of slavery alone but also that a whole people were marked as inferior by the law. And that mark has endured. The dream of America as the great melting pot has not been realized for the Negro; because of his skin color he never even made it into the pot.

These differences in the experience of the Negro make it difficult for me to accept that Negroes cannot be afforded greater protection under the Fourteenth Amendment where it is necessary to remedy the effects of past discrimination. In the *Civil Rights Cases*, supra, the Court wrote that the Negro emerging from slavery must cease "to be the special favorite of the laws." 109 U.S., at 25; see supra, at 392. We cannot in light of the history of the last century yield to that view. Had the Court in that decision and others been willing to "do for human liberty and the fundamental rights of American citizenship, what it did ... for the protection of slavery and the rights of the masters of fugitive slaves," 109 U.S., at 53 (Harlan, J., dissenting), we would not need now to permit the recognition of any "special wards."

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It is because of a legacy of unequal treatment that we now must permit the institutions of this society to give consideration to race in making decisions about who will hold the positions of influence, affluence, and prestige in America. For far too long, the doors to those positions have been shut to Negroes. If we are ever to become a fully integrated society, one in which the color of a person's skin will not determine the opportunities available to him or her, we must be willing [*402] to take steps to open
those doors. I do not believe that anyone can truly look into America's past and still find that a remedy for the effects of that past is impermissible.

***

I fear that we have come full circle. After the Civil War our Government started several "affirmative action" programs. This Court in the Civil Rights Cases and Plessy v. Ferguson destroyed the movement toward complete equality. For almost a century no action was taken, and this nonaction was with the tacit approval of the courts. Then we had Brown v. Board of Education and the Civil Rights Acts of Congress, followed by numerous affirmative-action programs. Now, we have this Court again stepping in, this time to stop affirmative-action programs of the type used by the University of California.

MR. JUSTICE BLACKMUN.

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I yield to no one in my earnest hope that the time will come when an "affirmative action" program is unnecessary and is, in truth, only a relic of the past. I would hope that we could reach this stage within a decade at the most. But the story of Brown v. Board of Education, 347 U.S. 483 (1954), decided almost a quarter of a century ago, suggests that that hope is a slim one. At some time, however, beyond any period of what some would claim is only transitional inequality, the United States must and will reach a stage of maturity where action along this line is no longer necessary. Then persons will be regarded as persons, and discrimination of the type we address today will be an ugly feature of history that is instructive but that is behind us.

***

I suspect that it would be impossible to arrange an affirmative-action program in a racially neutral way and have it successful. To ask that this be so is to demand the impossible. In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot -- we dare not -- let the Equal Protection Clause perpetuate racial supremacy.

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MR. JUSTICE STEVENS, with whom THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE REHNQUIST join, concurring in the judgment in part and dissenting in part.

[Justice Stevens and his colleagues strongly contended that the matter should be dealt with as a matter of statutory interpretation of the Civil Rights Act. In their view, Bakke was clearly excluded from a program receiving federal funding "on the ground of race" in violation of §601 of the Civil Rights Act. In their view, the plain language of the statute governed the result, and the fact that Congress had not explicitly considered voluntary affirmative action was not relevant in light of the statute’s general principles. In their view, the legislative history reinforced this interpretation. Proponents gave repeated assurances that the Act would be “colorblind.”]

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Although Bakke’s holding is therefore technically limited to a statutory violation, the reasoning was followed as a matter of constitutional law in City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989), which held that a local ordinance requiring that prime contractors award at least 30% of each contract to minority business enterprises violated the Fourteenth Amendment. Justice O’Connor’s plurality opinion first explained why these remedial programs were subject to close judicial scrutiny. First, she reaffirmed that “the rights established a personal rights.”

To whatever racial group these citizens belong, their "personal rights" to be treated with equal
dignity and respect are implicated by a rigid rule erecting race as the sole criterion in an aspect of public decisionmaking.

Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen "fit" this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.

Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility. See University of California Regents v. Bakke, 438 U.S., at 298 (opinion of Powell, J.) ("[P]referential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relation to individual worth"). We thus reaffirm the view *** that the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification.

[The opinion rejected Justice Marshall’s argument in dissent that "race-conscious classifications designed to further remedial goals" should be subject to a relaxed standard of review.] How the dissent arrives at the legal conclusion that a racial classification is "designed to further remedial goals," without first engaging in an examination of the factual basis for its enactment and the nexus between its scope and that factual basis, we are not told. However, once the "remedial" conclusion is reached, the dissent's standard is singularly deferential, and bears little resemblance to the close examination of legislative purpose we have engaged in when reviewing classifications based either on race or gender. See Weinberger v. Wiesenfeld, 420 U.S. 636, 648 (1975) ("[T]he mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme"). The dissent's watered-down version of equal protection review effectively assures that race will always be relevant in American life, and that the "ultimate goal" of "eliminat[ing] entirely from governmental decisionmaking such irrelevant factors as a human being's race," [Wygant v. Jackson Bd. of Education, 476 U.S. 267, 320 (STEVENS, J., dissenting)] will never be achieved.

Finally, the Court made it clear that general remediation of societal discrimination did not constitute the sort of compelling interest to justify a blatantly racial classification.

Justice Scalia concurred, noting:

The difficulty of overcoming the effects of past discrimination is as nothing compared with the difficulty of eradicating from our society the source of those effects, which is the tendency -- fatal to a Nation such as ours -to classify and judge men and women on the basis of their country of origin or the color of their skin. A solution to the first problem that aggravates the second is no solution at all.

Id. at 521-22. Only compelling circumstances, in his view, “can justify an exception to the
principle embodied in the Fourteenth Amendment that “[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens.” Id. at 522 (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

In *Croson*, Justice O’Connor acknowledged the argument that *Carolene Products* jurisprudence suggests that the level of judicial scrutiny should vary according to the ability of different groups to defend their interests in the representative products. See J.H. Ely, *Democracy and Distrust* (1980) at 170 (majoritarian prejudice and indifference not an issue when white majority burdens itself). In the case, O’Connor rejected this argument because the Richmond City Council at the time had a majority of black representatives. In *Contractors Assn. Of Eastern Pennsylvania, Inc. v. City of Philadelphia*, 6 F.3d 990, 1000 (3d Cir. 1993), the city sought to distinguish *Croson* on that ground, but the court rejected the argument:

More generally, the *Carolene Products* theory puts a court in the awkward position of nullifying legislative outcomes based on judges’ own assumptions about the political process. And as one commentator has noted, the process of selecting groups as discrete and insular minorities necessarily requires normative judgments about political outcomes, i.e., those groups identified as minorities are those whose interests the court believes are inadequately protected by existing policies. Terrance Sandalow, *The Distrust of Politics*, 56 N.Y.U. L. Rev. 446, 466-67 (1981). Such judgments improperly interfere with the legislative will.

Justice Powell’s judgment in *Bakke* that the maintenance of diversity in educational institution was a compelling state interest was reaffirmed by a majority in an opinion written by Justice O’Connor. *Grutter v. Bollinger*, 539 U.S. 306; 123 S. Ct. 2325 (2003).

The continuing divisions among the justices are also exemplified in a key decision concerning voting rights. In *Shaw v. Reno*, 509 U.S. 630 (1993), a 5-4 majority struck down a North Carolina reapportionment statute that created two gerrymandered districts where a majority of voters were African American (the state had 12 representatives and approximately 25% of North Carolinians are African American). For the majority, Justice O’Connor remarked that it was “unsettling how closely the North Carolina plan resembles the most egregious racial gerrymanders of the past.” She summarized precedents holding that the purpose of the Equal Protection Clause is to “prevent the States from purposefully discriminating between individuals on the basis of race.” Discrimination “solely on the basis of race” is, by its very nature, “odious to a free people whose institutions are founded upon the doctrine of equality.” Racial classifications “threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility.” Thus, explicit racial distinctions as well as “rare” statutes that are facially neutral but are “unexplainable on grounds other than race” require an “extraordinary justification.” The majority also expressed hostility to the whole idea of race-based districting:

The message that such districting sends to elected representatives is equally pernicious. When a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole. This is altogether antithetical to our system of representative democracy. As Justice Douglas explained in his dissent in *Wright v. Rockefeller*, [376 U.S. 52 (1964)], nearly 30 years ago:
"Here the individual is important, not his race, his creed, or his color. The principle of equality is at war with the notion that District A must be represented by a Negro, as it is with the notion that District B must be represented by a Caucasian, District C by a Jew, District D by a Catholic, and so on... That system, by whatever name it is called, is a divisive force in a community, emphasizing differences between candidates and voters that are irrelevant in the constitutional sense...

... When racial or religious lines are drawn by the State, the multiracial, multireligious communities that our Constitution seeks to weld together as one become separatist; antagonisms that relate to race or to religion rather than to political issues are generated; communities seek not the best representative but the best racial or religious partisan. Since that system is at war with the democratic ideal, it should find no footing here." 376 U.S. at 66-67.

Justice O’Connor repeated Croson’s holding that “equal protection analysis ‘is not dependent on the race of those burdened or benefited by a particular classification.’” Croson, 488 U.S. at 494 (plurality opinion).

Among the dissenters, Justice Stevens attacked the basic foundations of the majority’s opinion. In his view the Equal Protection Clause’s mandate to govern impartially is abused when a group with power over the electoral process defines electoral boundaries solely to enhance its own political strength at the expense of any weaker group. That duty, however, is not violated when the majority acts to facilitate the election of a member of a group that lacks such power because it remains under-represented in the state legislature -- whether that group is defined by political affiliation, by common economic interests, or by religious, ethnic, or racial characteristics.

Justice Stevens also objected that the effect of the Court’s holding was to single out racial minorities from the many political minority groups whose interests are considered in reapportionment plans. He argued: “If it is permissible to draw boundaries to provide adequate representation for rural voters, for union members, for Hasidic Jews, for Polish Americans, or for Republicans, it necessarily follows that it is permissible to do the same thing for members of the very minority group whose history in the United States gave birth to the Equal Protection Clause. A contrary conclusion could only be described as perverse.”

C. Contrasting Canadian Doctrine

Canadian law on affirmative action is, of course, quite the opposite. The equality provision of the Charter, s. 15, provides:

15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
An initial American glance at this provision would suggest that, like the unadorned equality provision of the Fourteenth Amendment as interpreted by the U.S. Supreme Court, s.15(1) condemns race-based affirmative action programs, but these programs are explicitly authorized by the exemption contained in s.15(2). Indeed, the legislative history of the Charter shows an express desire to avoid litigation similar to *Bakke*. However, the Supreme Court in *Lovelace v. Ontario*, [2000] 1 S.C.R. 950, made it clear that s.15(2) reflects the same goals, rather than constituting an exemption from, the constitutional norm of substantive equality contained in s.15(1). Citing Professor Colleen Sheppard’s study, Litigating the Relationship Between Equity and Equality (1993), the Court concluded that the “exception” approach “is inconsistent with the substantive equality analysis and encourages a negative approach to ameliorative programs.” Rather, in her words, “affirmative action is presented as an expression of equality, rather than an exception to it.”

The Court suggested that the plain meaning of s.15(1) did not preclude affirmative action programs, and cited one drafter’s observation that s.15(2) was added “out of ‘excessive caution’, intending to bolster the substantive equality approach in s. 15(1), since, at the time the Charter was being drafted, there was a worry that affirmative action programs would be over-turned on the basis of reverse discrimination. *Id.* ¶105, citing Walter S. Tarnopolsky, “The Equality Rights in the Canadian Charter of Rights and Freedoms” (1983), 61 Can. Bar Rev. 242.

Another example of race-neutral American and race-conscious Canadian approaches arises because both countries are plagued by the disproportionate number of racial minorities (African Americans and aboriginals, respectively) in their prison systems. In many areas of the United States, the number of young black men involved in the criminal justice system approaches 1/3. Manitoba’s population is 12% aboriginal, but over half the prison inmates are aboriginal. The figure is even more stark in Saskatchewan. *See generally* Michael Jackson, “Locking Up Natives in Canada,” (1988-89) 23 U.B.C. L. Rev. 215.

Parliament responded to academic claims that criminal justice would be improved by taking into account aboriginal concepts of “restorative justice” and that sentencing should focus on the needs of the people most closely affected by the crime -- the victim, the immediate community, and the offender. *See generally* Michael Jackson, “In Search of Pathways to Justice: Alternative Dispute Resolution in Aboriginal Communities” (1992) U.B.C L. Rev. (Special Ed.) 147. In addition to adding these factors to general sentencing guidelines, Parliament provided in s. 718.2(e) of the *Criminal Code* that “all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.” In *R. v. Gladue*, [1999] 1 S.C.R. 688, the Supreme Court of Canada directed judges, in sentencing aboriginal offenders, to consider “the broad systemic and background factors affecting aboriginal people, and of the priority given in aboriginal cultures to a restorative approach to sentencing” in order to determine the sanctions “which maybe appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection.” *Id.* at 738. While the provision did not mean that sentences were to be automatically reduced for aboriginal offenders, or that restorative sentences were necessarily more lenient, the Court expressly noted that “the jail term for an aboriginal offender may in some circumstances be less than the term imposed on a non-aboriginal
offender for the same offense.” *Id.* at 739.

In part reflecting similar concerns in the United States, the federal Sentencing Commission recommended a change in law that provides for significant incarceration for possession with intent to distribute 5 grams of crack cocaine or 500 grams of powder cocaine, the former being primarily used by African Americans and the latter drug disproportionately used by whites. Congress, however, rejected the Commission’s recommendation. Judicial challenges to the distinction have been uniformly unsuccessful. See *United States v. Harding*, 971 F.2d 410 (9th Cir. 1992).

**D. Judicial review of whether affirmative action plans are legitimate**

One justification for strict judicial scrutiny of affirmative action plans is that close scrutiny is necessary to determine whether racial classifications really were “benign,” “remedial,” or motivated instead by “illegitimate notions of racial inferiority or simply racial politics.” *Croson*, *supra*. However, the U. S. Supreme Court has made it clear that the only racial classifications that are justifiable are those that are “remedial” in the sense that they are narrowly tailored to remedy a specific finding of illegal discrimination. Thus, contrary to the language of *Croson*, American justices hostile to affirmative action have never suggested that sincerely “benign” classification not motivated by stereotype or “racial politics” would be constitutional.

On this point, there is no real difference north of the border. A classification defended as an ameliorative program that promotes substantive equality is not exempt from close scrutiny. Rather, the government must show that the program really is designed to ameliorative disadvantage and must rebut any claims of stereotype. See, e.g., *Re MacVicar and Superintendent of Family and Child Services*, (1986) 34 D.L.R. (4th) 488, 503 (B.C.S.C.) (otherwise “little discriminatory legislation could ever be attacked successfully, for almost all positive law has as its stated object the betterment or amelioration of the conditions in our community of a disadvantaged individual or group”). The Court’s affirmation of the ameliorative plan challenged in *Lovelace v. Ontario*, *supra*, demonstrates this. Having found that a tripartite agreement between the provincial government, First Nations bands and private casino operators constituted a genuine ameliorative program, the Court did not end its inquiry but rather carefully considered whether the exclusion of aboriginal groups not part of First Nations bands organized under the *Indian Act* constituted substantive discrimination, either by classifying based on stereotype or unfairly burdening them.

**E. What is Brown’s legacy?**

**PARENTS INVOLVED IN COMMUNITY SCHOOLS v. SEATTLE SCHOOL DISTRICT NO. 1**

**SUPREME COURT OF THE UNITED STATES**
**Nos. 05-908 and 05-915**, 2007 U.S. LEXIS 8670 (June 28, 2007)

[The Seattle and Louisville school districts voluntarily adopted student assignment plans that rely on race to determine which schools certain children may attend. The Seattle district, which has never
operated legally segregated schools or been subject to court-ordered desegregation, classified children as white or nonwhite, and used the racial classifications as a "tiebreaker" to allocate slots in particular high schools. Louisville schools had been desegregated by court order, but in 2000 the District Court dissolved the decree after finding that the district had eliminated the vestiges of prior segregation to the greatest extent practicable. In 2001, Louisville adopted its plan classifying students as black or "other" in order to make certain elementary school assignments and to rule on transfer requests. The petitioners, parents whose children may not have been able to attend their preferred schools because of the race-conscious plans, contended that allocating children to different public schools based solely on their race violates the Fourteenth Amendment's Equal Protection guarantee.

CHIEF JUSTICE ROBERTS announced the judgment of the Court, and delivered the opinion of the Court with respect to Parts I, II, III-A, and III-C, and an opinion with respect to Parts III-B and IV, in which JUSTICES SCALIA, THOMAS, and ALITO join.

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III

A [For the majority]

[Roberts, C.J., cited precedents requiring strict scrutiny to ensure that the challenged plans were "narrowly tailored" to achieve a "compelling" government interest." The court noted that a previously recognized compelling interest in remedying the effects of past intentional discrimination was not available here because Seattle had not intentionally discriminated and Louisville had been found to have remedied its history of segregation. The opinion recalled a major precedent-setting opinion, Milliken v. Bradley, 433 U.S. 267, 280, n. 14 (1977), which held that the harm being remedied by mandatory desegregation plans is the harm that is traceable to segregation, rather than segregated housing patterns, and that "the Constitution is not violated by racial imbalance in the schools, without more."]

The second government interest we have recognized as compelling for purposes of strict scrutiny is the interest in diversity in higher education upheld in [Grutter v. Bollinger, 539 U.S. 306, 328 (2003)]. [The opinion emphasized that Justice Powell’s opinion in Bakke had rejected “an interest in simple ethnic diversity.” Critical to Grutter’s Upholding the University of Michigan Law School’s race-conscious admissions policy was that race was simply one factor in a “highly individualized, holistic review.” In contrast, in these cases “race is not considered as part of a broader effort to achieve "exposure to widely diverse people, cultures, ideas, and viewpoints," ibid.; race, for some students, is determinative standing alone.” Moreover, “the plans here employ only a limited notion of diversity, viewing race exclusively in white/nonwhite terms in Seattle and black/"other" terms in Jefferson County. But see Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 610, 110 S. Ct. 2997, 111 L. Ed. 2d 445 (1990) ("We are a Nation not of black and white alone, but one teeming with divergent communities knitted together with various traditions and carried forth, above all, by individuals") (O'Connor, J., dissenting).” For example, a Seattle school with 50 percent Asian-American students and 50 percent white students but no African-American, Native-American, or Latino students would qualify as balanced, while a school with 30 percent Asian-American, 25 percent African-American, 25 percent Latino, and 20 percent white students would not. “It is hard to understand how a plan that could allow these results can be viewed as being concerned with achieving enrollment that is "broadly diverse."" The opinion further distinguished Grutter because of “considerations unique to institutions of higher education, noting that in light of ‘the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.’"]

B [For Roberts, C.J., and Scalia and Alito, JJ.]

[The plurality found that the litigants’ dispute over the benefits of racial diversity need not be resolved,]
because it is clear that the racial classifications employed by the districts are not narrowly tailored to the goal of achieving the educational and social benefits asserted to flow from racial diversity. In design and operation, the plans are directed only to racial balance, pure and simple, an objective this Court has repeatedly condemned as illegitimate. The Court noted that the plans were tied to each district's specific racial demographics, rather than to any pedagogic concept of the level of diversity needed to obtain the asserted educational benefits. The districts did not offer evidence explaining why the level of racial diversity necessary to achieve the asserted educational benefits happens to coincide with the racial demographics of the respective school districts.

Accepting racial balancing as a compelling state interest would justify the imposition of racial proportionality throughout American society, contrary to our repeated recognition that "at the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." Miller v. Johnson, 515 U.S. 900, 911, 115 S. Ct. 2475, 132 L. Ed. 2d 762 (1995) (quoting Metro Broadcasting, 497 U.S., at 602, 110 S. Ct. 2997, 111 L. Ed. 2d 445 (O'Connor, J., dissenting); internal quotation marks omitted). Allowing racial balancing as a compelling end in itself would "effectively assure that race will always be relevant in American life, and that the 'ultimate goal' of 'eliminating entirely from governmental decisionmaking such irrelevant factors as a human being's race' will never be achieved." Croson, supra, at 495, 109 S. Ct. 706, 102 L. Ed. 2d 854 (plurality opinion of O'Connor, J.) (quoting Wygant v. Jackson Bd. of Ed., 476 U.S. 267, 320, 106 S. Ct. 1842, 90 L. Ed. 2d 260 (1986) (STEVENS, J., dissenting), in turn quoting Fullilove, 448 U.S., at 547, 100 S. Ct. 2758, 65 L. Ed. 2d 902 (STEVENS, J., dissenting); brackets and citation omitted). An interest "linked to nothing other than proportional representation of various races . . . would support indefinite use of racial classifications, employed first to obtain the appropriate mixture of racial views and then to ensure that the [program] continues to reflect that mixture." Metro Broadcasting, supra, at 614, 110 S. Ct. 2997, 111 L. Ed 2d 445 (O'Connor, J., dissenting).

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[The plurality rejected Seattle’s effort to justify race-conscious school assignments] as necessary to address the consequences of racially identifiable housing patterns. The sweep of the mandate claimed by the district is contrary to our rulings that remedying past societal discrimination does not justify race-conscious government action. ***

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C [For the majority]

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The districts have also failed to show that they considered methods other than explicit racial classifications to achieve their stated goals. Narrow tailoring requires "serious, good faith consideration of workable race-neutral alternatives," Grutter, supra, at 339, 123 S. Ct. 2325, 156 L. Ed. 2d 304, and yet [neither school district appeared to seriously consider alternatives that would not require race-conscious assignments.]

IV [For the majority]

[Chief Justice Roberts rejected JUSTICE BREYER's effort to justify the challenged plans by relying on precedents that allowed race-conscious remedies for past intentional discrimination. Justice Breyer’s approach would obliterate the clear distinction that prior cases had drawn between segregation by state action and racial imbalance caused by other factors, citing Freeman v. Pitts, 503 U.S. 467, 495-96 (1992) ("Where resegregation is a product not of state action but of private choices, it does not have
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After explaining why various precedents upon which Justice Breyer relied were distinguishable or pre-dated the Court’s reaffirmation of strict scrutiny for all racial classifications, the opinion returned to, and explicitly rejected, his argument that a different standard of review should be applied because the districts use race for beneficent rather than malicious purposes, noting that it had been repeatedly pressed in the past.

JUSTICE BREYER’s position comes down to a familiar claim: The end justifies the means. He admits that “there is a cost in applying a state-mandated racial label,” but he is confident that the cost is worth paying. Our established strict scrutiny test for racial classifications, however, insists on “detailed examination, both as to ends and as to means.” Adarand, supra, at 236 (emphasis added). Simply because the school districts may seek a worthy goal does not mean they are free to discriminate on the basis of race to achieve it, or that their racial classifications should be subject to less exacting scrutiny.

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[The opinion notes that the deference to local school boards advocated by Breyer, J., was “fundamentally at odds” with strict scrutiny.]

JUSTICE BREYER’s dissent ends on an unjustified note of alarm. [The plurality expressly rejected the dissent’s prediction that this decision threatens “hundreds of state and federal statutes and regulations,” and specifically stated that a provision of the No Child Left Behind Act that requires States to set measurable objectives to track the achievement of students from major racial and ethnic groups, 20 U.S.C. § 6311(b)(2)(C)(v) -- had “nothing to do with the pertinent issues in these cases.” They further noted that they “express no opinion,” “even in dicta,” about race-conscious decisions with regard to where to construct new schools, how to allocate resources among schools, and which academic offerings to provide to attract students to certain schools, all of which “implicate different considerations than the explicit racial classifications at issue in these cases.”]

If the need for the racial classifications embraced by the school districts is unclear, even on the districts' own terms, the costs are undeniable. "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." Adarand, 515 U.S., at 214, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (internal quotation marks omitted). Government action dividing us by race is inherently suspect because such classifications promote "notions of racial inferiority and lead to a politics of racial hostility," Croson, supra, at 493, 109 S. Ct. 1044, 113 L. Ed. 2d 854, "reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin," Shaw v. Reno, 509 U.S. 630, 657, 113 S. Ct. 2816, 125 L. Ed. 2d 511 (1993), and "endorse race-based reasoning and the conception of a Nation divided into racial blocs, thus contributing to an escalation of racial hostility and conflict." Metro Broadcasting, 497 U.S., at 603, 110 S. Ct. 2997, 111 L. Ed. 2d 445 (O'Connor, J., dissenting). As the Court explained in Rice v. Cayetano, 528 U.S. 495, 517, 120 S. Ct. 1044, 145 L. Ed. 2d 1007 (2000), "one of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities.”

***

The parties and their amici debate which side is more faithful to the heritage of Brown, but the position of the plaintiffs in Brown was spelled out in their brief and could not have been clearer: "The Fourteenth Amendment prevents states from according differential treatment to American children on the basis of their color or race." Brief for Appellants in Nos. 1, 2, and 4 and for Respondents in No. 10 on Reargument in Brown I, O. T. 1953, p. 15 (Summary of Argument). What do the racial classifications at issue here do, if not accord differential treatment on the basis of race? As counsel who appeared before
this Court for the plaintiffs in Brown put it: "We have one fundamental contention which we will seek to develop in the course of this argument, and that contention is that no State has any authority under the equal-protection clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens." Tr. of Oral Arg. in Brown I, p. 7 (Robert L. Carter, Dec. 9, 1952). There is no ambiguity in that statement. And it was that position that prevailed in this Court, which emphasized in its remedial opinion that what was "at stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis," and what was required was "determining admission to the public schools on a nonracial basis." Brown II, supra, at 300-301, 75 S. Ct. 753, 99 L. Ed. 1083 (emphasis added). What do the racial classifications do in these cases, if not determine admission to a public school on a racial basis?

Before Brown, schoolchildren were told where they could and could not go to school based on the color of their skin. The school districts in these cases have not carried the heavy burden of demonstrating that we should allow this once again -- even for very different reasons. For schools that never segregated on the basis of race, such as Seattle, or that have removed the vestiges of past segregation, such as Jefferson County, the way "to achieve a system of determining admission to the public schools on a nonracial basis," [*84] Brown II, 349 U.S., at 300-301, 75 S. Ct. 753, 99 L. Ed. 1083, is to stop assigning students on a racial basis. The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.

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JUSTICE THOMAS, concurring.

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I

[Thomas, J., rejected the dissent’s claim that the school districts are threatened with resegregation, arguing that racial] imbalance is not segregation, and the mere incantation of terms like resegregation and remediation cannot make up the difference.

A

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Racial imbalance is the failure of a school district's individual schools to match or approximate the demographic makeup of the student population at large. Racial imbalance is not segregation. Although presently observed racial imbalance might result from past de jure segregation, racial imbalance can also result from any number of innocent private decisions, including voluntary housing choices. ***

B

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1

*** The Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all. Therefore, as a general rule, all race-based government decisionmaking -- regardless of context -- is unconstitutional.

2

This Court has carved out a narrow exception to that general rule for cases in which a school district has a "history of maintaining two sets of schools in a single school system deliberately operated to carry out a governmental policy to separate pupils in schools solely on the basis of race." In such cases, race-based
remedial measures are sometimes required. [No such extraordinary circumstance occurs here, Justice Thomas concluded.]

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II

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A

[Next, Thomas, J., rejected the view expressed by Breyer, J., and several lower court judges that a somewhat less strict scrutiny was appropriate where programs were not "aimed at oppressing blacks," do not "seek to give one racial group an edge over another," or were "far from the original evils at which the Fourteenth Amendment was addressed."].

Even supposing it mattered to the constitutional analysis, the race-based student assignment programs before us are not as benign as the dissent believes. "Racial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination." As these programs demonstrate, every time the government uses racial criteria to "bring the races together," someone gets excluded, and the person excluded suffers an injury solely because of his or her race. The petitioner in the Louisville case received a letter from the school board informing her that her kindergartener would not be allowed to attend the school of petitioner's choosing because of the child's race. Doubtless, hundreds of letters like this went out from both school boards every year these race-based assignment plans were in operation. This type of exclusion, solely on the basis of race, is precisely the sort of government action that pits the races against one another, exacerbates racial tension, and "provokes resentment among those who believe that they have been wronged by the government's use of race." ***

B

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2

Next, the dissent argues that the interest in integration has an educational element. The dissent asserts that racially balanced schools improve educational outcomes for black children. In support, the dissent unquestioningly cites certain social science research to support propositions that are hotly disputed among social scientists. In reality, it is far from apparent that coerced racial mixing has any educational benefits, much less that integration is necessary to black achievement. [Here, Thomas, J. catalogues the sharp differences among scholars about the effect of integration, citing, inter alia, T. Sowell, Education: Assumptions Versus History 7-38 (1986) and L. Izumi, They Have Overcome: High-Poverty, High-Performing Schools in California (2002) (chronicling exemplary achievement in predominantly Hispanic schools in California). He found the dissent’s approach of validating race-conscious action on if “sufficient social science evidence supports” the government’s conclusion to be far too deferential, leaving “our equal-protection jurisprudence at the mercy of elected government officials evaluating the evanescent views of a handful of social scientists. To adopt the dissent's deferential approach would be to abdicate our constitutional responsibilities.”]14

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6 As I have explained elsewhere, the remedies this Court authorized lower courts to compel in early desegregation cases like Green and Swann were exceptional. Sustained resistance to Brown prompted the Court to authorize extraordinary race-conscious remedial measures (like compelled racial mixing) to turn the Constitution's dictate to desegregate into reality. Even if these measures were appropriate as remedies in the face of widespread resistance to Brown's mandate, they are not forever insulated from constitutional scrutiny. Rather, "such powers should have been temporary and used only to overcome the widespread resistance to the dictates of the Constitution."

14 The dissent accuses me of "feeling confident that, to end invidious discrimination, one must end all
Most of the dissent's criticisms of today's result can be traced to its rejection of the color-blind Constitution. The dissent attempts to marginalize the notion of a color-blind Constitution by consigning it to me and Members of today's plurality. But I am quite comfortable in the company I keep. My view of the Constitution is Justice Harlan's view in Plessy: "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." Plessy v. Ferguson, 163 U.S. 537, 559, 16 S. Ct. 1138, 41 L. Ed. 256 (1896) (dissenting opinion). And my view was the rallying cry for the lawyers who litigated Brown. See, e.g., Brief for Appellants in Brown v. Board of Education, O. T. 1953, Nos. 1, 2, and 4 p. 65 ("That the Constitution is color blind is our dedicated belief"); Brief for Appellants in Brown v. Board of Education, O. T. 1952, No. 1, p. 5 ("The Fourteenth Amendment precludes a state from imposing distinctions or classifications based upon race and color alone"); see also In Memoriam: Honorable Thurgood Marshall, Proceedings of the Bar and Officers of the Supreme Court of the United States, X (1993) (remarks of Judge Motley) ("Marshall had a 'Bible' to which he turned during his most depressed moments. The 'Bible' would be known in the legal community as the first Mr. Justice Harlan's dissent in Plessy v. Ferguson, 163 U.S. 537, 552, 16 S. Ct. 1138, 41 L. Ed. 256 (1896). I do not know of any opinion which buoyed Marshall more in his pre-Brown days . . . ").

The similarities between the dissent's arguments and the segregationists' arguments do not stop there. Like the dissent, the segregationists repeatedly cautioned the Court to consider practicalities and not to embrace too theoretical a view of the Fourteenth Amendment. And just as the dissent argues that the need for these programs will lessen over time, the segregationists claimed that reliance on segregation was governmental use of race-conscious criteria" and chastises me for not deferring to democratically elected majorities. Regardless of what JUSTICE BREYER's goals might be, this Court does not sit to "create a society that includes all Americans" or to solve the problems of "troubled inner city schooling." Ibid. We are not social engineers. The United States Constitution dictates that local governments cannot make decisions on the basis of race. Consequently, regardless of the perceived negative effects of racial imbalance, I will not defer to legislative majorities where the Constitution forbids it.

It should escape no one that behind JUSTICE BREYER's veil of judicial modesty hides an inflated role for the Federal Judiciary. The dissent's approach confers on judges the power to say what sorts of discrimination are benign and which are invidious. Having made that determination (based on no objective measure that I can detect), a judge following the dissent's approach will set the level of scrutiny to achieve the desired result. Only then must the judge defer to a democratic majority. In my view, to defer to one's preferred result is not to defer at all.

The dissenter half-heartedly attacks the historical underpinnings of the color-blind Constitution. I have no quarrel with the proposition that the Fourteenth Amendment sought to bring former slaves into American society as full members. What the dissent fails to understand, however, is that the color-blind Constitution does not bar the government from taking measures to remedy past state-sponsored discrimination -- indeed, it requires that such measures be taken in certain circumstances. Race-based government measures during the 1860's and 1870's to remedy state-enforced slavery were therefore not inconsistent with the color-blind Constitution.
lessening and might eventually end.

What was wrong in 1954 cannot be right today.\(^{27}\) Whatever else the Court's rejection of the segregationists' arguments in *Brown* might have established, it certainly made clear that state and local governments cannot take from the Constitution a right to make decisions on the basis of race by adverse possession. ***

*** Although no such distinction is apparent in the *Fourteenth Amendment*, the dissent would constitutionalize today's faddish social theories that embrace that distinction. The Constitution is not that malleable. Even if current social theories favor classroom racial engineering as necessary to "solve the problems at hand," post, at 21, the Constitution enshrines principles independent of social theories. See *Plessy*, 163 U.S., at 559, 16 S. Ct. 1138, 41 L. Ed. 256 (Harlan, J., dissenting) ("The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time . . . . But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens . . . Our Constitution is color-blind, and neither knows nor tolerates classes among citizens"). Indeed, if our history has taught us anything, it has taught us to beware of elites bearing racial theories. n30 See, e.g., *Dred Scott v. Sandford*, 60 U.S. 393, 19 How. 393, 407, 15 L. Ed. 691 (1857) ("They [members of the "negro African race"] had no rights which the white man was bound to respect"). Can we really be sure that the racial theories that motivated *Dred Scott* and *Plessy* are a relic of the past or that future theories will be nothing but beneficent and progressive? That is a gamble I am unwilling to take, and it is one the Constitution does not allow. ***

JUSTICE KENNEDY, concurring in part and concurring in the judgment.

[The opinion notes that while the “enduring hope is that race should not matter; the reality is that too often it does.” Thus, Kennedy, J., viewed the plurality opinion as implying] an all-too-unyielding insistence that race cannot be a factor in instances when, in my view, it may be taken into account. The plurality opinion is too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of their race. The plurality's postulate that "the way to stop discrimination on the basis of race is to stop discriminating on the basis of race," ante, at 40-41, is not sufficient to decide these cases. Fifty years of experience since *Brown v. Board of Education*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), should teach us that the problem before us defies so easy a solution. School districts can seek to reach *Brown's* objective of equal educational opportunity. The plurality opinion is at least

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\(^{27}\) It is no answer to say that these cases can be distinguished from *Brown* because *Brown* involved invidious racial classifications whereas the racial classifications here are benign. How does one tell when a racial classification is invidious? The segregationists in *Brown* argued that their racial classifications were benign, not invidious. See Tr. of Oral Arg. in *Briggs v. Elliott*, O. T. 1953, No. 2, p. 83 ("It [South Carolina] is confident of its good faith and intention to produce equality for all of its children of whatever race or color. It is convinced that the happiness, the progress and the welfare of these children is best promoted in segregated schools"); Brief for Appellees on Reargument in *Davis v. County School Board*, O. T. 1953, No. 3, p. 82-83 ("Our many hours of research and investigation have led only to confirmation of our view that segregation by race in Virginia's public schools at this time not only does not offend the Constitution of the United States but serves to provide a better education for living for the children of both races"); Tr. of Oral Arg. in *Davis v. County School Board*, O. T. 1952, No. 3, p. 71 ("To make such a transition, would undo what we have been doing, and which we propose to continue to do for the uplift and advancement of the education of both races. It would stop this march of progress, this onward sweep"). It is the height of arrogance for Members of this Court to assert blindly that their motives are better than others.
open to the interpretation that the Constitution requires school districts to ignore the problem of de facto resegregation in schooling. I cannot endorse that conclusion. To the extent the plurality opinion suggests the Constitution mandates that state and local school authorities must accept the status quo of racial isolation in schools, it is, in my view, profoundly mistaken.

The statement by Justice Harlan that "our Constitution is color-blind" was most certainly justified in the context of his dissent in Plessy v. Ferguson, 163 U.S. 537, 559, 16 S. Ct. 1138, 41 L. Ed. 256 (1896). The Court's decision in that case was a grievous error it took far too long to overrule. Plessy, of course, concerned official classification by race applicable to all persons who sought to use railway carriages. And, as an aspiration, Justice Harlan's axiom must command our assent. In the real world, it is regrettable to say, it cannot be a universal constitutional principle.

***

JUSTICE STEVENS, dissenting.

While I join JUSTICE BREYER's eloquent and unanswerable dissent in its entirety, it is appropriate to add these words.

There is a cruel irony in THE CHIEF JUSTICE's reliance on our decision in Brown v. Board of Education. The first sentence in the concluding paragraph of his opinion states: "Before Brown, schoolchildren were told where they could and could not go to school based on the color of their skin." This sentence reminds me of Anatole France's observation: "The majestic equality of the law, forbids rich and poor alike to sleep under bridges, to beg in the streets, and to steal their bread." THE CHIEF JUSTICE fails to note that it was only black schoolchildren who were so ordered; indeed, the history books do not tell stories of white children struggling to attend black schools. In this and other ways, THE CHIEF JUSTICE rewrites the history of one of this Court's most important decisions.

THE CHIEF JUSTICE rejects the conclusion that the racial classifications at issue here should be viewed differently than others, because they do not impose burdens on one race alone and do not stigmatize or exclude. The only justification for refusing to acknowledge the obvious importance of that difference is the citation of a few recent opinions -- none of which even approached unanimity -- grandly proclaiming that all racial classifications must be analyzed under "strict scrutiny."

If we look at cases decided during the interim between Brown and Adarand, we can see how a rigid adherence to tiers of scrutiny obscures Brown's clear message. Perhaps the best example is provided by our approval of the decision of the Supreme Judicial Court of Massachusetts in 1967 upholding a state statute mandating racial integration in that State's school system. See School Comm. of Boston v. Board of Education, 352 Mass. 693, 227 N.E.2d 729. Rejecting arguments comparable to those that the plurality accepts today, that court noted: "It would be the height of irony if the racial imbalance act, enacted as it was with the laudable purpose of achieving equal educational opportunities, should, by prescribing school pupil allocations based on race, founder on unsuspected shoals in the Fourteenth Amendment." Id., at 698, 227 N. E. 2d, at 733 (footnote omitted).

***

The Court has changed significantly since it decided School Comm. of Boston in 1968 [by summarily affirming the Massachusetts Supreme Court]. It was then more faithful to Brown and more respectful of our precedent than it is today. It is my firm conviction that no Member of the Court that I joined in 1975 would have agreed with today's decision.
JUSTICE BREYER, with whom JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE GINSBURG join, dissenting.

These cases consider the longstanding efforts of two local school boards to integrate their public schools. The school board plans before us resemble many others adopted in the last 50 years by primary and secondary schools throughout the Nation. All of those plans represent local efforts to bring about the kind of racially integrated education that Brown v. Board of Education, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), long ago promised -- efforts that this Court has repeatedly required, permitted, and encouraged local authorities to undertake. This Court has recognized that the public interests at stake in such cases are "compelling." We have approved of "narrowly tailored" plans that are no less race-conscious than the plans before us. And we have understood that the Constitution permits local communities to adopt desegregation plans even where it does not require them to do so.

The plurality pays inadequate attention to this law, to past opinions' rationales, their language, and the contexts in which they arise. As a result, it reverses course and reaches the wrong conclusion. In doing so, it distorts precedent, it misapplies the relevant constitutional principles, it announces legal rules that will obstruct efforts by state and local governments to deal effectively with the growing resegregation of public schools, it threatens to substitute for present calm a disruptive round of race-related litigation, and it undermines Brown's promise of integrated primary and secondary education that local communities have sought to make a reality. This cannot be justified in the name of the Equal Protection Clause.

I

Facts

[The dissent observed that Brown “set the Nation on a path toward public school integration,” and in subsequent cases often required race-conscious practices, such as mandatory busing and race-based restrictions on voluntary transfers. Specifically, the Supreme Court upheld a specific racial demographic for previously segregated schools in Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1 (1971). The Court noted that these efforts “brought about considerable racial integration,” but recently integration was back-sliding. Today, more than one in six black children attend a school that is 99-100% minority.]

[Case histories omitted from this excerpt] highlight three important features of these cases. First, the school districts' plans serve "compelling interests" and are "narrowly tailored" on any reasonable definition of those terms. Second, the distinction between de jure segregation (caused by school systems) and de facto segregation (caused, e.g., by housing patterns or generalized societal discrimination) is meaningless in the present context, thereby dooming the plurality's endeavor to find support for its views in that distinction. Third, real-world efforts to substitute racially diverse for racially segregated schools (however caused) are complex, to the point where the Constitution cannot plausibly be interpreted to rule out categorically all local efforts to use means that are "conscious" of the race of individuals.

***

A court finding of de jure segregation cannot be the crucial variable. After all, a number of school districts in the South that the Government or private plaintiffs challenged as segregated by law voluntarily desegregated their schools without a court order -- just as Seattle did.

***

II

The Legal Standard

A longstanding and unbroken line of legal authority tells us that the Equal Protection Clause permits local school boards to use race-conscious criteria to achieve positive race-related goals, even when the
Constitution does not compel it. ***
***

Courts are not alone in accepting as constitutionally valid the legal principle that *Swann* enunciated -- *i.e.*, that the government may voluntarily adopt race-conscious measures to improve conditions of race even when it is not under a constitutional obligation to do so. That principle has been accepted by every branch of government and is rooted in the history of the *Equal Protection Clause* itself. Thus, Congress has enacted numerous race-conscious statutes that illustrate that principle or rely upon its validity. See, *e.g.*, 20 U.S.C. § 6311(b)(2)(C)(v) (No Child Left Behind Act); § 1067 et seq. (authorizing aid to minority institutions). In fact, without being exhaustive, I have counted 51 federal statutes that use racial classifications. I have counted well over 100 state statutes that similarly employ racial classifications. Presidential administrations for the past half-century have used and supported various race-conscious measures.

***

III

Applying the Legal Standard

A

Compelling Interest

[Justice Breyer identified three aspects of the interests at stake that he found compelling. First is “an interest in setting right the consequences of prior conditions of segregation” not only in schools but also with regard to housing patterns, employment practices, economic conditions, and social attitudes. Second is an interest in overcoming the adverse educational effects produced by and associated with highly segregated schools. Third, there is an interest in producing an educational environment that reflects the "pluralistic society" in which our children will live. It is an interest in helping our children learn to work and play together with children of different racial backgrounds. It is an interest in teaching children to engage in the kind of cooperation among Americans of all races that is necessary to make a land of three hundred million people one Nation.]

[Justice Breyer acknowledged that social science data reached different results as to whether highly segregated schools in fact produce adverse educational effects and whether integrated schools result in graduates with more cooperative attitudes about race.]

If we are to insist upon unanimity in the social science literature before finding a compelling interest, we might never find one. I believe only that the Constitution allows democratically elected school boards to make up their own minds as to how best to include people of all races in one America.

B

Narrow Tailoring

[Here, Justice Breyer explains his conclusion that the challenged plans are narrowly tailored, and why alternatives suggested by other justices and *amici* are not likely to be as effective in preventing resegregation.]
V

Consequences

***

[Justice Breyer feared that the plurality’s approach will result in a “surge of race-based litigation,” would threaten widespread integration practices, etc.]

*** By way of contrast, I do not claim to know how best to stop harmful discrimination; how best to create a society that includes all Americans; how best to overcome our serious problems of increasing de facto segregation, troubled inner city schooling, and poverty correlated with race. But, as a judge, I do know that the Constitution does not authorize judges to dictate solutions to these problems. Rather, the Constitution creates a democratic political system through which the people themselves must together find answers. And it is for them to debate how best to educate the Nation's children and how best to administer America's schools to achieve that aim. The Court should leave them to their work. And it is for them to decide, to quote the plurality's slogan, whether the best "way to stop discrimination on the basis of race is to stop discriminating on the basis of race." That is why the Equal Protection Clause outlaws invidious discrimination, but does not similarly forbid all use of race-conscious criteria.

***

And what of law’s concern to diminish and peacefully settle conflict among the Nation's people? Instead of accommodating different good-faith visions of our country and our Constitution, today's holding upsets settled expectations, creates legal uncertainty, and threatens to produce considerable further litigation, aggravating race-related conflict.

And what of the long history and moral vision that the Fourteenth Amendment itself embodies? The plurality cites in support those who argued in Brown against segregation, and JUSTICE THOMAS likens the approach that I have taken to that of segregation's defenders. But segregation policies did not simply tell schoolchildren "where they could and could not go to school based on the color of their skin," they perpetuated a caste system rooted in the institutions of slavery and 80 years of legalized subordination. The lesson of history is not that efforts to continue racial segregation are constitutionally indistinguishable from efforts to achieve racial integration. Indeed, it is a cruel distortion of history to compare Topeka, Kansas, in the 1950's to Louisville and Seattle in the modern day -- to equate the plight of Linda Brown (who was ordered to attend a Jim Crow school) to the circumstances of Joshua McDonald (whose request to transfer to a school closer to home was initially declined). This is not to deny that there is a cost in applying "a state-mandated racial label" [citing Justice Kennedy’s concurring opinion]. But that cost does not approach, in degree or in kind, the terrible harms of slavery, the resulting caste system, and 80 years of legal racial segregation.

***

To emphasize their strong disagreement, dissenting justices often read a portion of their dissent from the bench when the decision is announced. Extraordinarily, Justice Breyer’s comments from the bench included remarks not in his printed opinion, taken by reporters as a reference, on the last day of the Term, to many decisions. Breyer’s oral comments were reported to be: “It’s very rare in the law that so few have changed so much so quickly.” (Transcript from NPR’s Fresh Air interview with New York Times Supreme Court correspondent Linda Greenhouse.)
V. Lessons

A. Are Minorities Better Off with Judicial Protection?

Americans live in an interesting time in which to consider the role of the Notwithstanding Clause and the role of Congress in enforcing equality norms. Professor John Nowak, in *The Rise and Fall of Supreme Court Concern for Racial Minorities*, 36 Wm. & M. L. Rev. 345, 347 (1995), concludes that “as the membership of the Court has changed, the Court’s approach toward protecting racial minorities has also changed.” Thus, “the rise and fall of Supreme Court protection for racial minorities simply reflects the political background of the Justices on the Court in each era.” According to Nowak, judicial protection of racial minorities was virtually non-existent prior to the New Deal. From the late 1930s through the early 1950s, the Court incrementally changed its rulings concerning equal protection and congressional power to provide greater protection for minorities, followed by grand rhetoric but modest remedies during a period where society was unwilling to accept a more liberal view of civil rights and then a period of active leadership in the protection of racial minorities through its rulings concerning equal protection and an expansive reading of federal civil rights statutes. Since the 1980s, he finds that the Court has turned against racial minorities. Nowak explains this history as follows:

The Supreme Court’s history indicates that legal theories are of far less importance than the political affiliation of the Justices of the Court in determining the outcome of the Supreme Court decisions concerning racial minorities. In the pre-New Deal era, the Court had absolutely no sympathy for racial minorities and was often an active participant in the oppression of racial minorities. Fifty years ago, a Court composed of Democrats became increasingly concerned with racial equality. Forty years ago the Court took a bold step toward the protection of racial minorities in the Brown decision. In the 1960s the Court that was dominated by Democratic appointees attempted to protect minority race persons as it decided a wide variety of issues. The Nixon appointees brought a wavering approach to civil rights. The Reagan appointees to the Supreme Court have been able to narrow the Court rulings on civil rights cases.

Id. at 471. The lesson Nowak draws from this history is that “the Justices cannot be counted onto protect racial minorities from oppression in our society.” While future presidents might appoint justices that will lead the court to protect minority rights, they might not. He concludes that “Congress is likely to remain a stronger defender of racial minorities that the Supreme Court in the foreseeable future.” Id. at 472.

More generally, scholars including Professor Morton Horwitz argue that American constitutional history is characterized by the ineffectiveness of judicial protection of the rights of the powerless and the predominant use of rights theories to protect the powerful. Rights theory, the argument continues, was developed in the 18th century as a response to revolutionary sentiments in the U.S. and France with the principal effect of protecting private property rights.

Should those who find these arguments persuasive seriously consider a constitutional amendment to add a Notwithstanding Clause? Shouldn’t liberal Democrats endorse it so that progressive legislation may be passed without hectoring from Rehnquist and Scalia? Shouldn’t conservative Republicans endorse it as an insurance policy to prevent a tilt back to the left?
B. Lessons for the Current Australian Debate

In Australia (as noted in Chapter Three) a “National Human Rights Consultation” is currently under way on the question of whether Australia has adequate legal protection for human rights. Much of the public debate has focused on whether there should be a Commonwealth Bill or Charter of Rights (most of this debate assumes that such a Bill or Charter would be statutory, not constitutional - partly because of the well-recognised difficulty in securing constitutional amendment).

Professor George Williams has been a prominent proponent of the case for the Charter of Rights. In 2007, in an ABC interview, he set out his reasons:

Australia has a human rights problem. This is apparent in our overreaching anti-terror laws, in how we deny prisoners the vote and have made it harder for young people to enrol, and in the 17 year gap in life expectancy between Aboriginal and other Australians. The problem also extends to how we treat young children.

Until recently, Australia locked up children in conditions that caused many of them to become mentally ill. It seems unthinkable that this could have occurred, yet it did. The problem was the law, which said that the detention of people seeking asylum in Australia was mandatory. That law was applied without exception, even to unaccompanied children already suffering trauma.

... 

The statistics make for grim reading. According to the Human Rights and Equal Opportunity Commission, the number of children in immigration detention peaked at 1,923 over 2000 to 2001. By the end of 2003, a child placed in detention was kept there on average of one year, eight months and eleven days. Some children were detained for more than three years. Almost all of the detained children were found to be refugees and so were eventually released into the community.

The detention of children occurred under an Australian law introduced in 1992 by the Keating government and continued after John Howard became Prime Minister. In other nations, it would have been counter-balanced by a bill or charter of rights.

Australia is now the only democratic nation in the world without this human rights protection, and so the Australian immigration law went unchecked. In fact, when the immigration law was challenged in the courts it was held to be legally unobjectionable.

The High Court of Australia upheld the detention of children in 2004. Another case that year went further, finding that detention remains lawful even where the conditions are harsh or inhumane.

A final High Court decision added that the detention could be indefinite. As an adult, Ahmed Al-Kateb had arrived in Australia by boat in December 2000 without a passport or visa. Taken into detention under the Migration Act, he sought refugee status but was refused. After eighteen months in detention he asked to be deported.
However, Al-Kateb was born in Kuwait of Palestinian parents and the absence of a Palestinian nation left him 'stateless'. The Commonwealth sought unsuccessfully to remove him to Egypt, Jordan, Kuwait and Syria as well as to Palestinian territories.

Faced with this stalemate and no foreseeable end to his detention, Al-Kateb applied to the courts for his release. In nations like the United Kingdom and the United States, judges have found that the law does not permit indefinite detention. Nevertheless, the Australian High Court found by four to three that the Migration Act and the Constitution permit just this.

One of the majority judges, Justice Michael McHugh, conceded that Al-Kateb's situation was 'tragic'. He also noted that 'Eminent lawyers who have studied the question firmly believe that the Australian Constitution should contain a Bill of Rights.' But, in the absence of such a law, he found that 'the justice or wisdom of the course taken by the parliament is not examinable in this or any other domestic court' since 'it is not for courts... to determine whether the course taken by Parliament is unjust or contrary to basic human rights.'

With these words, Justice McHugh spelt out what it means for Australia not to have a charter or bill of rights. Without this instrument, there may be no check on laws that violate even the most basic of our freedoms.

Professor Irving has taken an alternative perspective. In a chapter published in a 2009 collection, she set out some of her reasons:

... 

No reasonable person can object to the protection of rights. Those who question the Bill of Rights agenda are rarely contemptuous of rights, or of the law, or the integrity of the judiciary or the judicial system. Most are concerned, rather, about the best means of protecting rights. The central issue is whether the best means revolves around judicial review.

...

A system such as Australia’s involves three arms of government. Each plays its part in balancing diverse and conflicting interests, in maintaining and protecting our fundamental institutional structures, in developing our standards and values, and in preventing the other arms of government from accumulating or monopolizing power. The problem does not lie in the grasping (or even willing) over-reach of judges. It lies in misconstruing the separation of powers. It lies in what Bills of Rights ask judges to do.

Judges do not wantonly strike down laws in the course of judicial review. Legislation is rarely ruled unconstitutional. People outside the legal profession are likely to be surprised, even disappointed, to learn this. Indeed, one of the first problems with proposals for Bills of Rights is their tendency to create false expectations on the part of those who are not familiar with judicial history. This was evident in the deliberative poll forums prior to the adoption of the ACT’s Human Rights Act, and in many other public forums on this question. There is a common, and popular perception that individual grievances can be simply redressed through access to the
courts, and that claims that rights have been breached will invariably be vindicated. The record is that challenges to the validity of laws fail just as often as, if not more often than they succeed.

... The objection is not to laws protecting rights, but to a Bill (or other type of legal instrument) according to which the validity of the laws, as such, can be challenged. Australia is far from deficient in rights. This is a range of rights-bearing Commonwealth legislation; for example, the Racial Discrimination Act 1975; the Ombudsman Act 1976; the Freedom of Information Act 1982; the Sex Discrimination Act 1984; the HREOC Act 1986, among many others. These have counterparts in State laws. Australia has a robust common law, and a network of administrative review tribunals.

Australia’s record in protecting rights goes beyond the legal sphere. This is commonly overlooked in debates about the merits of a Bill of Rights. A strong democracy and an active civil society are critical in the protection of rights and freedoms. Australia has a democratic political culture, along with practices and institutions that support it. It has a complex democratic infrastructure. To give one example, the Australian Electoral Commission performs numerous democratic functions, including public education. Australia’s long-standing system of compulsory voting serves not only to ensure that a genuine majority records its voice at election time. It also requires governments to make active provision for exercising the vote, creating maximum opportunities for every eligible person (including the homeless, those in remote communities, in hospitals, and even prisons) to cast a vote. Our parliaments have a complex committee system. The Senate Scrutiny of Bills Committee, for example, assesses and regularly reports on proposed legislation with respect to, among other things, whether bills “trespass unduly on personal rights and liberties”; “make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers”; or “make rights, liberties or obligations unduly dependent upon non-reviewable decisions”. Other standing and select parliamentary committees conduct inquiries into the status of rights protection more broadly...

In many of these legal and political initiatives, Australia has been a pioneer. Australians did not feel uncomfortable standing alone, or with few companions in the common law or democratic world, when these initiatives were first adopted. Our record is not perfect, but it is far from the stark picture that is conveyed in the claim that Australia, alone among democratic countries, lacks a Bill of Rights.

... People are fearful – quite reasonably at times – of the potential for erosion unless rights are protected from alteration. This very goal, however, may have perverse effects, taking the struggle for rights out of the political realm, making it uni-dimensional and uni-directional, encouraging the disadvantaged to think primarily in terms of legal avenues for redress. These avenues are costly and uncertain. The vesting of policy, especially with resource implications, in the judiciary is certain to politicize the judicial arm of government. The “dialogic” process [based on the UK, Victorian and ACT models, and favoured by many advocates in Australia] has the potential for creating antagonism between the judiciary and the government, as much as – perhaps even more than – constructive exchange. If so, it cannot fail to have a corrosive effect upon the independence of the judiciary.

That Australia is unique in not having a Bill is held up by proponents as a defect, even a matter
for shame. But unless and until Australia’s record in protecting rights is manifestly and consistently weaker than in other comparable countries, there is no cause for shame. Currently we have a robust, complex system of rights protection, and an effective separation of powers. We should work on improving them, not supplanting them.