PLAYING IT SAFE

How the Supreme Court Sidesteps Hard Cases and Stunts the Development of Law

LISA A. KLOPPENBERG

Playing It Safe

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To my spouse and best friend, Mark Zunich; to our wonderful children, Nicholas, Timothy, and Kellen; and to my loving parents, Ed and Angie Kloppenberg. "I thank my God upon every remembrance of you."

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Introduction

Courts frequently go out of their way to avoid deciding important and controversial constitutional issues. The U.S. Supreme Court (the "Court" or "Supreme Court") does so quite frequently, using a variety of strategies to dodge contentious issues. This book describes some of those "avoidance" strategies and the costs they impose on litigants and others seeking constitutional interpretation. Judges sometimes lean on avoidance strategies to protect courts from charges of judicial activism. This book argues that the Court has often invoked avoidance techniques in what it calls "socially sensitive" cases, when litigants challenge such things as racial and ethnic discrimination, gender inequalities, abortion restrictions, sexual orientation discrimination, or environmental abuses. In such cases, courts should provide a check on the more politically responsive branches of government. Litigants must sometimes bring issues to courts precisely because legislative or executive officials have ducked a controversy for fear of retaliation at the polls. When judges avoid judicial review of the most politically and socially controversial issues, they evade their constitutional responsibility.

Moreover, when courts only provide the check of judicial review selectively, they do not provide justice evenhandedly. The Court has not invoked the avoidance doctrine consistently. It alternatively employs—or ignores—avoidance to achieve particular substantive outcomes. The Rehnquist Court has ignored avoidance dictates in order to strengthen the protection afforded states under federalism, while it has used avoidance concerns to bar lawsuits claiming redress for widely shared discrimination and environmental degradation. In many cases, the Court has refused to expand the Warren Court's constitutional vision and has been deferential to state courts, even when a state court's construction of state law might conflict with a federal constitutional claim. But in the lawsuits challenging the Florida vote count in the 2000 presidential election, the states' rights majority readily disregarded the usual deference techniques.

Instead, it leapt into the political process to challenge the Florida Supreme Court's interpretation of Florida law as that Court issued rulings favorable to Vice President Al Gore; the Court created new federal constitutional protections, drawing on Warren Court precedents; and it issued orders affecting the timing of vote counts which ensured Governor George W. Bush the presidency. Although the *Bush v. Gore* dissenters remained fairly consistent with their earlier opinions in arguing for avoidance by the Court, several justices reversed their usual substantive positions, echoing the states' rights incantations of their colleagues in opposition to federal constitutional claims. The split decision on a highly politicized issue exposed the hypocrisy in the justices' use of avoidance. The Court could have cloaked itself in ample avoidance precedent and retreated to the sidelines, letting the political processes in Florida and Congress proceed.

The adage that federal courts should avoid "unnecessary" constitutional issues is not new. It has long shaped the Court's construction of the proper role of federal courts, even though many people believe the Court should provide guidance about the Constitution to encourage its uniform application and keep it meaningful as our society evolves. Some New Deal justices—responding to the activism of the conservative Court during the *Lochner* era—praised avoidance techniques to promote deference to Congress and the executive branch and to protect the Court from political pressure. As the Warren Court expanded constitutional rights, conservative judges and scholars heralded avoidance as a foundational rule of judicial restraint. Since 1970, the Court has augmented the array of avoidance devices and used them extensively. When conservative justices constituted the Court's majority in recent years, many liberals and moderates urged avoidance. Currently, the Court's most liberal or moderate members—including justices Ruth Bader Ginsburg, Sandra Day O'Connor and John Paul Stevens—often advocate avoidance, while its most vocal conservative, Justice Antonin Scalia, usually criticizes avoidance.

Although many courts employ avoidance techniques, this book focuses on the Supreme Court because it acts as a model for all courts in the federal system by defining the appropriate role of federal courts. Moreover, state courts often look to the Court for guidance on federal constitutional issues. Avoidance is sometimes a necessary tool on multi-judge courts to reach consensus. It provides flexibility for judges who cannot completely control their docket or the presentation of issues in

our litigant-driven system. It allows judges to choose among relevant constitutional issues in civil liberties cases.[1] Additionally, the Court simply cannot hear all the cases brought to it and must act strategically in using its limited resources.[2] While some avoidance is justified for these reasons, the Court at times also uses less convincing reasons to avoid decision making. Briefly, the Court predicates its avoidance doctrine on the separation of powers principle (respecting the powers of other federal branches); federalism concerns (respecting the powers of the states); the Court's political viability; the final and delicate nature of judicial review; and the overriding importance of constitutional adjudication.[3]

The justifications for avoidance are analyzed in detail through the narratives in each chapter. Federalism and separation of powers arguments figure prominently, as the Court emphasizes promoting deference to other constitutional actors. But the Court often exaggerates the deference granted or other actors simply refuse the Court's invitation to participate in shaping constitutional law. The deference rationales implicate a complex political and legal interchange which does not always match the Court's idealistic reliance on abstract theories of governance.

In general, the other rationales for avoidance are even less persuasive than the deference rationales. The importance of constitutional issues is not a valid reason for the Supreme Court to avoid them. Precisely because the issues are so critical, the Court should provide reasoned elaboration, even if that reveals dissension among the justices. Such disagreement about what the Constitution means is a healthy part of the adversarial system and fosters the development of robust theories and careful applications of the Constitution. Appellate courts provide an important check on other government and private actors in construing the Constitution. Fears that their rulings will completely foreclose others from constitutional dialogue are often exaggerated. Moreover, the Court's concern for its own political viability—its credibility and reputation—is also shortsighted. The Court is a respected institution which will endure even if it decides controversial issues properly before it.[4] And the Court is well situated to address some of those issues when politicians are reluctant to do so, as explored in the cases profiled below. Finally, judicial review should be viewed through a long-term lens, in which constitutional adjudication and responsive debate are fruitful avenues to keep the Constitution meaningful over time. Heightened concern for avoidance of judicial review too often skews constitutional interpretation in favor of the status quo and powerful majorities.

This book concentrates primarily on constitutional challenges that reached the Supreme Court but were not reviewed on the merits, profiling some litigants' stories to demonstrate the costs of avoidance. Although some critical denials of certiorari are briefly explored in conjunction with the Court's heavy use of other avoidance techniques in specific areas such as affirmative action, this book does not examine in detail the "cert denial" process. That process is an extremely important avoidance tool, which the Court uses for sheer practicality and to shape the substance of its docket. The justices' strategic use of cert denials is an intriguing area that has been explored in depth by others.[5] A few general observations about the Court's cert denial practices, however, are worthy of note. Under jurisdictional rules provided by Congress, the Court has had more control in choosing which cases to hear since 1988. The numbers have climbed from four thousand cert petitions per year in the early 1980s to over seven thousand petitions at the close of the 1990s. In that time, the Court has decreased the cases it has accepted, from about 150 cases per year to about 100, issuing written opinions in only about 75 cases. The Court has compensated for this lessened production somewhat by increasing its practice of granting cert and then remanding for reconsideration in light of its intervening precedent or another development.[6] But the current Court clearly does not accept many important conflicts among lower courts in interpreting federal statutory and constitutional questions. This lack of guidance leads to frustrations among lawyers, clients, lower court judges, and others who must interpret federal law.[7]

Additionally, this study of avoidance is not a thorough empirical review of cases heard by the Court in which avoidance techniques arise. Within the large group of constitutional challenges the Court accepts for review, this book is selective, focusing on civil liberties areas in which the Burger and Rehnquist Courts have frequently and explicitly discussed avoidance strategies and justifications. Even within that sphere, the book does not cover protections for criminal defendants or death penalty cases, First Amendment speech and religion challenges, or regulatory "takings" that harm individuals and small businesses, although inconsistent avoidance rulings abound in those areas. For example, while the Court has avoided some Establishment Clause claims, it contorted its usual procedural approach to hear one particular challenge in the 1990s. A federally funded New York City education program sent public school teachers to parochial schools to provide remedial education to students

irrespective of religion. New York's approach was deemed by the Court to be excessive entanglement of church and state. Two years later the Court reversed its thinking, bypassing procedural concerns regulating Establishment Clause jurisprudence, and ruling in favor of local governmental control.[8] In cases in which the government targets unpopular speech, the Court has frequently used avoidance to construe laws narrowly without directly condemning them as a First Amendment infringement.[9] In the criminal procedure area, the Court has used avoidance to backtrack from precedents affording defendants greater constitutional protection.[10] Although all constitutional areas are not explored, the areas canvassed in *Playing It Safe* offer a fairly representative picture of the Court's avoidance techniques, yielding insights and critical commentary about the Court's reasons for avoiding socially sensitive cases.

This book will describe how the Court avoids controversial cases and trace the Court's expansion of avoidance strategies in particular areas of constitutional law from the 1970s through the 1990s. A variety of examples will be canvassed to argue that regardless of whether judges are politically liberal or conservative, reflexive use of avoidance poses dangers. First, however, review of an older avoidance controversy exemplifies how the Court sometimes bows to political or "face saving" reasons for avoidance or emphasizes vague federalism concerns to deflect an issue.[11] This story also demonstrates the real-life effects of avoidance, including extensive delay, increased financial costs, potential deprivation of rights, and lack of guidance from the Court on critical issues. Avoidance imposes costs not only on the litigants, but on our whole polity by stultifying and dispersing the development of constitutional law. Contrasting that example with the Court's approach to the presidential election contest of 2000 exposes how justices can manipulate avoidance techniques in a result-driven manner.

The Case of the Pullman Porters

In 1941, the Supreme Court heard a case on racially segregated employment conditions brought by railroad companies, a company that employed porters, and a porters' union against the Texas Railroad Commission.[12] The Commission had issued a statewide order that sleeping cars, typically operated by black porters who earned lower wages than white male conductors, could not be operated without conductors. Blacks were

excluded from employment as conductors. Two groups of railroad employees lined up on opposite sides of the case along racial lines: the black Pullman porters supported the railroads, while the white conductors supported the Commission. Plaintiffs charged that the order violated state law and federal law, including the Commerce Clause and Due Process. The porters argued that the Fourteenth Amendment, enacted after the Civil War, prohibited racial segregation. The Commission defended the segregation order in part because of its concerns for the safety of "white girls" in the sleeping cars. The porters responded that, as a group, they were "pretty high-classed colored men" who could be trusted. The Court, as courts often do, suppressed the race, class, and gender tensions in its description of the dispute.[13] The Court's approach in many disputes involving socially or politically divisive cases continues to be one of suppression and avoidance of these difficult issues, a stance that serves to strengthen the perception of intractability.

When the federal trial court blocked its order, the Commission appealed directly to the Supreme Court. The Court acknowledged that the railroads and the porters raised a valid federal constitutional claim; indeed, the Court called it "more than substantial." But the Court sent the railroads and porters back to start the lawsuit over again in the state courts of Texas. This was unusual because these plaintiffs had selected the federal court system initially, and the federal courts clearly had jurisdiction to hear the dispute. Generally, if a lawsuit meets the jurisdictional requirements so that it can be filed in either state or federal court, the plaintiff gets to choose which court system to use. While federal courts are courts of limited jurisdiction, they have a complementary duty to hear cases over which they do have jurisdiction.[14] The Court instead invented a new procedural tool to rid itself of the case—a doctrine that has become known as *Pullman* abstention—because it was concerned about the ramifications of deciding the dispute on the merits.

The *Pullman* Court said that the segregation dispute touched a "sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open." The Court hoped that the sensitive racial issue could be avoided if the state courts relied on state law to find that the Commission had no authority to issue orders implicating conditions of employment. However, the federal trial judge had already concluded that the Commission had not abused its broad powers under Texas law. The Supreme Court hoped for a contrary interpretation by the Texas courts. State courts have more authority than federal courts,

including the Supreme Court, on state law issues. If the Texas state courts agreed with the lower federal court about the Commission's authority to regulate railroad employees, the Supreme Court offered that plaintiffs could return to the federal courts for decision of the federal constitutional claims. Then the Supreme Court would have to face those issues, but it was willing to do so only as a last resort.

The Court justified its avoidance in *Pullman* by relying on the need to promote harmony between federal and state law, as well as between federal and state government systems. "Few public interests have a higher claim upon the discretion of a federal [court] than the avoidance of needless friction with state policies." But what if the friction is due to a conflict between the Texas Commission's segregation order and Equal Protection principles? Surely national norms of nondiscrimination should trump local norms. Admittedly, it is easy to criticize the Court in hindsight. Maybe the Court's circuitous abstention procedure actually kept the chance for victory alive for the plaintiffs because the Supreme Court might not have ruled for them had it reached the merits. After all, the country was in the midst of war in 1941 and the U.S. military was still segregated. Segregation was rampant in many states and at the federal level. The "separate but equal" doctrine, created by the Court in 1896, was still good law; indeed, the NAACP was just beginning to achieve some success in challenging this doctrine by focusing on actual inequalities for blacks in education and other settings.

But the Court's backhanded deflection of this important equality issue through jurisdictional technicalities is disingenuous. *Pullman* presented an excellent opportunity for the Court to develop, rather than avoid, constitutional law. Even if the Court ruled against plaintiffs, a vigorous dissent could sow the seeds for constitutional change. A ringing condemnation of racism—from a majority or dissenting justice—would have met substantial resistance, but it also would have made an important symbolic and moral contribution to constitutional law and potentially advanced integration efforts.

The policy of avoiding socially sensitive issues lingered as the Court considered other challenges to segregation. In the early 1950s, the Court delayed issuing its equality ruling in *Brown v. Board of Education* for several terms. When law clerks questioned him about the delay, Justice Frankfurter—a strong advocate of avoidance through jurisdictional doctrines—responded: "Why, don't you understand that a social revolution is involved in the decision of that case? Do you want us to come down

with it in an election year?"[15] In *Brown*, the Court noted that earlier, quite narrow rulings had not required it to reexamine the separate but equal doctrine to grant relief to the black plaintiffs. It then announced that separate but equal has no place in public education. The Court was undoubtedly spurred to revise federal equality law by international Cold War political pressure.[16] Twenty years later, during the 1970s, the Court repeatedly avoided explosive constitutional issues regarding the Vietnam conflict. For example, the Court found that plaintiffs had no standing to bring one claim of constitutional harm shared by all members of the public.[17] Concern over public receptivity to Court opinions still haunts some justices, as they struggle with difficult issues like sexual-orientation discrimination in the military and gender discrimination in the workforce related to women's reproductive capacity.

The Court is not consistent in how it employs the malleable avoidance techniques. They are a striking example of the Court's failure to live up to ideals of neutrality.[18] The *Pullman* ruling ignored other precedent which allowed the Court to decide for itself the state law issue presented or proceed based on the lower federal court's interpretation of state law.[19] Subsequently, the Court allowed litigants to press only federal constitutional claims if they so chose, depriving the Court of using nonconstitutional grounds to support its ruling.[20] In other cases, the Court contorts statutes or parses claims to avoid difficult constitutional questions. When the Court avoids, it chooses to retain the status quo in constitutional law without justifying why reducing friction, or other justifications for avoidance, are more weighty than exploring the constitutional question on its merits.

Moreover, the *Pullman* Court created a new procedure which required the parties to spend extra time and money to litigate another lawsuit in the state courts. All the parties must have been frustrated with the ruling, particularly the plaintiffs who had prevailed below. The Court's deflection of this important equality issue in an arduous and costly way teaches other plaintiffs not to expect constitutional rulings on socially sensitive issues from the federal courts. Further, the deference afforded Texas law and Texas courts is quite questionable. Because state courts have the last word on state law issues, they can easily correct erroneous interpretations of state law. *Pullman* abstention is partly about federal courts "saving face" by avoiding such errors in the first place. As with many avoidance techniques, this one centers on institutional concerns of the federal courts and reflects little sympathy for the costs and delay imposed on the parties and others awaiting constitutional guidance. Justice William Dou-

glas, a member of the *Pullman* majority, later said of the abstention device, "If I had realized the creature it was to become, my doubts would have been far deeper than they were." He termed it a "legal research luxury" which was unfair to parties and did not promote justice. "Time has a particularly noxious effect on explosive civil rights questions, where the problem only festers as grievances pile high and the law takes its slow, expensive pace to decide in years what should be decided promptly."[21]

Bush v. Gore: *The 2000 Presidential Election*

The Court's speedy and decisive involvement in the 2000 presidential election and its willingness to create new law in the midst of the "political thicket" stand in sharp contrast to *Pullman* and its progeny. With the extremely close popular vote in Florida and the Electoral College vote looming, Florida began recounting some ballots. Republican candidate Bush appealed a Florida Supreme Court ruling which allowed more extensive recounts and thus favored Democratic candidate Gore.[22] The U.S. Supreme Court agreed to review the federal statutory and constitutional claims, although it was not required to do so. On an expedited schedule and after oral arguments showed disagreements among the justices, the Court issued a brief opinion vacating the Florida ruling and asking the Florida court to clarify the grounds for extending the deadline for certifying election tallies. The Court sought illumination as to how the Florida court's construction of state statutory and constitutional law interacted with federal law. This first ruling was quite consistent with the *Pullman* approach and more recent precedent instructing federal courts, out of respect for states, to seek clarification from state courts in such circumstances. This step may have been the only common ground the justices could find and they may have been wary of how a split decision from the Court would affect the credibility of the election result as well as the Court's own institutional credibility.

Upon remand, the Florida Supreme Court expanded on its reasoning quickly and reiterated that the recounts should proceed. Again, the U.S. Supreme Court agreed to hear the case expeditiously, although it could have declined review. It stayed the Florida decision, stopping the vote counts. In a statement accompanying the stay, Justice Scalia asserted that counting votes which may not ultimately count as "legal votes" under Florida law threatened irreparable harm to Bush, "and to the country, by

casting a cloud upon what he claims to be the legitimacy of his election. Count first, and rule on the legality afterwards, is not a recipe for producing election results that have the public acceptance democratic stability requires." The Court thus evinced concern for preventing embarrassment for Bush in the event that Gore received a majority of the vote in Florida as the recounts in heavily Democratic counties continued. In dissent to the granting of the stay, Justice Stevens argued:

> Counting every legal vote cannot constitute irreparable harm. On the other hand, there is danger that a stay may cause irreparable harm to [Gore] and, more importantly, to the public at large—because of the risk that "the entry of the stay would be tantamount to a decision on the merits in favor of [Bush]." Preventing the recount from being completed will inevitably cast a cloud on the legitimacy of the election.

Although he identified some constitutional problems in the recounts when the Court proceeded to examine the merits of Bush's claims, Justice David Souter said, "If this Court had allowed the State to follow the course indicated by the opinions of its own Supreme Court, it is entirely possible that there would ultimately have been no issue requiring our review, and political tension could have worked itself out in the Congress."

After further argument, the Court issued a per curiam ruling (an unusual label for one which is neither brief nor unanimous). Identifying a need for more uniform standards among Florida counties for the recount, the Court created new Equal Protection and Due Process law. The Court drew on general principles identified in Warren Court voting precedents designed to redress disenfranchisement of African Americans. This is ironic given the claims of some African American voters that, in the absence of recounts, their votes for Gore would be undercounted or excluded by Republicans running the Florida election processes and that the Florida court's orders had helped address this discrimination. Dissenting, Justice Stevens emphasized that, despite the Warren Court rulings, "we have never before called into question the substantive standard by which a State determines that a vote has been legally cast." But the majority made clear that it was announcing a limited remedy, not a broad new protection available to voters in many other state and local elections. In a concurring opinion, the Chief Justice and two other conservatives emphasized that this was a rare instance of federal court intervention in state law and state election processes, justified because of the unique national importance of a presidential election.

Having established a new standard, the Court concluded that there was insufficient time for Florida to conduct a proper recount consistent with that standard. Although seven justices found the Florida process to have at least potential constitutional difficulties, the Court split 5-4 on whether additional time for recounting remained. Of course, the timing problem was exacerbated by the stay of the recount issued by the Court three days previously. Additionally, some dissenters claimed that the Court arbitrarily imposed the December 12 date—the same date its opinion issued—as the final deadline. The law, for example, provides a date two weeks past December 12 on which Congress shall request a state's electoral returns if they are not already received. The dissenters also said the Court should have left the recount feasibility determination to those in Florida more familiar with the practical realities, giving the state a chance to comply with the new standard. Justice Ginsburg termed the timing bar "a prophecy the court's own judgment will not allow to be tested." The unnecessary timing conclusion, on top of the stay, contributed to perceptions that the Court was driven by results—getting Bush elected—or by the political concerns of ensuring finality to the election and legitimacy for the new president. By December, some citizens were anxious for closure and worried about the impact of lingering election uncertainty on financial markets.

The Court's opinion was astonishing and inconsistent with precedent in several ways. First, the Court created new federal constitutional protections governing state electoral processes. In doing so, the justices on both sides reversed their usual constitutional positions. Several of the more liberal dissenters, who generally believe in a vigorous role for federal law, argued for state autonomy in the face of federal constitutional claims. The most conservative justices, who are generally strong advocates for states' rights, identified a new national interest justifying a national standard that trumps state autonomy. Thus, both sides appeared driven to some extent by their political rather than their jurisprudential preferences. Perhaps new law and Supreme Court leadership were needed. There were serious problems in Florida's process. The Court reported that under Broward County's standard, almost three times as many new votes were uncovered there as in Palm Beach County. Results varied depending on whether hand counts or machine tallies were used. Partial totals were included for Miami-Dade. The Court waded surprisingly deeply into the details of recount procedures, finding the Florida court's failure to specify who would recount the ballots problematic and

expressing concern over the role of observers. Throughout this book, I urge the Court to avoid less and offer more guidance on constitutional law, exposing its divisions and spurring the development of constitutional dialogue. *Bush v. Gore* offers new Equal Protection law, but the Court made clear that its impact is limited; intervention by federal courts is appropriate only in elections of great national importance. It is unclear whether lower courts should apply the new standard to address some of the nationwide voting problems cited by the per curiam opinion, including disparate counting standards and punch card vagaries. The import of the ruling for uniform national practices is not obvious because the opinions can also be read as an anomalous intervention by the high Court in a time of national crisis.

The second startling part of the Court's activity was its willingness to confront, rather than avoid, a divisive political issue. The Court could have simply refused to hear the challenges and let the political processes in Florida and in Congress proceed. Drawing on its avoidance precedents, the Court had several options. It could have deferred to the Florida Supreme Court's interpretation of Florida law. Oddly, the per curiam opinion finds it unnecessary to address one question in resolving the Equal Protection challenge: Did the Florida court have authority, under state law, to define what constitutes a legal vote and mandate the recount? If the Court had considered this question first, it might have extricated itself from the case, as it did in *Pullman*. If the Florida court lacked this authority, the case could have been returned to Florida and other Florida officials could have proceeded with vote definition and recount decisions. The Court could have avoided handing down its new Equal Protection doctrine with its serious federalism consequences. On the other hand, if the Florida court did have authority to define a legal vote and order recounts, but erred in exercising that authority, the Court could proceed to the Equal Protection question: Was the recount sufficiently fair so that each vote was treated equally? Justice Stevens concluded that a distrust of the impartiality of the Florida justices must underlie the Bush challenge and that the Court (largely Republican appointees) lent credence to that position by concluding that the Florida justices (all Democratic appointees) unacceptably rewrote Florida law. In contrast, some dissenters protested that the Florida justices reasonably interpreted Florida law, acting within acceptable judicial bounds. Perhaps the Court was so disturbed by the Florida law interpretation—and how it might be influenced by politics—that it ignored the dictates of avoidance.

Justice Ginsburg's dissent focused primarily on avoidance and respect for the states, citing the "cautious approach" the Court often prescribes when federal courts review federal claims intertwined with state law issues. Justice Stephen Breyer found the ruling driven primarily by political rather than legal issues: "Of course, the selection of the President is of fundamental national importance. But that importance is political, not legal. And this Court should resist the temptation unnecessarily to resolve tangential legal disputes, where doing so threatens to determine the outcome of the election." Breyer quoted a classic line from Justice Louis Brandeis, advocating avoidance by the Supreme Court: "The most important thing we do is not doing." He concluded that the Bush challenge offered no compelling reason to rush in, and warned of damage to the Court from a split, highly political decision.

This book urges the Court to rely less on avoidance, to employ avoidance techniques more consistently, and to provide overt explanations and assessments of the costs and benefits of avoidance. *Bush v. Gore* is troubling in part because of the Court's longstanding hesitancy to enter into electoral politics and the lack of compelling reasons for a departure in this instance. There is a striking dissonance between the Court's willingness to address Bush's claims on the merits and its unwillingness to address other types of claims for other claimants. In evaluating avoidance, it is always difficult to separate our opinions about the procedural device from our views on the substantive outcome. I hoped Gore would win the election, so it is easy to see the Court's interference as unjustified. But even if the Court had intervened to help my candidate win, avoidance would be more appropriate. Avoidance is more justified here because the ruling concerned the electoral process and the challenges did not involve minority interests inadequately protected in the political process. Indeed, the Florida rulings were supported by some because they could help prevent discrimination against minorities by allowing more extensive recounts. Generally, I urge the Court to avoid less because it can advance guidance, development and greater uniformity in federal constitutional law through its rulings. Here, however, the Court created new law and simultaneously attempted to confine its national import, apparently not authorizing other courts to apply the federal law to more closely supervise state electoral processes. The Court could have avoided its ruling in *Bush v. Gore* with a clear conscience under its avoidance precedents and with better justifications for avoidance than it can produce for most other cases in this book.

Defending the Court's intervention in the election as not unprecedented, a former solicitor general from a conservative Republican administration cited Warren Court precedents. This is an incongruous tribute, given the many attacks by conservatives on what they deem the inappropriate activism of that Court. The *Bush v. Gore* Court, anticipating accusations of judicial activism, concluded the per curiam opinion on a less conventional note:

> None are more conscious of the vital limits on judicial authority than are the members of this Court, and none stand more in admiration of the Constitution's design to leave the selection of the President to the people, through the legislatures, and to the political sphere. When contending parties invoke the process of the courts, however, it becomes our unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront.

The Court seems to protest too much. In many other cases, the fact that litigants present an important constitutional issue or national interest is not deemed sufficient to compel a ruling on the merits. As this book shows, the Court has often refused to hear constitutional claims, using multiple avoidance techniques, in an attempt to play it safe.

Many judges and some scholars approve of avoidance because it encourages many constitutional interpretations by various states, localities, and others. It supposedly prevents foreclosure by the Court because the "lawsaying" power is shared broadly. In reviewing specific civil liberties cases, this book challenges some of those assertions, arguing both that foreclosure claims are overstated and that too much avoidance deprives us of constitutional interpretation and causes us to lose the important contributions of federal judges—particularly those on appellate courts—in construing the Constitution.

The avoidance doctrine encompasses many devices, which are often arcane and technical. Rather than supplying a dense compendium of avoidance mechanisms at the outset, each avoidance tool is explored in the context of specific cases, animating how it affects litigants and constitutional law through concrete examples. This book looks at the justiciability doctrines of standing, mootness, and ripeness, limiting the types of controversies that federal courts will hear under Article III. In cases brought by environmentalists, the Court has often used standing to bar challenges to government and private activity detrimental to the environ-

ment or species. Yet the Court has allowed challenges by ranchers to government activity protecting the environment or species. In cases brought by racial minorities challenging governmental discrimination, the Court frequently has termed the injuries too speculative to support standing. In contrast, the Court allows "reverse discrimination" claims readily in the affirmative action and racial redistricting challenges. Inconsistent ripeness and mootness rulings similarly abound in the Court's treatment of privacy and equality claims.

Through the avoidance tool of measured steps, the Court issues narrow or piecemeal rulings constricting the development of law in cases raising race and gender discrimination. Certainly, observers vary greatly on whether to characterize a particular decision as narrow or broad, as the debates among justices about this avoidance rule reveal. Their perceptions are often linked to what they think about the merits of the dispute. Although the Court could provide fuller guidance by accepting fewer cases and explicating its analysis thoroughly, the current Court instead accepts fewer cases and frequently relies on narrow rulings which do not provide robust reasoning or precedent helpful in analogous situations. Avoidance also instructs federal courts to rule on a statutory or state law ground when possible or to certify issues to state courts. Courts use the avoidance canon to construe statutes or direct democracy initiatives to avoid serious constitutional problems they pose, although this often conflicts with a broader interpretation supported by many voters and a commonsense reading of the law. When using the avoidance canon, a court expresses its "serious doubts" about the law only at a quasi-constitutional level. Finally, avoidance encompasses the many abstention doctrines like *Pullman* created by the Court to refrain from deciding cases even when Congress has conferred jurisdiction.

Playing It Safe criticizes both the extent of the Court's avoidance and its inconsistent application of avoidance strategies. While the Court avoids developing certain areas of constitutional law, it expends valuable resources heightening structural areas like federalism and separation of powers. The Rehnquist Court actively shields states from liability and national oversight, while curtailing the power of the national branches to resolve national problems like gender-based violence. The Court aggressively enhances standing requirements to limit the types of cases brought to federal courts. In sum, the Court has alternatively invoked avoidance and aggressive constitutional interpretation to solidify its vision of a limited role for federal courts in developing constitutional law, particularly

when it perceives federalism concerns. The Court more readily protects states, who exert great power at the state government level and who are well represented in federal politics through the electoral process and in Congress, while it often neglects the interests of the less powerful through avoidance. Courts should articulate fair and important reasons before they avoid important constitutional questions, even in politically sensitive situations, so as not to encourage more societal discrimination on the basis of race, ethnicity, gender, class, sexual orientation, radical speech, or membership in an unpopular group like a minority religion. Fuller and less selective participation by the Court on constitutional issues would better inform a long-term constitutional dialogue and, to the extent justices deemed them unconstitutional, serve as a constitutional check on temporary or local majoritarian impulses.

1

The Court Avoids Scrutinizing "Official English" Mandate

Maria-Kelly Yniguez frequently spoke both Spanish and English as an insurance claims manager for the state of Arizona. She managed medical malpractice claims filed against state hospitals, interviewing claimants about their injuries, explaining state compensation policies, and drafting settlement documents in both languages to ensure that claimants understood the ramifications of their signatures. In 1988, Arizonans by a one percent margin passed an initiative amending their state constitution to declare English the official state language. After the election, Ms. Yniguez stopped using Spanish with her clients, because she and other Arizona employees feared discipline. She was offended by the new law and worried that it would prevent her from doing her job effectively. She felt concerned for monolingual and bilingual persons who would be unable to communicate effectively with her and other governmental employees. Ms. Yniguez was born in Arizona and her parents were Mexican. As a Latina, she felt that she could express important ideas and emotions more vividly in Spanish. Spanish was also part of her cultural heritage, which fostered a sense of community and government accessibility for Spanish speakers as they processed their malpractice claims.[1]

Maria-Kelly Yniguez brought the first challenge to the constitutional amendment in federal court, alleging that the law violated the First Amendment, Equal Protection, and a federal civil rights statute.[2] The law was put on hold while the case proceeded. Ms. Yniguez had never been a civil rights activist, yet she knew there might be a downside to filing suit. Shortly after she sued, someone shot out the windows on her daughter's car one night while it was parked in the family driveway. She also received dozens of mean-spirited letters and calls telling her to "go back to Mexico."[3]

The Importance of the English-Only Challenge

The *Yniguez* litigation was monitored around the country by the media, politicians, academics, civil rights activists, supporters and opponents of the English-Only movement, state officers and employees, and members of the public. The initiative's primary sponsor, Arizonans for Official English ("AOE"), was led by a retired federal immigration agent. The campaign was financed by U.S. English, the oldest advocacy group for English-Only laws, with more than 1 million members nationwide. The Arizona measure went further than previous symbolic measures in other states had gone, requiring state and local governments to conduct business in English. It contained a few exceptions. Languages other than English could be spoken to educate foreign-language students, to protect the rights of criminal defendants, to protect public health and safety, and to comply with federal law. Other English-Only laws were often more symbolic, reaching far fewer conversations and persons. For example, some of these laws required official documents to be written in English. Although Arizona's English-Only law was the most restrictive,[4] many states or localities faced similar proposals or had recently enacted English-Only laws. Laws imposing or encouraging a common language are not new in the United States, and the English-Only issue reemerged in the 1980s, particularly in areas with many Spanish-speaking persons.[5] By 1997, over twenty states and forty municipalities had laws that made English the official state language. Between 1970 and 1990, the Latino population of the United States more than doubled, while the Asian population quadrupled. Latinos will be the largest minority group early in the twenty-first century. According to the 1990 census, nearly 32 million people communicated in a language other than English and more than half of these persons spoke Spanish.

The national importance of the English-Only issue was demonstrated by the unusually large number and tone of amicus briefs filed by many persons, politicians, and organizations when the Supreme Court agreed to hear the case. (Such "friend of the court" briefs are filed by persons or groups with a strong interest in the subject matter of a case who are not parties. Amicus briefs are often filed in appellate courts on matters of broad public interest.) Civil rights groups warned the Court that the stakes extended far beyond language choice. Resolution of constitutional questions surrounding English-Only laws might have legal and political significance for related controversies such as bilingual education, restric-

tions on immigration, and affirmative action. Civil rights briefs warned the justices that English-Only laws are part of a racist exclusionary system and a "racist strategy to negate nonwhite racial and cultural groups."[6] During the *Yniguez* litigation, the U.S. Court of Appeals for the Ninth Circuit recognized that language can be a proxy for national-origin discrimination and expressed concern that the burden of English-Only laws falls disproportionately on non-English speaking persons. Indeed, civil rights groups criticized a wave of laws in the 1990s burdening minority groups, including harsh immigration restrictions, denials of welfare benefits to legal and illegal immigrants, limitations on health care and education for illegal immigrants, and anti-affirmative action programs. In this anti-immigrant environment, Congress and many states considered English-Only laws.

Opponents of Arizona's law saw the 1990s wave of English-Only laws as an extension of a history of discrimination, of the legally authorized destruction of minority groups by the dominant Anglo-American population. Examples abound, such as the restrictions on the use and teaching of Native American languages by the U.S. and state governments,[7] and congressional restrictions on the use of Spanish in western states, including Arizona and New Mexico. At the turn of the twentieth century, California's constitution provided that laws could be published only in English, and English literacy was a voting prerequisite. One brief filed in the Supreme Court by civil rights advocates summarized the concerns:

> Article 28, Arizona's English Only amendment, is not about national unity versus balkanization. Nor is it about the encouragement of immigrant assimilation versus cultural group separatism. These descriptions conceal the ill-will of many English Only supporters toward immigrant-racial minorities and further mislead persons of good will about the amendment's consequences.
>
> Arizona's English Only amendment is about negation and exclusion. It is designed to achieve a false sense of unity through an apparently homogenous polity by rendering invisible those who do not look and talk like "Americans." If enforced, the amendment would destroy many immigrant group members' ability to function in day-to-day interactions with government and to participate meaningfully in political life. Moreover, the amendment will, for many, eviscerate their cultural groups and deprive immigrants of the cultural base of identity and support needed to cope with continuing mainstream racism and nativism.

In contrast, numerous conservative groups and leaders supported Arizona's English-Only law, claiming that its intentions were benign: to foster unity, not promote discrimination. During his presidential campaign, for example, Bob Dole supported the English-Only movement to protect "national unity," and Newt Gingrich cautioned that because of bilingualism, the "very fabric of American society will eventually break down." Thus, language differences fostered "linguistic and cultural isolation," giving non-English-speaking groups political leverage that could result in political and social unrest.[8] In the 1988 Arizona ballot pamphlet, supporters of the English-Only law encouraged voters to "stop [the] erosion of our common bond . . . threatened by language conflicts and ethnic separatism." Another argument in the pamphlet described Arizona at a crossroads: "It can move towards the fears and tensions of language rivalries and ethnic distrust, or it can reverse this trend and strengthen our common bond, the English language."

Thus, the English-Only issue is closely linked to other struggles over racial and ethnic relations. The link is frequently subtle because the laws are directed at language and the racial undertones may not be explicit. Supporters of English-Only measures refer to "American" culture, rather than race or ethnicity. As Justice Scalia said in an affirmative action case: "In the eyes of government, we are just one race here. It is American."[9] The Washington Legal Foundation, a conservative group fostering states' rights, advised the Supreme Court in *Yniguez* that Arizona's law encouraged unity, calling upon a very Anglo-American portion of our shared heritage including the Mayflower Compact and the Federalist Papers. The group cautioned against a new "cult of ethnicity . . . [that] denounce[s] the idea of a melting pot, . . . challenge[s] the concept of 'one people,' and . . . perpetuate[s] separate ethnic and racial communities."[10] As presidential candidate Pat Buchanan put it in 1992: "I think God made all people good, but if we had to take a million immigrants in, say Zulus, next year, or Englishmen, and put them in Virginia, what group would be easier to assimilate and would cause less problems [*sic*] for the people of Virginia?"[11]

Sometimes the discrimination is even more overt, with proponents of English-Only laws arguing that the laws are needed to prevent the U.S. from becoming a non-white, non-English-speaking "mongrel nation." "'Mongrel' clearly conjures images of the menacing savage Indian, the sinister ponytailed Chinese or the barbarous brown-skinned Hawaiian, and echoes early fears of diminishing white racial purity."[12] Such claims

resonate with legal efforts by Virginia to support its law forbidding whites from marrying non-whites. Virginia argued that the law served legitimate purposes such as "to preserve the racial integrity of its citizens," "[to prevent] corruption of blood," "a mongrel breed of citizens," and "the obliteration of racial pride." The Supreme Court ducked the issue with shaky jurisdictional reasoning in 1956, after the Virginia Supreme Court had found that the law did not violate Equal Protection. Alexander Bickel acknowledged that it would have been "unthinkable" for the Court to uphold the law after *Brown v. Board of Education.* Nevertheless, he defended the Court's avoidance. "[W]ould it have been wise, at a time when the Court had just pronounced its new integration principle, when it was subject to scurrilous attack by men who predicted that integration of the schools would lead directly to 'mongrelization of the race' and that this was the result the Court had really willed, . . . to declare that the state may not prohibit racial intermarriage?" Twelve years later, the Warren Court again faced an equality challenge to Virginia's law. About one-third of the states still prohibited and punished interracial marriage in 1967. Another fourteen states had repealed such laws within the prior fifteen years. The Court noted that these laws first arose in the U.S. as part of slavery, but many of the modern laws were adopted during a period of "extreme nativism" following World War I. Finding Virginia's justifications an unconstitutional "endorsement of white Supremacy," the Court finally voided the law on Equal Protection grounds in *Loving v. Virginia.*[13]

Similar fears about mongrelization and impurity support the English-Only movement. John Tanton, the founder of the national advocacy group U.S. English which financed the Arizona campaign for an English-Only law, warned of a "Latin onslaught." In comparing Caucasian and Latino demographics, he said that Latino fertility will cause "those with their pants up [to] get caught by those with their pants down."[14] English-Only supporters also warn of "rampant bilingualism," "linguistic ghettos," and "language rivals," conjuring up intimidating images of gangs and ghettos, racial violence, and unrest while preying on stereotypes of poor, uneducated, desperate immigrants who only bring crime and problems to the United States. These fears are often disguised in rational and legal, politically palatable discourse about safeguarding the English language, the Constitution, and the American way of life.[15]

In sum, the English-Only issue is of broad symbolic import, testing our polity's ability to tolerate language diversity, which is closely linked to other aspects of cultural, ethnic, and racial identity and diversity. Was the

Arizona law designed to encourage social harmony through use of a common language, as its proponents claimed? Or was it, as one Ninth Circuit judge found in *Yniguez*, "a mean-spirited, nativist measure" that embodied discrimination and repression of ethnic and cultural differences?

The Journey to the United States Supreme Court

Shortly after Maria-Kelly Yniguez filed her lawsuit in federal court challenging Arizona's law, the Arizona attorney general released a legal opinion advising that the new law allowed state employees to use languages other than English when doing so would facilitate the delivery of government services.[16] Despite the law's broad wording, the attorney general interpreted it narrowly to mean that only official acts such as rendering a judicial decision or promulgating laws must be in English. Because judicial decisions and laws had been written in English previously, the new law was of very little significance under the attorney general's interpretation. The attorney general used this narrow interpretation to avoid conflicts between the English-Only law and other federal and state laws, including federal constitutional guarantees. Because Arizona has a substantial population of bilingual persons and persons for whom English is not their primary language, the attorney general's construction recognized a substantial exception to an English-Only requirement. According to the 1990 census, more than 20 percent of Arizonans are bilingual. Over 10 percent of Arizonans speak Spanish fluently. A small percentage of Arizonans cannot speak English well or at all.

The state urged the federal trial court to dismiss the lawsuit because there was nothing left to fight about. Ms. Yniguez would still be able to speak Spanish to non-English or bilingual persons to facilitate service delivery. She had not been disciplined or even threatened with discipline for speaking Spanish on the job. The state also argued that the law posed a novel state law question (the breadth of the English-Only law) which should be decided by the Arizona Supreme Court instead of the federal courts. Nevertheless, the federal trial court reached the merits of the First Amendment claim and invalidated the law, finding that it was overly broad and infringed on protected speech by governmental employees.

After the federal district court's decision, Ms. Yniguez resigned from her state job to accept a more lucrative position at a private hospital. Both she and the state initially chose not to appeal the trial court's decision.

But procedural complexities kept the dispute alive. The initiative's primary sponsor, AOE, sought to appeal and then the attorney general sought to appeal. The Ninth Circuit allowed both those parties to intervene, and it allowed the primary group opposed to the initiative to intervene as well. Ms. Yniguez then decided to appeal, asserting a claim for nominal damages. Although she had left government service, a Ninth Circuit panel found the controversy sufficiently concrete because of the adversity of the litigants and her damages claim. The three-judge panel agreed with the trial court that the law violated the First Amendment by inhibiting Arizona employees' speech.

This ruling was so important and controversial that the rest of the Ninth Circuit judges voted to hold an en banc hearing, where the decision of the three judges would be reconsidered by a larger segment of the court. Usually, the entire court of appeals for the particular circuit would decide a case en banc, but the Ninth Circuit is so large that eleven of the twenty one full-time circuit court judges constituted an en banc panel at that time. By only a 6-5 margin, the Ninth Circuit en banc agreed that the English-Only law was unconstitutional. The majority and dissenting opinions authored by nationally known and outspoken liberal and conservative judges, offered thoughtful disagreement about the First Amendment speech rights of public employees. The Ninth Circuit did not reach the litigants' Equal Protection claims or the First Amendment rights of those seeking government services or any federal statutory claims. The procedural wrangling and extent of the substantive controversy among the judges during the Ninth Circuit appeals process added significant time and expense to pursuing the dispute.

Finally, the case was ready for appeal to the Supreme Court. The Court did not have to hear the case. It could have let the Ninth Circuit en banc decision stand, but the Court granted certiorari and heard from the parties and many interested politicians, organizations, and individuals through amicus briefs about the constitutionality and significance of Arizona's English-Only law. While *Yniguez* wound through the federal courts, other plaintiffs challenged the English-Only law in the Arizona state court system. In *Ruiz v. Symington,* four of Arizona's elected officials, five state employees, and a public school teacher sued the governor, alleging, like Ms. Yniguez, that the English-Only law violated the federal Constitution.[17] Again, AOE intervened to defend the law. The Arizona Supreme Court put the *Ruiz* litigation on hold once the U.S. Supreme Court agreed to hear *Yniguez.*

The Supreme Court Finds the Dispute Moot

More than eight years after Arizona voters passed the law, the Supreme Court unanimously vacated the lower court opinions. The Court, however, did not reach the merits of the constitutional challenges presented. Instead, it threw the case out of the federal court system because it found the case "moot" as of the point Ms. Yniguez left government service. The dispute had dissolved, the Court reasoned, because Yniguez's personal stake in it disappeared once she left government service. The Court began: "In litigation generally, and in constitutional litigation most prominently, courts in the United States characteristically pause to ask: Is this conflict really necessary?" The Court interprets Article III to require that all federal court controversies involve a person or entity with a real, personalized stake in the dispute to bring and continue litigation. This requirement serves to ensure good advocacy to sharpen the presentation of issues for the courts and ensures a serious commitment of skill and resources from the parties.

Although other government employees were clearly affected by Arizona's law after Ms. Yniguez left state service, her lawyers had not included them in the lawsuit. Under the Court's restrictive Article III interpretation, it must ignore others affected by the law until another litigant with a "live" grievance properly presented returns the issue to the Court. *Yniguez* demonstrates how Article III justiciability doctrines (e.g., standing, ripeness, mootness) can be used to avoid important issues until the Court deems them properly presented.

In contrast, the lower federal courts had found that a real, imminent controversy continued to exist even after Yniguez left the state's employ because Arizona's governor pledged to comply with the law and expected all state employees to do so. Additionally, the Ninth Circuit had reasoned that with the primary sponsors and opponents of the law participating in the suit, the parties were sufficiently adverse and willing to fight hard about the law's meaning and present the constitutional issues with appropriate skills and resources. The Supreme Court did not find this persuasive, since the attorney general had advocated a narrow interpretation of the law (confining it only to official acts and documents) and during the later stages of the *Yniguez* litigation, AOE (the primary supporter of the law) switched its interpretation to support the attorney general's position. Perhaps, in the justices' view, the opponents of the English-Only law had scored an important victory already through the acquiescence of

AOE and the state of Arizona to a narrow version of the law. But in actuality, as Arizona officials enforced the law, it was not so clear that the narrow version of the law would always be the one applied. And opponents of the law might also have worried about the symbolic chilling effect upon non-English and bilingual speakers of leaving the broad law sought by many voters in place, even if state government urged a narrow, legalistic construction.

Despite the time, money, and energy invested in the litigation over eight years, the Court threw *Yniguez* out because it determined that the immediate parties no longer had a live controversy over what Yniguez could say on the job. This ruling was consistent with its mootness precedents and could have been avoided if Ms. Yniguez's lawyers had filed the suit as a class action composed of numerous state employees as plaintiffs, some of whom still worked for Arizona at the time the case reached the Supreme Court. But their client did not want to file a class action suit because she did not want to turn the English-Only issue into one of "Hispanics versus the English speakers of Arizona." Moreover, class actions are not easy to pursue. They require special procedural knowledge and often can be more expensive and burdensome than ordinary litigation.

Finally, the Supreme Court took the unusual step of vacating the earlier *Yniguez* opinions, effectively erasing the findings that the law was unconstitutional and destroying the prior victories of those who opposed the English-Only law. Without much explanation, the Court concluded that vacating the opinions was appropriate because the case presented federalism concerns and "exceptional circumstances."

Many people reacted strongly to the Court's decision. The mootness ruling, on the heels of the long, complicated history of the *Yniguez* case, caused much confusion and frustration among Arizona voters and others concerned with the English-Only issue. As one editorial writer put it, "Eight years after voting to do the state's business in English, Arizonans still don't know whether their own judgment about how their own employees should behave at work will be allowed to become law by judges who don't pay a dime of Arizona taxes. And they likely won't know for another couple of years."[18] He continued: "Sadly, this decision did nothing to end the legal chaos. It only shifted the battleground to the state courts . . . and left open a distinct possibility of having to fight the war again in the federal court." Many Californians had closely watched the litigation, in light of litigation challenging their own recent anti-immigrant measure, Proposition 187. This measure, entitled "Save Our State," denied

state services such as education and health care to those suspected of being undocumented immigrants. After voters approved the law in 1994, it soon faced court challenges. In 1996, Californians had also enacted an initiative that limited affirmative action in public contracting, employment, and education. In 1986, California voters had approved by direct democracy an English-Only law, but the law required legislative approval for enforcement and the legislature never approved it. One senator complained: "They left it up to the Legislature, and when you leave anything up to the Legislature, nothing happens." He indicated that the Supreme Court's mootness ruling "could put political pressure on a balky California Legislature."[19]

When we await the Court's pronouncements on the constitutionality of an important new law, avoidance can be at best frustrating and at worst dangerous. One of the problems of avoidance through procedural rulings like mootness (and even refusals to hear a case by denying certiorari) is that the public often misconstrues avoidance rulings as victories. It is not surprising that some observers viewed the rejection of Yniguez's challenge as a signal on the merits of the dispute. The English-Only law was not displaced; indeed, the lower court opinions overturning it were erased. Mauro Mujica, chairman of U.S. English, triumphantly declared, "This should be a clear indication to the lower courts that it is inappropriate to tamper with the will of the people after they have exercised their vote within the democratic process."[20]

The Court's mootness ruling "delighted states' rights advocates who say such an approach may blunt other constitutional attacks, including the pending challenge to California's [anti-affirmative action measure]."[21] The Supreme Court did encourage the lower federal courts to certify the dispute over how narrowly to construe the English-Only law to the Arizona courts to try to save the statute. Although an amicus brief highlighted the question of how much deference courts owe direct democracy measures, the Court did not tackle that issue directly. Nevertheless, some judges are likely to read *Yniguez* as mandating a "cautious" approach to direct democracy controversies. Subsequently, for example, a federal trial judge found that the California measure conflicted with the federal Constitution. Three Ninth Circuit judges, relying on the Court's admonitions in *Yniguez,* expressed concern that if the trial judge had incorrectly interpreted the Constitution, he thwarted the will of 4,736,180 voters with a single stroke of a pen. But rather than certifying the measure to the California state courts, the Ninth Circuit interpreted the state

law itself. The judges reached the merits and found that it did not offend the Constitution. The U.S. Supreme Court avoided the controversy when it denied certiorari, leaving the Ninth Circuit's invalidation intact.

Others expressed frustration with the *Yniguez* Court's focus on byzantine technicalities and the lack of guidance from the Court on the merits of language restrictions. A California state senator said, "I wish they had decided this on the merits, instead of just saying it was a 'moot question.'"[22] When the Supreme Court avoids constitutional issues, the rest of the country can only guess at the likely outcomes when it does address them, years later. Some justices view this as fostering debate and not foreclosing options, allowing a pluralistic society to live with deep differences of opinion.[23] But the Court's avoidance techniques often do not foster debate. Politicians are still reluctant to tackle difficult and controversial issues, particularly those that are not a significant concern to a majority of voters. Frequently, the persons or groups most likely to suffer from these unresolved differences are members of political, racial, cultural, sexual, or religious minority groups. The lack of guidance from the Court on constitutional law is also disturbing. When the Court does not promote uniform national constitutional interpretation, the content of Equal Protection or First Amendment rights will vary with a citizen's locale.

Avoidance through Certification and the Avoidance Canon

The Court in *Yniguez* went beyond a simple mootness ruling, which it could have completed in a few paragraphs, and gave a long lecture on how the lower federal courts should have disentangled themselves from this volatile controversy earlier. Justice Ginsburg, one of the Court's liberals, wrote the unanimous opinion. As a former Civil Procedure teacher, she is an expert on jurisdictional technicalities. The Court's disdain for what it viewed as procedural mistakes by the lower federal courts in this suit is thinly disguised.

The Court warned other federal courts to avoid federal constitutional issues by sending novel state law issues like the interpretation of the Arizona law to the state court system through certification. Certification statutes allow a federal court to send state law issues to a state's highest court. In *Yniguez,* certification would mean that the Arizona Supreme Court would have to figure out whether the English-Only law applies only to official documents and acts like judicial opinions or more broadly

to government-employee speech. After a state supreme court ruling, the parties return to the federal system for rulings on federal law issues. The opinion closed on a hopeful note, awaiting the *Ruiz* decision, which the Court said might greatly simplify the federal constitutional questions presented.

In *Yniguez,* the Supreme Court also reminded the lower federal courts how certification can interact with the avoidance canon to deflect difficult constitutional controversies presenting federalism concerns. The avoidance canon is a rule of statutory construction that encourages judges to determine whether a law can be read in a narrow way to contain it within constitutional bounds. The *Yniguez* Court implied that if the lower federal courts or, preferably, the Arizona Supreme Court on certification had found the state's narrowing interpretation persuasive, the litigants could have relied on that interpretation in federal court, and the law could have been upheld on federal constitutional grounds. If, on certification, the Arizona court refused to apply the canon and read the law broadly, only then would the federal courts need to face the constitutional challenges. Of course, this reasoning contains interpretations of the Constitution: it hints that a narrow reading of the English-Only law would not offend the First Amendment or other constitutional provisions and that a broader reading might. Those hints are not binding precedent. However, they are an indirect way of expressing the constitutional thinking of some of the justices and can thus constrain other courts without clearly changing the content of the Court's constitutional precedents. The Court frequently shapes the direction of constitutional law with such quasi-constitutional rulings.

In urging avoidance through certification, the Court highlighted the potential importance of the English-Only issue for Arizona, the unsettled state law question of the meaning of the new law, the attorney general's narrowing construction, and the primary sponsors' belated agreement with that construction as reasons for avoidance. The Court concluded that the "more cautious approach" of certification was better than a ruling on the merits, particularly because of the federalism concerns posed. Federalism is the balance of powers between the national and state or local governments. The Rehnquist Court in the 1990s went to great lengths to enlarge and protect the areas in which states have autonomy to operate without federal oversight, as chapter 7 details. The *Yniguez* Court meant that the federal courts could have avoided friction between the two court systems and potential error on the state law issue through certification.

The Court did not elaborate much on how certification would build a "cooperative judicial federalism," but it probably reasoned that the lower federal courts could have shown more respect for Arizona's legal, social, and political predicament by allowing the Arizona court a chance to agree that the attorney general's narrow construction of the English-Only law was the correct one. This might have saved the statute's constitutionality while also taking away much of its force—appeasing both sides of the controversy. Additionally, the Court wanted the lower federal courts to avoid friction-generating "error" by construing the law one way and then facing potential embarrassment and inconsistent rulings if the Arizona court construed it differently. By giving the Arizona court the first opportunity to speak, the Court hoped to foster Arizona's authority in this controversy while also relieving the federal courts of pressure and responsibility.

Sixty years before *Yniguez,* the Court created an abstention doctrine in order to avoid an Equal Protection challenge brought by a railroad company and black Pullman porters to a Texas law which favored white conductors. As described in the Introduction, the Court preferred that Texas courts first review the state law issues, hoping to avoid federal constitutional rulings in the "socially sensitive" area of race and gender relations.[24] The *Yniguez* Court conceded the errors of *Pullman* abstention. It acknowledged that this kind of abstention "proved protracted and expensive in practice, for it entailed a full round of litigation in the state-court system before any resumption of proceedings in federal court." The *Yniguez* Court insisted that certification will work better than abstention because it only requires one round of litigation (in the state's highest court) before proceedings resume in federal court. Certification certainly might save the federal courts time, energy, and resources. But the Court does not mention that certification still imposes additional cost and delay on the litigants, as compared to remaining in federal court and allowing the federal court to construe the scope of the English-Only law. Moreover, certification adds work to the state courts. Thus, litigants may face long waits or hostility to certification requests in some courts. Busy state courts do not always appreciate having controversies delegated to them. For example, the Arizona Supreme Court put the related *Ruiz* litigation on hold while *Yniguez* was pending. It did not have to do so; it chose to await the federal system's outcome to discourage forum shopping (when litigants "shop around" for the court, judge, jury, or law which they believe will be most favorable for them). The Arizona court also sought to

encourage uniform state and federal court interpretation of the English-Only law by awaiting the outcome of the U.S. Supreme Court's ruling. If it was anxious to rule definitively on the state law issues, the Arizona court could have ruled on the law's construction (and even on its constitutionality) before the U.S. Supreme Court issued its opinion. Indeed, the state supreme court gets the last word on state law issues such as the scope of a state law (assuming a court does not construe a law narrowly solely to evade federal court review). So, even if the federal courts had all construed the law broadly, the Arizona court could diverge on the state law question of interpretation and find the attorney general's narrow construction persuasive after a federal court ruling. The state supreme court could even have the last word on state law after a ruling from the U.S. Supreme Court. Thus, any error in construing state law made by a federal court is easily correctable.

Further, the *Yniguez* Court ignored that state supreme courts do not always welcome the additional political pressure when sensitive issues are certified to them. The Arizona court did not discuss this political concern when it put *Ruiz* on hold, but few judges would think it appropriate to acknowledge that type of pressure. Nevertheless, in an era of increasing attacks on judicial independence and increasing use of initiatives for controversial lawmaking in nearly half of our states, many elected state judges feel the pressure. Although both state and federal judges face criticism for their unpopular rulings, federal judges enjoy life tenure and are much more protected than most state court judges. State judicial election and retention campaigns are becoming more expensive and contentious. State judges have come under attack for their rulings in criminal cases and for rejecting popular direct democracy enactments. In such an atmosphere, many judges try to avoid appearing "activist."[25]

It is easy to understand why supporters of the English-Only law might read into *Yniguez*'s cautionary warnings a philosophy of federal court judicial restraint. The Court's unstated premise seems to be that controversies that present federalism concerns are best decided by the more politically responsive state court judges, not by their life-tenured federal counterparts. Perhaps the justices reason that Arizona voters would resent the judicial system less if their state courts (rather than the federal courts) limited or voided the English-Only law. Moreover, if voters disagree with the Arizona Supreme Court's interpretation of the English-Only law or their conclusion about its constitutionality, the vot-

ers will have redress at the polls. In other cases, the Supreme Court has been explicit about basing avoidance techniques in part on the importance of protecting the federal courts from charges of interference with the will of the voters or the products of the majoritarian political process. Thus, not only can certification save the federal courts a lot of work, it can take some political heat off the federal system by transferring it to state courts. In *Yniguez,* if certification had worked as the Court envisioned, the federal courts could have saved a narrow version of the English-Only law, attributing the narrow reading to state courts. Of course, the federal courts also could have done that without the cost and delay of certification by using the avoidance canon to adopt the state's narrowing construction. As explained shortly, the lower federal courts chose not to use that option because the construction was so implausible and conflicted so greatly with voter intent.

The Supreme Court's avoidance through certification strategy poses problems similar to those that courts and litigants struggled with under *Pullman* abstention. Certification may be a little less harsh than *Pullman* abstention, but it still imposes additional costs and delay for the parties and places additional burdens on the state courts. And, not surprisingly, the Court chooses a controversy strikingly similar to the *Pullman* case in which to substitute certification for abstention. Once again, the Court promotes a deferral device in a racially charged, socially sensitive, politically heated setting without even mentioning the racial or cultural tensions in the English-Only dispute or any of the real-life significance of the controversy. Under the Court's reasoning, the more significant and controversial a state law is, the more risk of friction between the state and the federal court system. Thus, federal judicial review is deemed most appropriate where it is least needed: for state laws that do not present serious constitutional problems and for state laws that are not important or controversial.

The *Yniguez* Court approved so heartily of avoiding federal constitutional issues that it also suggested to the Arizona Supreme Court that it use its own version of the avoidance canon to construe the English-Only law narrowly. But the Arizona Supreme Court declined to follow the U.S. Supreme Court's avoidance advice. In *Ruiz,* the Arizona court found that its own attorney general's narrowing construction was implausible and conflicted with the voters' intent, and it struck down the broad English-Only law as a violation of the federal First Amendment.

The Arizona Court's Rejection of the Avoidance Canon

The Arizona court in *Ruiz*—like the lower federal courts in *Yniguez*—wisely declined to use the avoidance canon. Both recognized that adopting the attorney general's narrowing construction could avoid the need for finding the law unconstitutional, but they simply found the construction implausible. The Arizona court explained that the English-Only proscription in the law's text was extremely broad and contained only a few specific and limited exceptions. Those exceptions did not expressly encompass speaking Spanish when necessary to facilitate provision of government services or allowing elected officials to communicate with their constituents, as the attorney general advised. Instead, the law allowed languages other than English to be spoken only in a narrow range of cases—to educate foreign-language students, to protect the rights of criminal defendants, to protect public health and safety, and to comply with federal law. Thus, the attorney general's opinion flew in the face of the "plain meaning" of the law.

Moreover, the Arizona court refused to avoid the constitutional issues through narrow construction because that reading conflicted with the drafters' and voters' intent. Instead, the proponents of the initiative through public statements, ballot materials and pamphlets backed a "broad, comprehensive construction" of the law. Although the primary sponsors later revised their reading of the law during litigation to support the attorney general's narrowing construction, the Arizona court did not find that switch dispositive. The Arizona court also expressed concern that the attorney general's legal opinion conflicted with the intent of the "average reader" of the initiative.[26]

This rejection of the canon by the lower federal courts and the Arizona court is highly persuasive. When courts face a broad law, containing limited express exceptions, the plain language of the measure is the best evidence of voter intent and should be given more weight than a sponsor's belated acceptance of a limited construction. If most Arizona voters reasonably assumed that the law contained a broad prohibition on government employees using languages other than English at work, the attorney general's construction undermines their intent. The text should also carry more weight than narrowing constructions written by politicians or government attorneys who did not draft the measure and may not have supported it. For example, Governor Rose Mofford (the primary state defendant during the litigation) had not supported the English-Only law

during the initiative campaign. She was "an outspoken critic" of the law and termed it "sadly misdirected." Frequently, state officials feel obliged to defend laws they might not have supported, and they may be content with a watered-down version of the law or a political compromise.

Finally, rejection of the avoidance canon is more consistent with U.S. Supreme Court precedent acknowledging that the canon should not be employed where a limiting construction conflicts with the plain meaning of the text. Thus, the Ninth Circuit reasoned that certification was not appropriate in *Yniguez* because it did not want to completely rewrite the law so that it could pass constitutional scrutiny. And, as the Arizona court said, if all the unconstitutional portions were voided to salvage the law, "the record is devoid of evidence that the voters would have enacted such a rewritten and essentially meaningless amendment." Courts justify avoidance techniques in part because they promote deference to other decision makers. In *Yniguez,* the U.S. Supreme Court qualified its usual "plain language limitation" by highlighting the possibility for deference to state executive branch interpretation. But using the avoidance canon to change the meaning of the law as the attorney general and AOE suggested (and the U.S. Supreme Court appeared to endorse) is not at all deferential to Arizona voters. Courts do not avoid friction when they leave in place a narrow interpretation contorting the plain meaning of a law and contradicting the understanding of the average voter.

The Arizona Supreme Court Invalidates the English-Only Law

The Arizona Supreme Court invalidated the English-Only law on First Amendment and Equal Protection grounds in 1998, finding that it unduly limited the political speech of elected officials and state employees, adversely impacted the rights of non-English-speaking persons to obtain access to the government, and impinged on the fundamental right of equal political participation and right to petition the government for redress. The Arizona court was the first to invalidate an English-Only law. The court unanimously struck down the law after holding oral arguments in the case at the University of Arizona law school, airing the debate on federal constitutional issues in a unique public forum.[27]

The attorney general was reportedly pleased with the decision and announced that the state would not appeal. Many civil rights lawyers were also pleased with the decision. As Enrique Medina said: "This is a victory

for the state of Arizona. It's exhilarating to know that the judicial system is protecting the rights of people of a different culture and who speak a different language." Others reaffirmed the political importance of the issues involved and the wide-reaching effect of the decision on not only Hispanics but Asians as well. Karen K. Narasaki, the executive director of the National Asian Pacific American Legal Consortium, predicted: "This ruling will have a national impact. . . . We have all been watching Arizona."[28] Obviously, the supporters of English-Only laws were disappointed. After ten years, the voters of Arizona learned that the law they had so narrowly enacted was unconstitutional. The U.S. Supreme Court still could have examined the federal law issues on the merits, including First Amendment and Equal Protection challenges to the broad English-Only law, but the Court denied certiorari when the Arizona ruling was appealed. In light of its effort in *Yniguez* to rid the federal courts of this controversy, the denial was not surprising.

Concluding Thoughts on Avoidance in Yniguez

Was the Supreme Court right that avoidance techniques could lessen friction and promote respect between the state and federal systems in this dispute? Civil rights advocates who opposed the English-Only law did receive redress, although only after ten years and at great expense. The answer they received, however, binds only the Arizona courts, not other state or federal courts across the nation. Many language restriction issues are left undecided at the national level. The Arizona court's opinion was also somewhat timid. Although the court refused to use the avoidance canon to narrowly construe the English-Only law and it did overturn the law, it also refused to condemn it as nativist and discriminatory. Instead, it assumed that the English-Only law reflected only benign motives. The Arizona court played it safe with a diplomatic air. "[W]e do not imply that the intent of those urging passage of the [law] or those who voted for it stemmed from linguistic chauvinism or from any other repressive or discriminatory intent. Rather we assume, without deciding, that the drafters of the initiative urged passage of the amendment to further social harmony in our state." The Ninth Circuit's en banc opinion, which alluded to the underlying cultural and racial conflict, was a stronger condemnation of the law and a better reflection of conflicting constitutional approaches.

In any event, other courts are free to take or leave the Arizona court's analysis of the federal constitutional issues. State or federal courts outside of Arizona might find the same broadly worded law constitutional. By the same token, a narrower English-Only law might pass muster in many courts. The Rehnquist Court sees this as a gain: the fate of other English-Only laws is not resolved. Opportunities to pass similar laws and debate on the merits of the issue are not foreclosed. But such disseminated constitutional authority is likely to lead to more uncertainty, more duplicative litigation, and more forum shopping.

Moreover, some of the Justices likely believe that federalism tensions are lessened because the Arizona court, rather than federal courts, struck down the law. Does that really make the loss more palatable for supporters of the law? Even if it does appease some voters, we should not be fostering such distrust of federal courts or viewing their judicial review as unwelcome interference with local politics rather than an important voice in the long-term constitutional dialogue. Similarly, is federalism promoted because, if voters approve or disapprove of the Arizona court's outcome, they will be able to influence future judicial elections? Again, this increases the pressure on state court judges to avoid controversial rulings and seek technical ways of deflecting lawsuits rather than airing legitimate opposing views on the merits of difficult constitutional issues.

Even though civil rights advocates eventually won in the Arizona courts, the uncertainty surrounding the validity of English-Only laws is troubling. If the Supreme Court continues to encourage federal constitutional law to be developed by a multitude of state courts over a long time, federal law will not be interpreted in a uniform manner. This leads to unfairness, where similar laws will be evaluated and similarly situated people will be treated differently. This could also lead to forum shopping, as the Arizona courts initially feared in *Ruiz*. Litigants may begin to choose courts based on their judges, while national groups will target state courts that they believe are receptive to their views or are politically vulnerable. Of course, forum shopping already occurs in and between state and federal court systems. Courts reach differing views on how to interpret laws and on their constitutionality, and we have many splits among courts on federal law issues. This problem is compounded by the Supreme Court's inability—and sometimes by its refusal—to hear many issues of national import on which lower courts have split.

The Court's view of precedential hierarchy displayed in *Yniguez* also undermines uniformity in federal law. The Court reprimanded the Ninth

Circuit for its attempt to resolve the federal constitutional issues in the English-Only dispute for all lower federal courts and state courts within its circuit. The Court made clear that it perceived the state courts as not bound by a federal court of appeals' interpretation of federal law when the state court has jurisdiction over the federal issue. (Note that it was not necessary for the Court to address this question to reach its mootness conclusion.) Under the Court's vision, a federal appellate court decision would only serve as binding precedent for the federal courts in its circuit. Their rulings should then be regarded as less important, and the Court should not be so concerned about them foreclosing debate or interfering with state court authority. Fewer options are foreclosed if other parties can seek a different ruling on federal constitutional law from the state court systems in a circuit. If instead federal courts are discouraged from interpreting the federal Constitution for fear of offending voters and politicians, or fear of not sufficiently respecting the authority of state courts, we will lose vital voices in developing constitutional law.

The Court in *Yniguez* did not take federal courts completely out of the debate by urging certification and use of the avoidance canon. When issues are certified to state courts, the litigants can return to federal court after the state court rules on the state law issues. But the Supreme Court did send a strong warning about federalism dangers and urged caution. This leaves only the Supreme Court or other national branches as the major engine for promoting uniformity in constitutional law. With its declining output, federalism concerns and avoidance emphasis, the current Court is unlikely to give fast and efficient relief to the problem of inconsistent rulings.

The justices express hope that avoidance strategies will result in deference, that they will animate other politicians to address constitutional issues and offer solutions. For example, the Court uses the avoidance canon and clear statement rules to send a statute back to Congress for clarification. Essentially, the Court asks: "Congress, did you really intend to push the constitutional envelope here? It seems to us that this legislation presents serious constitutional questions, so why don't you rewrite it?" In reality, there is little follow-through once the Court invokes avoidance. It is still difficult for politicians to redress many issues, especially those that do not already have popular support. Congress and state legislatures are majoritarian bodies which often seek to avoid conflicts. For example, bills to make English the official language of this nation were introduced frequently in Congress in the 1990s, but no such legislation

has cleared both Houses. Even a legislature that is supportive of minority interests faces time constraints, interest group pressures, and the need to compromise. Politicians do not always welcome the Court's attempts to defer—or deflect—responsibility to them. Issues affecting nonmajoritarian interests are often not handled well in majoritarian arenas. When legislators face minority group members in committee hearings and in routine legislative work, it may be easier to overcome prejudice, however, than when direct democracy is the primary vehicle for lawmaking.

In states that use direct democracy, voters are much more likely to enact a measure opposing civil liberties than strengthening them. From the 1960s to mid-1990s, voters have passed about only one of every three direct democracy measures. However, voters in that same period approved three out of every four measures opposing civil rights (e.g., measures targeting minority groups such as gays and lesbians, as well as racial and ethnic minorities).[29] The intense media campaigns accompanying many initiative campaigns often "oversimplify issues and appeal to voter prejudice and emotion."[30] And it is easy to allow our prejudices to speak unabashedly in the privacy of the voting booth. The ambiguity of many direct democracy measures complicates the question of voter intent. Many initiatives are poorly drafted and require judicial interpretation. But as one frustrated California voter asked after an anti–civil rights measure was invalidated by a court, "Why are we even allowed to vote on laws which are unconstitutional?" The ambiguous language of the English-Only initiative required further interpretation. Despite narrow interpretations by some lawyers and judges, the law did significant damage at a broad symbolic level. Leaving a narrow version of such a direct democracy measure in place may be a good political compromise, but it does little to promote clarity for voters or advance constitutional interpretation.

All courts, but particularly federal courts with life-tenured, politically insulated judges, are an essential countermajoritarian restraint on such processes. The *Yniguez* Court constricts significantly federal court judicial review of important, politically charged controversies. Certainly, federal courts are not completely removed from the realm of politics. They can still decide federal issues after some delay and being ever conscious of the Court's stern warning to "pause" in circumstances similar to *Yniguez*. But the Court does not offer many details about what constitutes similar circumstances. Would the Court urge caution whenever racial and ethnic tensions surround a case (e.g., affirmative action disputes)? Or does the Court suggest that federalism concerns are present whenever a case raises

"potentially important" issues for a state? Of course, this is true of most challenges to direct democracy measures. Or do the Court's cautions extend only to situations where a government offers a narrow construction and no one is heartily defending a broad version of the challenged law? The Court did not illuminate this in *Yniguez*. Nevertheless, in light of the Court's strong emphasis on avoidance, a lower federal court judge would be wise to take this warning seriously. Many federal judges are likely to be more cautious about exercising judicial review, while litigants will have increased incentives to take any cases raising federalism concerns to the state courts as a result of *Yniguez*. The remaining chapters in this book paint a fuller picture, showing that this result mirrors the ramifications of the Court's other avoidance techniques, like its expansion of standing to bar selected plaintiffs from raising environmental concerns, explored in the next chapter.

2

The Court Grapples with Congress and Standing Hurdles in Environmental Cases

During the last quarter of the twentieth century, the Supreme Court used a number of avoidance strategies to sidestep ruling on the merits of numerous environmental controversies. The most prevalent tactic was development of the constitutional law of "standing" to hinder people and groups concerned with protecting the environment from bringing claims to federal courts. This avoidance strategy thwarted congressional intent by substantially limiting the ability of citizen plaintiffs to enforce environmental laws. President Richard Nixon presented a lengthy message on environmental cleanup and pollution prevention in his 1969 State of the Union address and supported creation of the Environmental Protection Agency ("EPA") in 1970. The executive and legislative branches passed many laws during the remainder of the 1970s aimed at cleaning up our air and water, protecting species, regulating pesticide use, and managing hazardous waste. These laws significantly changed the relationship between regulated industries, environmentalists, and the federal government. Most of these laws provided a new enforcement tool by creating rights for private citizens to enforce the laws by suing when the government or regulated industry violated the environmental laws.

Congress included the option of litigation by private citizens to supplement the ability of regulators to enforce the laws.[1] Sponsors of some antipollution laws, for example, deemed citizen suits necessary because of the close relationship between some regulated industries and government regulators. Lawyers for the regulated industries complained that defending against citizen suits was expensive, and the suits were used to harass small businesses over technical violations of environmental laws. Some conservatives viewed environmental citizen suits as "blackmail" and encouraged courts to be hostile toward such "terrorism."[2]

After President Ronald Reagan's election, the executive and legislative support for environmental protection waned. With the emphasis on federal deregulation, the EPA's budget was significantly reduced. After steady increases during the 1970s, EPA enforcement actions declined during the 1980s as a result of budget cuts. In 1981, for example, the number of hazardous waste civil enforcement cases referred from the EPA to the Department of Justice dropped by 82 percent from the previous year. Meanwhile, Congress continued to expand the scope of the EPA's statutory responsibilities during the 1980s.[3]

As private citizens' suits under various environmental statutes reached the Supreme Court, the Court accepted some and declined to hear others. The Court accepted some types of environmental suits (such as clashes about water rights) only to instruct that the federal courts abstain from a decision on the merits and send those cases to the state courts.[4] Instead of ruling on the merits of environmental controversies, the Court aggressively developed constitutional law to make it harder for environmentalists to bring such disputes to federal courts. During this same period, the Court construed constitutional law to protect private property owners from zoning or beach access laws, making governmental "takings" to protect the environment more difficult. This chapter will focus on some of the cases in which the Court limited citizen access and will review a more recent decision that may signal a shift in the Court's attitude toward citizen enforcement.

In *Lujan v. Defenders of Wildlife,* environmentalists tried to protect endangered species from two federal agency development projects overseas. The Court ruled that the environmentalists could not establish that they suffered sufficiently personalized and imminent injuries to establish standing. The dissenters called *Defenders of Wildlife* a "slash-and-burn expedition through the law of environmental standing." *Defenders of Wildlife* stands in stark contrast to *Bennett v. Spear,* where the Court allowed citizen suits by ranchers claiming that government action to protect endangered species was too drastic and inappropriately diminished their water supply. Putting *Defenders of Wildlife* and *Bennett* together, the result is that plaintiffs with economic injuries who seek to prevent government protection of species are given access to the federal court system, while plaintiffs who seek to advance species protection are blocked. In *Chicago Steel v. Citizens for a Better Environment,* the Court subsequently expanded the requirements environmentalists must meet to bring suits under a toxic right-to-know law. The Court did so by develop-

ing a new part of the complicated standing doctrine requiring plaintiffs to show that the relief they seek involves some very tangible item of direct, personal benefit. It is not enough for plaintiffs to pursue a remedy that benefits the environment, punishes the polluter, or could produce more compliance with environmental laws in the future, such as a civil fine payable to the U.S. government. Although the toxic right-to-know law provides for such fines, the Court did not think plaintiffs would benefit from them in a sufficiently direct manner.

The chapter concludes with a review of *Friends of the Earth v. Laidlaw Environmental Services,* in which the Supreme Court reversed its long trend toward reducing citizen access to the courts and found that citizen plaintiffs had standing to enforce the Clean Water Act. In *Laidlaw* environmentalists brought a citizen suit alleging ongoing violations of the Clean Water Act by a company discharging mercury into a river. The Supreme Court affirmed a trial court ruling that imposed a penalty on the company even though the company had reformed its conduct and been in substantial compliance with the pollution law by the time trial court proceedings concluded. Applying an exception to the mootness doctrine, the Court remanded for the trial court to determine whether the defendant's voluntary stoppage of pollution activities after litigation commenced mooted the case. The Court also recognized the remedial potential of civil penalties in serving to deter future violations of environmental laws. The Court distinguished *Chicago Steel* as not involving any continuing or imminent violations.

These cases are important not only for the particular laws they construe, but because, until *Laidlaw,* they sent a broad signal to lower courts to heighten standing requirements and limit the ability of private citizens to enforce many environmental laws. Congress's attempts to enable private citizens to participate in environmental protection through litigation have been largely nullified by the federal courts over the last two decades, as these courts heeded the Supreme Court's standing precedents. Moreover, the profiled cases are troubling because they show the Court has stymied Congress in the environmental area. The Court has often repudiated citizen suits by environmentalists and rejected Congress's attempts to identify new rights shared by many citizens in environmental or species protection. The Court has been particularly harsh in its standing requirements for citizens who pursue claims for environmental harm while using a relaxed standing analysis for citizens like ranchers who claim a traditional legal injury such as damage to their property or

diminished access to water. In the environmental law area, standing has all too frequently been a significant one-way barrier to the claims of plaintiffs seeking to protect their environment.

The Standing Doctrine

Standing requires that the right person or entity bring a dispute to the federal courts. Article III of the Constitution provides that a federal court may hear "cases" and "controversies." The Constitution's text does not mention the pivotal justiciability doctrines such as standing, ripeness, and mootness that the Court has created to limit federal courts' powers to hear some kinds of cases. The Framers did not specify these limits, either. The Court, especially in the past twenty-five years, has augmented these barriers to judicial review. Standing, in particular, now requires a plaintiff to demonstrate three elements: (1) that he or she has suffered (or imminently will suffer) a personalized injury (2) caused by the defendants and (3) redressable by the court. The Court attempts to promote separation of powers by minimizing the role of federal judges—and increasing the role of the executive and legislative branches—in developing federal law. The Court also emphasizes that standing increases judicial efficiency. It affords chances for federal courts to safeguard their political capital.[5] Additionally, the Court uses standing to ensure vigorous advocacy from litigants to sharpen the presentation of issues to yield better decision making by federal courts. Finally, the Court says that standing advances fairness by making sure that the people raising claims are those truly affected by the dispute rather than bystanders.[6]

Legal scholars criticize the standing rules for numerous reasons. A leading expert called the standing decisions "erratic, even bizarre."[7] The Court has admitted that this area of constitutional law is confused.[8] Others complain that standing restricts the role of federal courts and unfairly limits the types of claims they can hear. Standing is usually considered at the outset of a case to advance efficiency and fairness, but it is viewed as so important that judges can bring it up themselves at any time. Although the standing inquiry is not supposed to entail a full look at the merits of the case, it has become in recent years a close examination of the factual allegations and legal claims advanced. Generally, the standing barrier is a one-way proposition that disadvantages plaintiffs—it is used frequently by those defending against lawsuits to get the suits kicked out of federal

court at an early stage of litigation, without resolution of the merits. In environmental cases, the barrier is often deployed against environmentalist plaintiffs, but not against plaintiffs charging that environmental protection harms their rights. This is consistent with the view of many commentators that the Court manipulates standing in a result-oriented manner.[9] The Court's standing decisions are inevitably linked to the Court's evaluation of which types of claims deserve federal court review.

Court Rejects Claims by Environmentalists to Protect Species

A prime example of using standing to express preferences about the merits of a dispute is *Defenders of Wildlife*. Decided in 1992, it is one of Court's major modern standing rulings, relied on heavily by lower courts and the Supreme Court.[10] *Defenders of Wildlife* was decided twenty years after some early environmental cases in which the Court was fairly relaxed in its standing inquiry. Although the Court recognized that the injuries claimed by plaintiffs in those early lawsuits did not look like traditional common law tort and property cases, the Court seemed to assume that Congress had appropriately identified new injuries in the environmental area through legislation and provided for broad standing.[11] The Court's approach to the standing inquiry in *Defenders of Wildlife* was quite different. The Court built on two 1980s standing decisions involving highly sensitive allegations of racial discrimination in local policing and in the federal government's tax support for racially discriminatory private schools. In those cases, discussed in chapter 3, the Court set out tough standards for gaining access to federal courts, heightening the threshold posed previously by standing.

Defenders of Wildlife concerned a challenge under the Endangered Species Act ("ESA"). Passed in 1966, the ESA promised a sea change in protection for wildlife and critical habitats, and its impact has been significant. "Over the last 20 years, the ESA has been the legal lever in bringing an $800 million shrimping industry into serious dialogue with conservationists ([to protect the] sea turtle), forestalling the completion of the $800 million Tellico Dam (snail darter), preserving the little remaining old growth ecosystems in the Pacific Northwest (spotted owl), reshaping timber harvesting practices in the Southeast (red-cockaded woodpecker), restructuring water rights for thousands of farmers along the Platte River (whooping crane), and prolonging a $659 million dam

project in Maine (snapdragon/furbish lousewart)."[12] Under the ESA, the Secretary of the Interior and the Secretary of Commerce make a list of endangered species and define their critical habitat. By 1995, approximately one thousand species were listed. In determining whether to list a species, federal officials examine threats of destruction, natural or human factors affecting its existence, disease or predation, and other factors. Listing of a species triggers numerous duties for the federal government, including the duties to conserve the species, not to jeopardize the species or its critical habitat with federal agency action, to prepare recovery plans, etc. One duty requires that federal agencies must consult with the Secretary of Commerce or Secretary of the Interior before undertaking an action (e.g., funding a development project) to ensure that the action does not pose a threat to a listed species or its habitat. In addition to mechanisms for government enforcement, the ESA provides for citizen suits. A citizen suit is a lawsuit brought by a private citizen or group, acting like private attorneys general, to supplement enforcement by government regulators. Congress provided for citizen suits in many environmental statutes because it recognized that the resources and time of government regulators were limited. Additionally, the drafters of environmental laws were concerned that the government regulators would face political pressure. Regulators who were perceived as captured by the regulated industry would not engage in enforcement efforts with the same zeal and independence as private citizens.

In 1978, the Department of the Interior under President Jimmy Carter issued a regulation interpreting the ESA to apply to actions of federal agencies which take place in foreign countries and threaten endangered species. But under President Ronald Reagan, the department reversed course in 1986 and issued a regulation interpreting the ESA to require consultation only for actions taken domestically or on the high seas. Soon, three environmental and wildlife conservation groups challenged the new regulation, alleging that it increased the extinction of endangered species in foreign countries. Plaintiffs Defenders of Wildlife, Friends of Animals and Their Environment, and the Humane Society of the United States sued the United States. "An association has standing to bring suit on behalf of its members when its members would have standing to sue in their own right, the interests are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit is not necessary."[13] When defendant protested that the environmental organiza-

tions were the wrong plaintiffs to bring the suit, two members of the Defenders of Wildlife submitted sworn statements detailing their interest in several specific projects overseas that would result in faster extinction of numerous protected species, the Mahaweli River Basin Project in Sri Lanka and the Aswan High Dam Project in Egypt. In light of the 1986 regulation, the federal agencies involved in those projects had proceeded without consulting the Secretaries.

The two women who signed the affidavits in *Defenders of Wildlife* had a professional interest in observing endangered species that would be harmed by the projects. Joyce Kelly had worked in conservation and natural resource management, including some time as a federal government employee, for more than a decade. She had traveled to Egypt in 1986 to observe the habitat of the Nile crocodile and hoped to return again to observe the crocodiles directly. A federal agency was helping to rehabilitate the power plant at the Aswan High Dam, which would impact a habitat for these crocodiles. Amy Skilbred was a wildlife biologist. She had traveled to the Mahaweli Project site, which U.S. Aid for International Development was funding, to study the Asian elephant and the leopard. The dissenters cited U.S. Fish and Wildlife Service predictions that the Mahaweli project could have a massive environmental impact by destroying a migration route and vital feeding ground for the Asian elephant. The project would also seriously affect the habitat of other listed species such as the leopard, the red-faced malkoha, the swan crocodile, the estuarine crocodile, the Bengal monitor, and the python. Skilbred hoped to return for more observation, but a bloody civil war was raging in Sri Lanka when the lawsuit commenced.

Plaintiffs claimed substantive injuries: that the two projects threatened several endangered species and their habitats and would likely lead to further destruction of those species. They also claimed that they had suffered injuries because of procedural violations of the ESA: the agencies' lack of consultation before funding the two projects. Thus, the environmental organizations argued that they had personalized interests to meet standing requirements through members like Kelly and Skilbred. Additionally, the environmental organizations advanced three theories to support standing. First, their members had observed or attempted to observe endangered species in those habitats and planned to do so again. Second, their members' work involved endangered species. Third, their members were connected sufficiently to the threatened harm because they used the same contiguous ecosystem as the endangered species. Under this "ecosystem nexus"

theory, a distant government action that could affect all those using a contiguous ecosystem provided standing because the ESA was broadly designed to protect the ecosystems of endangered species.

The Supreme Court dismissed the lawsuit because the plaintiffs lacked standing. A majority of the justices thought that the desire to observe species was the right type of injury to qualify under Article III. A few, however, expressed skepticism about whether species observation made an environmentalist's interest sufficiently personalized and concrete. For example, Justice Scalia rejected the first two theories plaintiffs advanced as too broad and diffuse to confer standing. "[A]nyone who goes to see Asian elephants in the Bronx Zoo, and anyone who is a keeper of Asian elephants in the Bronx Zoo, has standing to sue. . . . This is beyond all reason." He was also not receptive to the ecosystem theory; he would not extend the idea of a constitutionally recognizable injury to people who "use portions of an ecosystem not perceptibly affected" by the challenged governmental action.

Nevertheless, most of the justices agreed that the plaintiffs' demonstrated desire to observe the endangered species was the right type of injury to allow the suit to proceed. The Court concluded, however, that while plaintiffs claimed an appropriate injury, their injuries were not imminent. The Court reasoned that the injuries alleged were too speculative, citing the fact that the two women had not yet bought plane tickets or made definite plans to return to observe the species or habitats in Egypt or Sri Lanka. Their previous visits (which occurred before the projects began) "prove[d] nothing" and their future intentions were "not enough." Justices Anthony Kennedy and Souter, whose votes were important to garner a majority for this conclusion, emphasized that it was not reasonable on the facts of this case to assume that the two women who submitted sworn statements would be using the sites on a "regular basis." Some of the justices seemed concerned about opening the doors of federal courts to a flood of speculative or remote claims of harm that would not only overload the courts, but interrupt the actions of federal agencies.

Justice Stevens agreed with the Court's outcome but completely rejected the Court's standing analysis. He did not think Congress intended the ESA to apply to federal government activities in foreign countries. Stevens, like the dissenters, thought the environmentalists presented good types of injuries and that those injuries were sufficiently imminent. Quite persuasively, Stevens argued that the Court had already recognized several types of injuries as adequate in earlier environmental cases. The Court had accepted

professional, economic, and aesthetic interests in observing species as sufficient. He also argued that imminence "should be measured by the timing and likelihood of the threatened environmental harm" rather than the time lapses between visits of individuals to the sites. The dissenters pointed out that it would be easy, for example, for the women to buy plane tickets and make more concrete plans to return to the sites.

With this ruling, the *Defenders of Wildlife* majority did not allow plaintiffs a chance to establish the right types of injuries and their immediacy. The Court denied plaintiffs an opportunity to develop facts about the potential harm from the two development projects and the environmentalists' links to the projects during discovery, the fact-gathering portion of litigation, which occurs after the parties set out all possible allegations and defenses. The *Defenders of Wildlife* dissenters (the unusual combination of justices Blackmun and O'Connor) argued that because serious factual issues about the alleged harm remained for trial, the summary dismissal on standing grounds was too rushed. This demonstrates one danger of standing: it often operates as a kind of adjudication on the merits. The *Defenders of Wildlife* Court discounts most of the harms alleged by the environmental organizations and doubts whether they can attribute any significant ("perceptible") harm to the two projects. If plaintiffs in *Defenders of Wildlife* were allowed to prove their ecosystem nexus theory or other theories with testimony and documents gathered during discovery, they might have established ESA violations—that the projects would likely harm the three species and/or their habitats. Additionally, plaintiffs might have shown how the projects affected their work with, or observation of, those species and their ecosystems. They might have established that such injuries were actually imminent or had already resulted from the agencies' actions.

The rushed and rough determination of factual matters which standing entails can often deprive plaintiffs of a chance to establish their theory of injury, causation and redressability. This "prejudging" of the merits of environmental disputes is contrary to the spirit of notice pleading in the federal system, which was implemented so that litigants can begin with simple, general allegations of injury and defense and then use discovery to develop facts and proof. Yet, under the Court's modern case law, all federal courts are directed toward a limited notion of a case or controversy, and federal courts hear most claims arising under federal environmental laws. As they evaluate standing, the Court instructs lower courts to favor familiar types of harm such as common law tort, property,

and contract claims. The courts must be skeptical of even allowing a factual hearing for novel claims such as damage to contiguous ecosystems. This bias does not always promote separation of powers because it is applied even where Congress has given statutory grounds for a new type of injury, as with the ESA.

The Court's toughening of standing requirements fits well with its aggressive promotion of summary judgment as a tool to dispose of weaker cases early and with its heightening of other procedural limitations since 1980.[14] The Court has endorsed such sorting mechanisms because it is concerned with increasing the efficiency of the federal court system. It is worried about heavy civil and criminal caseloads, and it is influenced by a perception that many lawsuits (especially against the government) are frivolous. The Court errs in addressing these legitimate concerns through standing. Courts do face problems from frivolous filings, but judges have power to sanction litigants and lawyers for such behavior. Moreover, the government is already provided with special substantive defenses of immunity from suit in many instances to reduce the time, cost, and disruption of defending against claims. Admittedly, even the early stages of litigation are expensive and government defense is financed by taxpayers, but enforcing environmental laws may be worth that cost to some parties. The Court's narrow interpretation of Article III impedes the development of environmental law. Federal courts are limited in hearing new theories of injuries and evaluating chains of causation, even as scientific evidence mounts to show that environmental harms are gradual, long-term developments that coordinated action rather than discreet, band-aid measures. The Court's constricted focus also limits the ability of Congress to participate in the definition of cases and controversies. Moreover, as the ensuing contrast between *Defenders of Wildlife* and *Bennett* demonstrates, the Court's Article III conception often blocks access in a biased way: in favor of those with traditional claims such as monetary damages and to the detriment of those seeking to protect the environment and endangered species under novel statutory approaches.

Defenders of Wildlife: *Derailing Private Citizen Suits by Environmentalists and Citizen Suits*

The most important aspect of Court's ruling in *Defenders of Wildlife* was its rejection of the citizen standing. The Court deemed the citizen stand-

ing provision of the ESA unconstitutional as applied in that case. The Court is generally skeptical of citizen standing because it believes it is the job of Congress and the executive branch, not the courts, to vindicate the general public interest reflected in congressional statutes. If Congress could turn "the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicatable in the courts," it would be transferring "from the President to the courts the Chief Executive's most important constitutional duty"—"to 'take Care that the Laws be faithfully executed.'" In other words, courts would be inappropriately participating in law *enforcement* and usurping the power of the executive branch if they allowed citizen suits to proceed.

Lawyers can argue for a narrow reading of *Defenders of Wildlife*, one that would have very little precedential impact on future ESA cases or other types of environmental lawsuits. Lawyers could focus on the majority's "as applied" language. As several justices emphasized, the allegations of harm could easily be rectified by plaintiffs with more concrete plans or plane tickets in hand. Notwithstanding these arguments, many lower federal courts have read *Defenders of Wildlife* broadly, skeptically viewing many types of environmental claims brought by private citizens. These readings are justified by the Court's expansive language about the problems of citizen suits and their questionable constitutionality. In the Court's reasoning, generalized grievances are not *personal* enough injuries to confer standing.

The *Defenders of Wildlife* Court did not have to reach this constitutional ruling. It could have relied on earlier cases that treated the bar against generalized grievances as only a prudential barrier to standing. Prudential barriers are ones which federal courts have more discretion in applying; they can act more flexibly in heeding the cautions of prudential barriers, depending on their assessment of the particular situation. Justiciability doctrines contain an unusual blend of constitutional and prudential hurdles. The *Defenders of Wildlife* Court's apparent transformation of the bar against generalized grievance from a prudential concern to a constitutional barrier was confirmed by the entire Court in later cases.[15]

Justice Scalia—who generally does not like to avoid constitutional questions—eagerly increased the Article III requirements, despite the reservations expressed by justices Kennedy and Souter. In addition to his concerns about the breadth of plaintiff's approach to standing, Justice Scalia expressed reservations about how courts could redress the alleged procedural injuries. He noted that the courts could only require consultation, they

could not assure the substantive outcome of consultation (e.g., whether the agency projects would be allowed to proceed and thereby threaten the species). Five years later, the Court developed some of these redressability cautions and again toughened standing requirements in *Chicago Steel,* discussed later in this chapter.

While the *Defenders of Wildlife* majority focused on generalized grievances as a serious separation of powers problem, the dissenters charged that the Court's denial of standing created a different separation of powers problem. They argued that the agency consultation requirement of the ESA was intentionally included by Congress to provide appropriate supervision by a high-level executive official over the work of administrative agencies affecting endangered species. They reasoned that Congress could simply command executive branch officers to prohibit agency action that results in a loss of 5 percent of any listed species. "In complex regulatory areas, however, Congress often legislates . . . in procedural shades of gray." With the ESA, Congress afforded the executive branch great flexibility and discretion to the substantive requirements as long as the procedural requirement of consultation was followed. The dissenters feared "the Court seeks to impose fresh limitations on the constitutional authority of Congress to allow citizen suits in the federal courts for injuries deemed 'procedural' in nature." In contrast, in earlier cases, the Court had allowed environmentalists to proceed with procedural rights such as the right to obtain a timely environmental impact statement.[16] If courts refuse to accept judicial review of agencies' procedures, courts transfer power to the executive branch at the expense of Congress. In the battle between the Carter and Reagan executive officials over ESA interpretation, the Court gave more power to low-level officials to diverge from earlier congressional intent. Individuals or groups are left with no mechanism for enforcing the right of consultation. As Chief Justice Marshall said in an early Supreme Court opinion, the federal judiciary has "no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution."[17] Thus, the majority's conclusion that the citizen suit provision was unconstitutional as applied undermines the right which Congress gave private citizens: the interest in pursuing all ESA violations. By removing private citizens from the law enforcement team, the Court alters the separation of powers balance.

Justices Kennedy and Souter, however, staked out a middle ground in their separation of powers analysis, concurring in part with the Court's

opinion. Reluctant to take all power away from Congress, they sought to give the courts and private citizens some enforcement role. "Congress has the power to define injuries and articulate chains of causation that give rise to a case or controversy where none existed before." Kennedy and Souter showed some understanding of the intricacy of modern regulation, noting that "[a]s government programs and policies become more complex and far-reaching, we must be sensitive to the articulation of new rights of action that do not have clear analogs in our common-law tradition." Kennedy and Souter also refused to join the portion of Scalia's opinion denying procedural rights, hoping to leave some room for Congress to define appropriate procedural injuries. However, they suggested that Congress should be more clear in future citizen suit provisions. Congress should identify the injury it seeks to vindicate (not just general enforcement of violations of the ESA) and link the injury to the class of persons entitled to sue. In other words, Congress must identify how a narrower group or category of persons are harmed in specific ways by violations of the law.

In theory, Kennedy and Souter's approach minimizes separation of powers concerns because it leaves room for Congress to articulate new injuries and rights to sue to enforce environmental or other types of federal law. In practice, of course, it is hard for Congress to address the many items on their agenda with the clarity these justices require. Congress did not approve a proposal to amend the ESA's citizen suit provision shortly after *Defenders of Wildlife.*[18] Instead, Congress in the 1990s attempted to halt new listings and stop critical habitat designation. When Congress has identified a social ill like harm to endangered species from government activities and used its broad remedial powers to address the problem, true deference to Congress should entail a more relaxed view of standing to allow courts to define (over time and through a number of cases) which litigants present viable claims of harm under the legislation.[19] Indeed, Congress may deliberately leave language vague in order to achieve compromise, leaving the role of developing specifics to the courts in concrete cases.[20] The courts, both state and federal, regularly develop federal law by filling in gaps in the statutory schemes designed by Congress through litigation. They do so to implement congressional intent, believing, for example, that it is impossible when writing legislation for Congress to address all interpretive disputes that will arise.

For example, some of the Court's standing rulings in the 1970s developed a "zone of interests" test to recognize the idea that the standing

analysis may be more lenient when the claim asserted arises under a federal statute. The Court focused in these decisions on whether the interest raised by plaintiff was arguably within a zone of interests that Congress intended to protect or regulate with the statute in question. In several cases under the 1968 Civil Rights Act claiming racial discrimination in housing, the Court read Congress's broad language to allow citizens concerned with integration to sue. Congress had simply provided that any aggrieved person could sue to enforce the housing laws. The Court allowed potential renters, persons living in large housing complexes, public interest organizations, and an entire village to sue to enforce the nondiscrimination policy.[21]

Similarly, with environmental claims, the Court gave plaintiffs a chance to prove their claims of harm at trial, despite arguably attenuated causal chains, as long as the claims were within the zone of interests meant to be protected by the statutes. For example, in 1973, five law students in Washington, D.C., challenged the Interstate Commerce Commission regulations that put a surcharge on rail freight rates.[22] They argued that the agency's decision not to increase rates required an environmental impact statement ("EIS"). Their claim was fairly attenuated. They argued that the higher freight rates would lead to a higher use of nonrecyclable commodities, which would lead to a higher use of natural resources from the Washington, D.C., area, and this could lead to more refuse in local parks, as well as more mining and depletion of the area's natural resources they used. The Court allowed their suit to proceed, even though they pursued only a procedural right (to obtain an EIS) that might present redressability concerns because a court could not control whether the rate surcharge would go into effect.

Against this backdrop, *Defenders of Wildlife* appears to represent a marked shift in standing requirements. In *Defenders of Wildlife,* many members of the Court appear skeptical about reading Congress's intentions to protect endangered species broadly by enforcing citizen suit provisions and recognizing procedural rights. Yet the Court has not consistently taken such a harsh approach to ESA standing. The Court decided *Bennett*—a case brought by ranchers protesting species protection—only five years after *Defenders of Wildlife,* but relied on its older, more lenient "zone of interest" approach rather than the stringent standing analysis in *Defenders of Wildlife*. Using a more relaxed inquiry, the Court found that plaintiffs who complained that the government was doing too much to protect endangered species and thereby harming plaintiffs' economic in-

terests could proceed to sue in federal court under the ESA. Given Congress's stated purpose in enacting the ESA, the Court's relaxed standing inquiry would have been more appropriate in *Defenders of Wildlife* than in *Bennett.*

Court Allows Citizen Suits under ESA for Economic Injuries

In stark contrast to *Defenders of Wildlife,* the Court saw no problem in 1997 with allowing citizen standing under the same citizen suit provision of the ESA when plaintiffs claimed economic injury from species protection. Several ranchers and irrigation districts complained in *Bennett* that government action to protect fish would reduce their water supply and harm them economically. The Court allowed their suit to proceed, despite the extremely broad citizen suit provision they relied on and the fact that some of their claims raised redressability concerns. The *Bennett* Court's reading of the ESA and its standing analysis provide a striking contrast to *Defenders of Wildlife.* The Court contorts the statutory goals in *Bennett,* finding that the ESA is not only about *protecting* species and their environment, but about "the environment" more generally. *Defenders of Wildlife* and *Bennett* are a double blow for private citizen ESA enforcement. Plaintiffs with economic injuries who seek to prevent government protection of species are given access to the federal court system while plaintiffs who seek to advance species protection are blocked.

Some background for *Bennett* is useful. Since 1905, the United States has operated the Klamath Irrigation Project, one of the oldest federal reclamation schemes. The Klamath Project is a series of rivers, dams, lakes, and irrigation canals in southern Oregon and northern California, servicing about 240,000 irrigable acres of land. Cattle graze in the area, and ranchers grow cereal grains, grass seed, alfalfa hay, onions, and potatoes. The extent of water available to users of the Klamath Project depends on a series of factors, including state-based water rights, contracts, and flood and drought conditions. In 1988, two species of fish were added to the ESA listings: the Lost River sucker and the Shortnose sucker. The U.S. Fish and Wildlife Service ("FWS") determined in 1992 that the Klamath Project threatened the continued existence of those fish. FWS issued a Biological Opinion recommending restrictions on release of irrigation water and maintenance of certain water levels in the Gerber and Clear Lake Reservoirs to avoid jeopardizing the fish. The

Bureau of Reclamation, which operates the Project, said that it would implement FWS' recommendations.

Plaintiffs—two ranchers and two Oregon irrigation districts within the Project area—sued FWS officials and the secretary of the interior. The ESA citizen suit provision allows lawsuits by "any person . . . to enjoin any person, including [a federal entity], who is alleged to be in violation [of the ESA]." Plaintiffs claimed that FWS's recommendations were arbitrary, were unnecessary to protect the fish, deprived the plaintiffs of water they would otherwise be entitled to, and harmed them economically. Essentially, plaintiffs advanced a competing interest in the water supply. Plaintiffs also alleged that the government had violated their procedural rights under the ESA, similar to the consultation right violation alleged by the *Defenders of Wildlife* plaintiffs. They relied on procedural rights that required the federal government (1) to use the best scientific and commercial evidence available in making their recommendations, and (2) to not make species preservation decisions without considering the economic impact of those decisions. The lower federal courts in *Bennett* concluded that the plaintiffs did not meet standing requirements, emphasizing that the ESA was singularly devoted to ensuring species preservation and did not embrace plaintiffs' economic interests, which were at odds with species protection. Several federal appellate cases had denied zone of interest standing to other plaintiffs asserting economic harm.[23]

The Supreme Court unanimously reversed, reaching the constitutional question of standing, and finding that plaintiffs satisfied all three elements: injury, causation, and redressability. The Court upheld the ESA's citizen suit provision, despite noting its "remarkable" breadth (broader than in many other environmental statutes). Justice Scalia, for the entire Court, found the provision acceptable for two reasons. First, the Court characterized the ESA as a compromise between conflicting goals. One goal is to protect endangered species, but another is to make good economic choices and compromises in preserving endangered species and their habitats. Thus, the Court labeled the "overall subject matter" of the ESA as "the environment" rather than endangered species protection. The Court viewed the environment as a "matter in which it is common to think all persons have an interest," including monetary interests. Second, the citizen suit provision was obviously aimed at encouraging enforcement by private attorneys general, said the Court. Such private attorneys general could pursue underenforcement and zealous overenforcement of the ESA. In other words, the breadth of the ESA's

subject matter and the broad congressional endorsement of private supplemental enforcement supported standing for the plaintiffs. It is difficult to reconcile the Court's reading of the ESA in *Bennett* with Congress's intent in drafting the legislation. The primary purpose of the ESA was to protect endangered species, not those who rely on resources affected by those species. As the detailed congressional findings of fact supporting the statute show, the ESA is definitely not a neutral statute about balancing all competing concerns.

Additionally, the Court's interpretation of Article III is in startling contrast to its reasoning in *Defenders of Wildlife*. The *Bennett* Court reiterated the importance of standing in maintaining an appropriate separation of powers and in promoting a "properly limited" role for federal courts in a democratic society. Nevertheless, the Court in *Bennett* concluded that the standing burden is "relatively modest" for plaintiffs at the outset of litigation. The Court's tone and approach to standing is completely different in the two cases. In *Bennett*, the Court did not express concerns about the remarkably broad citizen suit provision leading to numerous lawsuits that might disrupt government action or overwhelm federal courts with environmental disputes. The federal government argued in *Bennett* that plaintiffs lacked standing under the *Defenders of Wildlife* analysis, but the Court did not distinguish *Defenders of Wildlife* or compare the two ESA citizen suit provisions. If we all share an interest in the environment, the citizen suit provision surely becomes an impermissible vehicle for generalized grievances.

Recall that in *Defenders of Wildlife* the Court read the ESA citizen suit provision aimed at enforcing federal compliance with the consultation provision of the statute as *too broad to support standing*. This breadth destroyed its effectiveness, although the injuries claimed by the environmentalists were more consistent with the ESA's purpose of protecting endangered species and obviously furthered congressional endorsement of private enforcement. Apparently, Congress appropriately provided private enforcement for those opposing wildlife protection, but inappropriately provided for private enforcement by wildlife conservationists. Looking at the very similar language of the citizen suit provisions does not solve this puzzle. It is solely the different types of injuries and facts alleged which distinguish the two cases.

Standing is easier for the ranchers and irrigation districts to achieve primarily because they present a more traditional type of harm than did the environmentalists in *Defenders of Wildlife*. Interference with economic

interests was long recognized at common law, and can be labeled a property right claim, a contract claim, or a tort. In contrast, the wildlife conservationists' claim that government action will harm endangered species and their habitats is a more modern and novel claim. Degradation to species and habitat is incremental and may be difficult to prove. The imminence of the harm may be hard to establish; scientific evidence might be necessary. The most direct harm is suffered by the species, so courts may not be receptive to claims brought by people or groups who observe and work with endangered species. Nevertheless, the protection of endangered species and their habitats is a statutory mandate enacted by the legislative and executive branches, with provision for citizen enforcement. By including a citizen suit provision, Congress surely must have envisioned some citizen suits by conservationists to enforce some government violations of the ESA.

Certainly the *Bennett* and *Defenders of Wildlife* cases present different factual scenarios, and factual differences are important in modern standing analysis. Perhaps *Defenders of Wildlife* is just a weak case factually: the wildlife researchers lived far from the project sites and did not visit them regularly. Similarly, the environmentalists in *Chicago Steel,* discussed next, could only show the defendants' *past* noncompliance with a toxic right-to-know law, not any ongoing or future violations. But it is hard to read such cases narrowly—however much environmentalists might like to do so—given the Court's broad language. The Court casts doubt on the constitutionality of citizen suits brought by conservationists in *Defenders of Wildlife,* yet treats the citizen suit provision relied on by the ranchers in *Bennett* in a relaxed manner, endorsing its remarkable breadth.

As Congress provides for new types of statutory rights, the Court has increasingly heightened federal court standing requirements, limiting the federal courts to hearing traditional claims with straightforward remedies such as monetary awards. This constricted standing approach does not allow federal courts to consider new types of cases, such as claims of government failure to follow proper procedures or suits attempting to get at some of the underlying causes of discrimination. Indeed, the Court's augmentation of standing and related doctrines that make access to courts more difficult can be seen as a reaction to increases in highly visible and controversial public law litigation.[24] Not surprisingly, the Court's bias in this area favors those who have traditional property or contract law claims, and those with preexisting, legally recognized claims to resources and wealth. At the same time, their bias takes power away from the legislative and executive branches to delineate new rights and protection for their enforcement in courts. This

skewed result is underscored when we examine one final recent environmental ruling, in which the Court denied access to private citizens who claimed they were injured by a manufacturer's failure to comply with pollution-reporting requirements.

A Defeat for Enforcing the Toxic Right-to-Know Law

Citizens for a Better Environment ("CBE"), an environmental protection organization, obtained information gathered under the Emergency Planning and Community Right-to-Know Act ("EPCRA") about a manufacturing company, Chicago Steel and Pickling Co. ("Chicago Steel"). Enacted by Congress in 1986, EPCRA establishes state, regional, and local agencies to inform the public about the presence of toxic and hazardous substances, and to provide for emergency response options for health-threatening releases.[25] Under the law, facilities that use specified toxic and hazardous chemicals must file annual forms detailing their chemical usage. These data are available to the public under EPCRA. Enforcement of EPCRA can come from state, local, and federal governments, and Congress again provided for citizen suits as a supplemental means of pursuing polluters who violate EPCRA.

Chicago Steel is a small steel pickler and reduction mill located on the heavily industrial south side of Chicago.[26] The company removes scale and rust from steel coils, which are unwound, put in hydrochloric acid tanks, washed, and air dried. In 1995, CBE sent a notice under EPCRA to the appropriate government officials, alleging that Chicago Steel had not filed the reports required under EPCRA between 1988 and 1995. The company filed the overdue reports quickly and the federal government chose not to sue, but after the required a sixty-day waiting period, CBE brought suit in federal court against Chicago Steel under EPCRA. CBE asserted that its members live in or frequently use the area near Chicago Steel's facility. They use EPCRA information to learn about toxic releases, plan for emergencies, and attempt to reduce the use of toxic chemicals in their locale. Thus, the members claimed that their "safety, health, recreational, economic, aesthetic and environmental interests" were impaired by the late reporting. The citizen suit provision authorized injunctive relief and civil penalties, payable to the U.S. Treasury.

Chicago Steel argued that Congress did not intend to authorize citizens to sue for past reporting violations and asserted that allowing suit

over a problem that has been fixed is gratuitous and subverts EPA's enforcement discretion. In a sense, it argued that the harm was done and past; a lawsuit would not alter anything and the dispute was thus moot. Additionally, Chicago Steel argued that any harm to CBE was diminished because all the information found in the EPCRA forms could have been found in other environmental forms filled out in a timely manner by the company. CBE responded that, if no citizen suits are allowed, violators will be able to fix reporting problems within the sixty-day notice period, and the only means of enforcing timely filing requirements will be through the federal government, whose resources are constrained.[27] The Solicitor General, arguing on behalf of the United States, agreed with the environmentalists, arguing that EPCRA citizen suits would be futile if potential defendants could avoid a suit altogether by delaying their filings or otherwise failing to comply until they received a citizen suit.

The lower federal courts split on whether to allow CBE's suit to proceed. The trial judge dismissed the suit, reading EPCRA to not allow a suit for purely past violations, but the Seventh Circuit Court of Appeals reversed, interpreting the statute to allow such suits. The Supreme Court dismissed the case for lack of standing. The Court reasoned that even if CBE could establish the right type of injury (the reporting failures harmed the group), CBE could not prove redressability. Redressability, the final standing hurdle, requires a plaintiff to show that a court ruling in its favor would make a real difference to it. The Court concluded that none of the relief requested, nor any relief the Court could envision, would reimburse CBE for losses caused by the late reporting or eliminate any effects of that late reporting upon CBE.

Rather than focus on the effectiveness of the citizen suit provision or congressional intent, the Court focused on the relief sought. The Court proceeded through each type of relief, deemed it either futile or inappropriate to address CBE's alleged harms, and concluded that CBE did not present a redressable Article III controversy. As is typical, CBE's initial pleading sought many types of relief, among which a court—usually the trial court—could choose if CBE prevailed in proving Chicago Steel's EPCRA violations and resultant harm to CBE. CBE first asked for a legal judgment declaring that Chicago Steel had violated EPCRA. The Supreme Court said that would be "worthless to all the world," including CBE, because Chicago Steel had already admitted that it failed to file the reports and because such failure clearly violated EPCRA. The Court disregarded the satisfaction CBE might feel from such a public, court decla-

ration of Chicago Steel's legal wrongdoing. The Court also ignored the precedential impact and deterrent effect such a declaratory judgment could have in preventing late filings by other companies.

As a second type of relief, CBE asked for authorization to inspect Chicago Steel's facility and records periodically at Chicago Steel's expense. Third, CBE asked for an order requiring Chicago Steel to supply copies of reports it files in the future with the federal government to CBE. The United States joined CBE in urging the Court to treat these claims for orders (injunctive relief) as sufficient to satisfy redressability. But the Court found that the injunctive relief requested would deal only with *future* actions of Chicago Steel. The Court deemed this only a generalized interest in deterring future EPCRA violations, which did not give CBE sufficient standing for injunctive relief. A federal court could only give injunctive relief aimed at Chicago Steel's future conduct if CBE alleged ongoing EPCRA violations or an imminent future violation. Proving an ongoing violation is difficult to do under EPCRA since there is no system of frequent monitoring and reporting.[28]

A fourth type of relief requested by CBE was civil penalties of $25,000 per day for each violation of the toxic right-to-know law. The Court rejected this type of relief because EPCRA civil penalties are payable to the U.S. Treasury, not to CBE. Relying on *Defenders of Wildlife,* the Court reasoned that by seeking civil penalties, CBE presented an impermissible generalized grievance shared by all members of the public, rather than its own personalized injury. If the gratification CBE would achieve if Chicago Steel had to pay such penalties was sufficient, the redressability requirement would become meaningless. "[A]lthough a suitor may derive great comfort and joy from the fact that the United States Treasury is not cheated, that a wrongdoer gets his just desserts, or that the nation's laws are faithfully enforced, that psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury." Three justices vehemently disagreed with this conclusory analysis. Why should a plaintiff have standing if the civil penalty were payable to plaintiff directly (like a cash bounty) but not acceptable if it was payable to the Treasury? The dissenting justices likened EPCRA's civil penalty to a punitive damages, which have long been accepted under traditional tort law to punish a defendant and deter future violations. Punitive damage awards are sometimes shared by litigation victors and the government.[29]

CBE's final request for relief concerned reimbursement for all expenses it had incurred in pursuing Chicago Steel's EPCRA violations,

which included investigation and prosecution expenses. Because Chicago Steel did not give CBE the information it was entitled to under EPCRA, CBE had to conduct a more expensive independent investigation and pursue litigation. The Court admitted that such reimbursement would benefit CBE directly and not all citizens at large. But the Court did not allow CBE to support standing by relying only on litigation costs, perhaps fearing that standing would then pose no barrier because all litigation entails cost. It also interpreted EPCRA as only providing for reimbursement of litigation costs and not investigative expenses CBE had incurred. Although CBE had also requested any further relief deemed appropriate (a familiar catch-all category), the Court could not supply any relief it thought would allay CBE's losses from the late reporting. Thus, the Court concluded that no federal court had authority to hear the lawsuit.

Chicago Steel will chill future EPCRA litigation because other private citizens, states, and local governments will face the same hurdle as CBE in establishing redressable injuries for reporting violations. The Court's standing decision effectively means that EPCRA violators can delay compliance until they receive a notice of a citizen's intent to sue. Once a violator submits all the required forms, the citizen suit is barred. The decision diminishes a citizen suit's effectiveness; it dampens the incentive for citizen groups to monitor possible violators because they will not be reimbursed for investigation or litigation expenses and will run into a standing barrier. Arguably, the ruling undermines EPCRA by allowing companies to file tardy reports without penalty. Under the Court's strained reasoning, the only time a citizen suit will be allowed under EPCRA is if the company fails to fix the violation or if the federal government prosecutes violations.[30] The Court is likely not troubled by this problem and would believe that Congress can address its ruling if it does not square with congressional intent. Congress, for example, could react to *Chicago Steel* by giving citizens a share of the penalties recovered, by authorizing citizens to recover investigation costs they incur before the litigation, and/or by making civil penalties fund environmentally beneficial projects in the community near the defendant's facility.

One final dispute between the justices in *Chicago Steel* deserves attention. Justice Stevens, concurring only in the judgment, accused the Court of developing significant new constitutional requirements for standing when the Court could have avoided that important constitutional question by resolving a statutory interpretation question first. A surprisingly large portion of the majority and concurring opinions involves a fight over which question

should be answered first: the constitutional issue of redressability, or the statutory interpretation question. EPCRA's citizen suit provision had been interpreted by some lower federal courts as allowing suits for late filings, and by others as only a right to sue when a facility completely failed to file required reports. The three concurring justices read the citizen suit provision as ambiguous and concluded that Congress did not intend to give private citizens such as CBE a right to sue for violations that occurred entirely in the past. Through this statutory construction maneuver, the Court could have bypassed the redressability issue completely.

Chicago Steel's standing ruling will impact litigants outside the environmental area. Previously, the Court had not said much about the redressability requirement, so the ruling is a significant elaboration on standing requirements applicable in all federal cases. Three justices protested the Court's reasoning, finding that it was not sufficiently deferential to Congress's ability to articulate new, nontraditional rights. They challenged the Court's curt dismissal of the various forms of relief which CBE sought, arguing that determination of appropriate relief is normally left to a later stage of litigation and the trial court's discretion. As in *Defenders of Wildlife,* the Court was very dismissive of the harms plaintiffs claimed. The concurring justices also expressed concern about the breadth of the ruling and its impact. Three times, they invoked the avoidance doctrine in criticizing their colleagues for expanding constitutional law unnecessarily.

After *Chicago Steel,* the Supreme Court agreed to hear *Friends of the Earth v. Laidlaw Environmental Services*.[31] An environmentalist organization brought a citizen suit alleging ongoing violations of the Clean Water Act by Laidlaw for discharging mercury into the North Tyger River in South Carolina. Friends of the Earth ("FOE") sought monetary penalties, declaratory and injunctive relief and its attorneys' costs and fees. Although the trial court found that Laidlaw had been in substantial compliance for several years, it imposed a penalty of $405,800. The appellate court dismissed the suit, emphasizing that "the only potential relief that may be available to redress their claimed injuries is the civil penalty imposed upon Laidlaw, which would be paid to the United States Treasury." The court remarked that it would have decided this case differently prior to *Chicago Steel,* but felt constrained by that decision. Laidlaw's lawyer said the appellate victory showed "the absurdity of companies' spending years in court battles over technical violations that have long since ended." In contrast, environmentalists said the decision gave industry a

green light to pollute because managers can avoid paying penalties as long as they stop polluting once they are caught. Some people living near the North Tyger River, concerned about odors from the site and chemical discharges, say ordinary Americans have lost their voice in environmental battles. In a prescient manner, a citizen living near the Laidlaw plant said, "If people who live in these places cannot have a say in what's going on, then everything and everybody in this country is in trouble."[32]

The Supreme Court, however, overturned the appellate decision in 2000, finding standing even though Laidlaw had ceased its allegedly unlawful conduct after the suit was filed. The Court also affirmed the award of $405,800 in civil penalties as appropriate redress for the injuries that prompted the litigation. The Court rejected Laidlaw's contention that FOE lacked standing because they failed to show that any of their members sustained or faced a threat of injury from its activities, and that the permit violations at issue did not result in health risk or environmental harm. Justice Ginsburg, for the 7-2 majority, stated: "The relevant showing for purposes of Article III standing is not injury to the environment, but injury to the plaintiff." The Court then found the sworn statements from FOE members, documenting that they curtailed their use of the affected area because of Laidlaw's alleged unlawful discharges, a sufficient showing of personalized injury. The Court harkened back to an early 1970s precedent, noting that environmental plaintiffs adequately allege injury when they state that they use an area affected by a challenged activity and are persons "for whom the aesthetic and recreational values of the area will be lessened by . . . the challenged activity."[33] The Court cited *Defenders of Wildlife* for the proposition that even the desire to observe a species is a cognizable injury for the purposes of standing.

The Court distinguished FOE members' injuries from those claimed by the *Defenders of Wildlife* plaintiffs. The Court deemed the FOE members' "conditional statements" that they would use the affected area if not for Laidlaw's discharging pollutants into it as sufficient, while characterizing the *Defenders of Wildlife* allegations as insufficient, "speculative 'some day' intentions" to use the area allegedly impacted by government activities. The distinction the Court makes is not self-evident. Both sets of allegations appear equally speculative, dependent on future events and the actions of third parties. If the *Defenders of Wildlife* plaintiffs had bought those airline tickets, perhaps they would have had the concrete plans to use an area or observe species necessary to establish standing. Perhaps the Court is willing to allow the *Laidlaw* allegations of injury be-

cause the causal link between the defendant's activity and harm to the affected area is less attenuated and easier to establish as a contained factual matter. In *Laidlaw*, pollutants would be discharged into a specific river that plaintiffs sought to use, while in *Defenders of Wildlife* plaintiffs' claimed harms arose from remote activities and might need to be channeled through an ecosystem nexus theory.

Laidlaw also argued that even if FOE had standing to seek injunctive relief, it lacked standing to seek civil penalties because they are paid to the government and offer no redress to private plaintiffs. But the Court disagreed, reasoning "it is wrong to maintain that citizen plaintiffs facing ongoing violations never have standing to seek civil penalties." The Court cited congressional findings and legislative history from the Clean Water Act to support its determination that civil penalties can both promote immediate compliance and deter future violations. The Court gave wide berth to Congress, offering "judicial attention and respect" to the multiple purposes Congress advanced by imposing civil penalties. The Court distinguished *Chicago Steel* as not involving any continuing or imminent violations, as did *Laidlaw*.

Conclusion

The Supreme Court chose to issue broad constitutional rulings in *Defenders of Wildlife* and *Chicago Steel,* although it could have avoided these rulings through more limited statutory construction grounds. When it decided to reach the standing issues, the Court augmented its earlier prudential rulings to create a constitutional requirement making it more difficult for environmentalists to enforce laws that favor them in federal courts. But, as *Bennett* demonstrates, the Court has not consistently blocked access for people challenging government conduct under environmental laws. In that decision, the Court allowed private parties complaining about overenforcement of environmental protection laws with more traditional allegations of economic injury to proceed in federal court under a broad citizen standing provision.

On the other hand, *Laidlaw* seems to be a significant change in the Supreme Court's approach to citizen standing, unless it is confined to Clean Water Act cases. Justice Scalia, dissenting, warned that the Court turned *Defenders of Wildlife*'s requirements into a mere function of pleading and created new standing law by allowing a "penalty payable to

the public remed[ying] threatened public harm." Indeed, he foresaw "grave implications for the future of democratic governance" because the Court nearly erased the redressability requirement elaborated in *Chicago Steel*. Perhaps *Laidlaw* demonstrated concretely the danger of the *Chicago Steel* approach. Although *Laidlaw* did not overrule *Chicago Steel,* it restricted the ruling significantly. The *Laidlaw* Court was willing to assume that Congress and the EPA have legitimate environmental reasons to adopt pollution standards, and that when citizens show a violation of those standards, courts should not second guess whether there is harm to the environment.

Through an aggressive, albeit narrow, interpretation of Article III, the Supreme Court has impeded citizen suits by environmentalists in the last twenty-five years. The Court has done this largely through standing decisions, which do not purport to be about the merits of the underlying environmental laws passed by the legislative and executive branches. But the standing law does reflect the Court's thinking about the merits: they reveal a bias against nontraditional types of claims such as broadly shared injuries to ecosystems and their users, and to citizens' ability to gather data about toxic hazards in their neighborhoods. The decisions limit the types of injuries for which Congress can provide judicial relief. Congress's role in developing Article III, however, may not be hopelessly blocked. Several justices have shown sensitivity to respecting the role of Congress in providing statutory rights and redress when Congress is sufficiently clear about its intent. But thus far, Congress has not rewritten the citizen suit provisions, which exist in most environmental laws, with the narrowness, clarity, and precision the Court often demands.

Lower federal courts have clearly picked up on the Court's directional signal in *Defenders of Wildlife* and have no choice but to closely scrutinize private citizens' environmental suits. Environmental groups will sometimes find plaintiffs with better factual claims than in *Defenders of Wildlife*. But the Court's resistance to looking at more systemic environmental harms is likely to deter environmentalists from bringing novel claims to protect species, land, air, and water. *Laidlaw,* in contrast, provides lower courts with a revised approach to citizen standing, more deferential to the clearer congressional intent animating the Clean Water Act. If this approach is extended to other environmental laws that specifically identify harms and provide citizen redress, the pendulum may swing in favor of environmentalists gaining access to courts. After *Laidlaw,* for example, the Fourth Circuit allowed Friends of the Earth to sue

for pollution under the Clean Water Act. One judge noted that the outcome would have been different under the Court's precedents prior to *Laidlaw*. Another concluded, relying on *Laidlaw*, that "[t]o bar the courthouse door to [this] claim of private injury would undermine the citizen suit provision of the Clean Water Act."[34]

The Court's piecemeal, narrow approach in cases prior to *Laidlaw* is diametrically opposed to the evolving scientific consensus, which suggests that governments should address environmental problems with comprehensive planning and consider the cumulative effects of activities on the environment and species. But in times of crowded federal court dockets and calls for efficiency from Congress, it is tempting for federal judges to follow the lead of *Defenders of Wildlife* and *Chicago Steel*. This allows other branches to handle environmental disputes, either the executive branch and agencies through prosecution of polluters, through government compliance with the explicit requirements of laws like the ESA, or Congress through a revision of citizen suit provisions. Judges may also be inclined to be cautious about allowing environmental suits to proceed to safeguard what the Supreme Court has called the federal courts' limited political capital. Such cases are often high profile, with many interested (and sometimes virulent) factions and significant publicity. Whether it is wolves in Yellowstone, a beach mouse in Alabama, or salmon recovery in Oregon, environmental disputes can be emotionally and politically charged. For example, the spotted owl litigation in the Northwest resulted in pressure on the University of Oregon School of Law's environmental clinic from timber interests and some legislators. Environmental clinics at other law schools have faced similar political pressure.

By developing standing law at a constitutional level, the Court is exercising its law-saying duty, sending directional signals to other courts and other constitutional decision makers. The selectivity with which the Court employs (or ignores) avoidance rules and applies standing requirements, however, is troubling. It has ignored avoidance concerns to aggressively block certain types of plaintiffs and claims from federal court. The Court may defend its lack of avoidance because it has construed Article III in such a way as to limit, not expand, the power of the federal courts. It is arguably not taking power away from the other branches and violating the separation of powers principle. This role for the federal courts, however, is too constrained. They should participate with Congress and the executive in interpreting environmental laws, filling in the gaps so as to effectuate the lawmakers' intent. By restricting the types of

cases that can be heard in federal courts, the Court actually limits the ability of Congress and the executive branch to implement fully the laws they design and redress the problems they identify. As the *Defenders of Wildlife* dissenters argued, this alters the balance of national powers because the judiciary no longer serves as a check on agency action. Although some justices assert in the environmental standing decisions that Congress may be able to respond with a revised citizen suit provision, it may be hard to satisfy the Court's often stringent Article III formula. The Clean Water Act sufficed in *Laidlaw*, but it remains to be seen how other citizen standing provisions will fare. In the area of federalism, where the Court has also aggressively construed the Constitution, the Court dropped similar hints of possible alternatives but then repudiated Congress's attempts to conform with the Court's prescription (see chapter 7). Moreover, by skewing Article III in such a backward-looking manner, the Court stifles the evolution of environmental law so that it cannot deal effectively with the magnitude of modern environmental problems.

3

The Court Uses Standing to Discourage Redress for Racial Wrongs

Early one morning in 1976, two members of the Los Angeles Police Department ("LAPD") stopped Adolph Lyons, a twenty-four-year-old African American, because one of the tail lights on his car had burned out. The officers, with guns drawn, ordered Lyons to get out of his car, face his car, and spread his legs. After he complied, the officers told him to put his hands on his head, and the officers patted him down. He then dropped his hands back to his side. The officers immediately ordered him to put his hands back behind his head, and one officer grabbed Lyons' hands, slamming them hard onto his head. Lyons complained about the pain caused by his key ring, which he held in his hands. Within five to ten seconds, one officer began to apply a choke hold by pressing his forearm into Lyons' throat. As Lyons was struggling for air, the officer handcuffed him and continued to apply the choke hold until Lyons blacked out. He was almost choked to death. When he returned to consciousness, Lyons was lying face down on the ground, choking, gasping for air, and spitting up blood and dirt. He had urinated and defecated. The officers released him after issuing a traffic citation.[1]

Mr. Lyons was fortunate that the choke hold did not kill him. Between 1975 and 1982, sixteen people died from the LAPD's use of choke holds.[2] Although African American men constituted only 9 percent of the city's population, they comprised 75 percent of the persons who died from police choke holds. Many other African American citizens suffered injuries short of death from choke holds. According to official altercation reports, LAPD officers used choke holds almost one thousand times between 1975 and 1980. The actual number may be higher, because officers and citizens do not report all altercations, and the city of Los Angeles does not keep records of injuries to suspects.

Adolph Lyons sued Los Angeles ("city") and the two police officers, alleging that the officers' use of a choke hold on him during a traffic stop, when he did not pose a serious threat of harm to them, violated his constitutional rights. He claimed that the use of the choke hold violated his Fourth Amendment right to be free from unreasonable searches and his Eighth Amendment right to be protected from cruel and unusual punishment. Additionally, he alleged that the use of the choke hold constituted racial discrimination in violation of the Fourteenth Amendment's Equal Protection Clause. He asked for damages and for injunctive relief, that is, for the court to stop the LAPD from using choke holds similarly in the future.

The *Lyons* trial judge, after hearing testimony about the physical and psychological effects of the types of choke holds used by the LAPD, concluded that choke holds "engender a high risk of irreparable injury or death as presently used and under the present training methods." LAPD trainers testified that officers were not taught to distinguish between felony suspects and misdemeanor suspects like Mr. Lyons, stopped for a broken tail light. LAPD officers had been taught to maintain the force of the choke hold until a suspect goes limp and were told that choke holds can be applied safely for up to three or four minutes. However, the choke hold usually produces an involuntary "fight or flee" reaction in victims. A victim's struggle can then be interpreted as willful resistance to arrest that must be overcome by prolonged choking and increased force. The trial judge heard evidence concerning the specific details of nine LAPD choke holds that had resulted in death. In the nine deaths, the police officers had applied choke holds for less than one minute, on average.

The federal trial judge found that the city authorized its police officers to apply life-threatening choke holds to citizens such as Lyons who posed no threat of violence. The judge found that the policy violated the Fourteenth Amendment's substantive Due Process Clause and "shocks the conscience." The judge then issued a preliminary injunction, ordering the city to stop authorizing choke holds when officers are not threatened with death or serious bodily injury, pending further trial court proceedings. Under the injunction, LAPD officers could continue to use choke holds when faced with serious bodily harm. The court also ordered better record keeping and an improved training program to halt further constitutional violations due to police choke holds. The Ninth Circuit Court of Appeals affirmed the preliminary injunction as within the trial court's discretion.

After the city appealed, the Supreme Court granted certiorari. When the Supreme Court heard the dispute in 1982, defendants asserted that trial court's ruling amounted to "substantial interference" with the LAPD's work. Amicus briefs from police organizations such as the International Association of Chiefs of Police and about a dozen California municipalities claimed that if the Court granted Lyons standing, municipalities would be forced to defend constantly the internal practices of law enforcement agencies. They also argued that the injunction against the use of choke holds was a major supervisory intrusion by the federal court into the daily workings of the LAPD, resulting in a substantial displacement of municipal authority. In other words, the local governments and police organizations voiced a federalism concern, arguing that federal courts were not sufficiently respecting their authority as sovereign entities with local autonomy. The city, relying on two Supreme Court cases from the 1970s, asserted that "federal court intervention in the daily operation of a large city's police department is undesirable interference which should be avoided if possible."

Mr. Lyons's lawyers, in contrast, urged the Court to uphold the trial judge's order. They argued that the city's policy violated the federal Constitution, which set important limits on the city's autonomy. The court's order was thus a necessary and proper way to ensure that LAPD officers did not use the choke hold in an unconstitutional manner. After agreeing to hear the case, the Supreme Court refused to rule on the merits or address the federalism arguments directly. The Court, by a 5-4 margin, found instead that Mr. Lyons lacked standing to bring his claim for injunctive relief to federal court. Lyons could sue for damages because of the injuries he suffered, but a federal court could not hear the claim that use of the choke hold in a similar manner should be barred in the future. The Court concluded that he was not the right person to bring the claim for injunctive relief because he could not prove that he would be injured *again* by an LAPD officer using a choke hold *on him*. The Court termed that pure speculation. The decision established that persons seeking injunctive relief against a government policy must show a substantial likelihood that the policy will harm them personally in the future.

Lyons and the other cases discussed in this chapter reflect the Supreme Court's clear preference for narrow, retrospective relief to address discrete past events over broader prospective relief to prevent future harm. Traditionally, standing was not a substantial barrier to federal court access. It was a more limited device to ensure that litigants were prepared to

be zealous advocates and present a concrete factual grievance. This chapter illustrates how the Court has developed the constitutional law of standing to deflect some of the most sensitive and important disputes, including charges of race discrimination by local and national governments. By doing so, the Court either transfers these disputes to other constitutional actors or allows them to languish, retaining the status quo. In contrast, the Court has employed a more relaxed standing inquiry to allow voters to raise claims of "reverse discrimination" against majority minority districts.

Susan Bandes observes that courts tend to see patterns of police brutality as a series of anecdotal, fragmented, isolated instances; courts cannot or do not choose to see systemic patterns of brutality as part of an overarching equality problem. When individuals seek to challenge police practices, they may be grouped in pernicious or stereotypical ways (as suspects or gang members) and easily marginalized. Conversely, the *Lyons* standing requirements tend to disaggregate these same individuals when they seek relief that would benefit other similarly situated people, transforming group interests into individual ones. Thus, the justice system works to turn away systemic challenges to governmental wrongdoing. When fragmented and disconnected, government misconduct is less threatening and easier to dismiss.[3] It is important to the Rehnquist Court that federal courts be able to award relief that is traditional, discreet, and final so that no continued judicial monitoring of the dispute is necessary.[4] Whenever a federal court is vaguely concerned about intrusion on the roles of other branches of government or where relief might require some continued court monitoring of executive action rather than a money-damages award, the standing hurdle is raised, as seen below and with the environmental challenges detailed in chapter 2.

But if Mr. Lyons, who was nearly choked to death, cannot seek injunctive relief, who can? As a young African American man living in Los Angeles, he was more likely than most others to encounter the use of an LAPD choke hold in the future. As noted earlier, three-fourths of the people who died from the use of LAPD choke holds were African American. Chokeholds were sometimes used to humiliate blacks by causing them to "do the chicken" (flop around from a loss of oxygen). In 1982, attempting to explain why such a high percentage of choke-hold deaths involved African Americans, Police Chief Daryl Gates asked for a study to determine if some blacks were especially susceptible to injury from choke holds. He said, "[W]e may be finding that in some blacks when

the hold is applied the veins or arteries do not open up as fast as they do on normal people." Race has often played a role in police abuse cases in Los Angeles, with many minority residents believing that the primarily white police force (who live mostly in white suburbs) are overly aggressive and abusive in minority communities. Warren Christopher, before he became U.S. secretary of state, headed a commission that determined that "[t]he problem of excessive force is aggravated by racism and bias" within the LAPD, and concluded that the LAPD culture was inadequate for a modern, multiethnic society. More than one-fourth of the 650 LAPD officers responding to a survey believed that some officers engage in racially discriminatory procedures and acknowledged that "an officer's prejudice toward the suspect's race may lead to the excessive use of force." The report found that at least several hundred officers repeatedly misused force and were not properly disciplined. Instead, many rogue cops were praised and promoted for their conduct. The commission also found that records of written messages between patrol cars and stations revealed repeated racial animosity by some officers. By transmitting them on the official LAPD system, the officers did not seem concerned that they would be disciplined for using racist and sexist language in some very hateful and violent messages. The 1991 Christopher Commission report outlined a path to improve police responsiveness to civil rights, but that report and an earlier report on police relations in South Central Los Angeles twenty years after the Watts riots have been largely ignored by the city and the LAPD.[5]

Further, because the police nearly killed Adolph Lyons with a choke hold in 1976, his personal, continuing fear of future interactions with LAPD officers was reasonable and justified as long as the same policy was in effect that gave officers wide latitude to use choke holds in nonviolent situations. The Supreme Court found, however, that his fear and his future likelihood of facing a choke hold was not enough to demonstrate an imminent, personalized injury for Article III standing purposes. The Court recognized in *Lyons* that it will be difficult for anyone to meet that standard. To obtain injunctive relief, the Court said that Lyons would need to show he would have another encounter with the LAPD, and he would need to make the "incredible assertion" that all LAPD officers always choke the citizens they pull over or that the city ordered or authorized its police officers to behave in such a manner. If the city's policy does amount to an ongoing constitutional violation, it is a problem shared by all citizens of Los Angeles. But the Court will not let litigants

bring generalized grievances against the government to the federal court system. It prefers that the legislative and executive branches address such widely shared complaints, even if they implicate constitutional norms.

The four dissenters charged that this injunctive relief inquiry was an unnecessary new standing hurdle created by the majority to block access to federal courts for plaintiffs claiming ongoing government constitutional violations. Mr. Lyons already had an Article III case or controversy: he had a claim that got him through the door of the federal courthouse. The dissenters reasoned that he had standing to sue the city and seek money damages because of the injuries he sustained in the 1976 traffic stop. He obviously had a personal stake in obtaining relief for the past LAPD conduct. Lyons could not win on his claim for money damages without proving that the city's choke-hold policy was unconstitutional as applied to him. Once the federal trial determined that the city's choke-hold policy was unconstitutional and injured Lyons, it had broad discretion to determine what type of relief was appropriate to redress the injury. Before *Lyons,* a trial court retained discretion—as long as a plaintiff had standing for one claim—to grant appropriate relief, including a declaration of legal rights, an award of money damages, injunctive relief against similar future conduct of the defendant, or some combination of relief. In *Lyons,* the Supreme Court established a new standing inquiry for each type of relief sought, depriving trial judges of their flexibility in remedial matters.

Admittedly, Lyons was not shut out of federal court completely. He could still pursue his damages claim. If he prevailed on a damages claim, establishing that the choke-hold policy was unconstitutional as applied to him, that award could send a message to the LAPD that could have some deterrent effect. But beyond a damage award, one of the benefits of injunctive relief is that it achieves deterrence more broadly, more swiftly, and with more certainty. For example, as Lyons's case dragged through the courts over five years, the trial judge's order halting the use of unconstitutional choke holds was stayed during two sets of appeals to the Ninth Circuit and Supreme Court on disputes over procedural issues. Meanwhile, the LAPD continued to use choke holds and more deaths resulted. During the early stages of *Lyons,* the trial court was made aware of nine prior deaths. By May of 1982, seven more people had died from LAPD choke holds. In the interim, presumably many more people were injured by LAPD choke holds.

An individual damage award is often insufficient to stop police prac-

tices in a department that has a history of allegations of brutality against racial minorities, as illustrated by a high-profile incident involving Joe Morgan, an African American baseball star and sports commentator. The LAPD has long been criticized for its treatment of African Americans, Latinas/os and other minorities and for discrimination against minorities within its own ranks.[6] In 1988, Mr. Morgan was apprehended by LAPD officers at Los Angeles International Airport as they looked for a drug suspect. The officers stopped, searched, and arrested Morgan primarily because he was African American. A judge ruled the stop unconstitutional and a jury awarded Morgan $90,000 in compensatory damages and $450,000 in punitive damages, designed to deter similar conduct in the future. The Ninth Circuit reduced the punitive award as excessive, although it acknowledged the LAPD's record of mistreating citizens and expressed hope that the LAPD would heed "yet another message" from the courts condemning its unconstitutional conduct.[7] Despite the numerous damage claims relating to excessive force paid by the city, complaints continue. For example, the city agreed to pay $750,000 in 1983 to settle a lawsuit by a black obstetrician after an LAPD officer restrained him with a bar-arm choke hold in July 1976. An off-duty black Santa Monica police officer who was subjected to excessive LAPD force in front of his family when stopped for a traffic violation settled for $22,500. From 1983 to 1988, complaints about excessive force by the LAPD doubled. Payouts in settlements and awards for LAPD-related litigation soared from $891,000 in 1980 to $11.3 million in 1990, the year before the Rodney King beating. Between 1992 and 1993, Los Angeles County paid more than $30 million to citizens victimized by police brutality.[8]

Additionally, the LAPD does not always comply with court orders. Consider, for example, the long, expensive *Lyons* litigation, in which the city and LAPD sought autonomy from federal courts even in light of serious problems with LAPD use of choke holds. Eventually, the LAPD altered its choke-hold policy so that they are now considered "deadly force," like a shooting, rather than a tool of "intermediate force." As of 2000, the city faced another LAPD corruption and brutality scandal in minority neighborhoods, even as the LAPD and the Santa Monica police department asked the Supreme Court to overturn a Ninth Circuit decision that barred their long-standing practice of continuing to question suspects after they had invoked their *Miranda* rights.[9]

Police use of excessive force against racial minorities is not confined to Los Angeles. The Leadership Conference on Civil Rights released a report in

2000 documenting racial disparities in the nation's criminal justice systems. The study found that blacks and Latinos are disproportionately targeted by police and prosecutors, who are overwhelmingly white. The report attributes this to a "self-fulfilling" set of assumptions about minorities that influences the decisions of police, prosecutors, and judges. Whether it is due to intentional or "unconscious" discrimination,[10] these assumptions contribute to an atmosphere "ripe for police abuse." One study found that black and Hispanic travelers nationwide were subjected to 43 percent of body searches in 1998, and another report showed that black and Latino youth are more likely than whites to be arrested, prosecuted, held in jail without bail, and sentenced to long prison terms.[11] The minority populations in U.S. prisons is extraordinarily and disproportionately high. The death penalty is under fire in part because of racial disparities in the prosecution and sentencing of defendants in death cases.

Despite continuing evidence of troubling law enforcement conduct toward racial minorities by some officers, or in some cities and departments, the Supreme Court has made it more difficult for federal courts to get to the merits of discrimination complaints. Although the *Lyons* Court focuses primarily on the procedural technicalities of standing, it does mention briefly the federalism concerns underlying the dispute. The Court is not only concerned with lower federal courts exercising caution in cases where plaintiffs request massive structural reform of local law enforcement entities. Whether a plaintiff seeks an injunction for "intrusive structural relief or the cessation of a discrete practice," he or she must meet the Court's heightened standing requirements. Lower courts have followed the Court's lead in *Lyons* in numerous cases, often involving allegations of police misconduct. For lack of standing, they have dismissed cases alleging improper use of chemical mace, the practice of awarding bonuses to police officers for arrests leading to conviction, and illegal strip searches of persons arrested for minor offenses.[12]

Several years after the *Lyons* decision, in *Allen v. Wright,* the Court again cited the federalism concerns identified in *Lyons* and two other cases to deny standing to plaintiffs who claimed that the federal government illegally supported racially discriminatory policies. In that decision, the Court described the precedent as animated by the "principle that 'a federal court . . . is not the proper forum to press' general complaints about the way in which government goes about its business."[13] The Court failed to mention that all three cases involved allegations of racial discrimination against local police departments by minorities. Does the

Court believe that it is more appropriate to let state courts handle claims raising concerns about intrusion into state and local government practices? Does the Court prefer that police departments or municipalities fix constitutional violations on their own? After enough damage awards, some are likely to get the message, and it will be financially worthwhile to alter illegal practices. Nevertheless, they might still face intense local political pressure to err on the side of majoritarian interests and neglect minority concerns (for example, to be particularly tough on crime in selected neighborhoods and target crime by racial or ethnic minorities).

The Court is balancing competing constitutional principles through its use of standing analysis: it expands the structural doctrine of federalism and restricts access for claims raising individual and group civil liberties. After *Lyons,* unless a plaintiff can show with certainty that she or he will be injured in the future, no injunctive relief can be awarded even for a local government's persistent constitutional violations. As the dissent concluded, "The federal judicial power is now limited to levying a toll for such a systematic constitutional violation."

Allen: *Implementing* Brown v. Board of Education

As noted above, the Court issued another major standing decision in a racially charged case several years after *Lyons*. In *Allen v. Wright,* plaintiffs were parents of black public school children in seven states. The parents did not want to enroll their children in private schools; they wanted an integrated public education for their children. These parents alleged that their childrens' right to an integrated education was impaired, curiously enough, by Internal Revenue Service ("IRS") tax policies.

After the Supreme Court's 1954 ruling in *Brown v. Board of Education,* which established the constitutional right to receive an integrated education, private schools flourished in many parts of the country. They thrived in districts where public schools were becoming racially integrated but where they had historically operated as an officially segregated, two-track system: one school for whites and one for nonwhites. In many districts, the growth in private schools, some of which were discriminatory, was clearly a response to desegregation efforts.[14] These "segregation academies" helped to make implementation of *Brown*'s integration mandate elusive in many school districts. Some of these private schools still received tax breaks from the federal government while

discriminating on the basis of race. These exemptions lowered tuition and made the private schools an affordable alternative for parents who wanted to keep their children out of desegregated schools.

Since the 1960s, the IRS had faced litigation over school integration. In 1967, the IRS began to deny tax exemptions to racially discriminatory private schools that received government aid. Two years later, the IRS was sued because its tax exemptions supported racially discriminatory private schools in Mississippi. In response to this suit, the IRS established a nondiscrimination policy in 1971 to deny tax-exempt status to schools that discriminated on the basis of race, regardless of whether they received government aid or were affiliated with a religion. To carry out the new nondiscrimination policy, the IRS implemented guidelines and procedures to determine whether a particular school was in fact discriminatory. They required schools applying for tax exempt status to adopt a racially nondiscriminatory policy, to publicize the policy, to keep detailed records evidencing compliance, and certify annually that the school adhered to the policy. The guidelines, however, proved to be ineffective in identifying schools that were actually discriminating against minority students.

The *Allen* parents sued the commissioner of the IRS and the secretary of the Treasury in 1976, arguing that the 1971 nondiscrimination policy was not working. They aimed their claim specifically at discrimination rather than segregation since segregation could be attributed to multiple factors, including housing patterns, admission, transfer and other policies of public school systems, religious reasons, and economic factors. They did not assert that the IRS violated the law if it granted a tax exemption to a nondiscriminatory private school that just happened to have few minority students. Instead, they alleged that by giving tax breaks to discriminatory private schools, the IRS sponsored racial discrimination and violated numerous laws, including the Equal Protection Clause and the Civil Rights Act of 1964. Plaintiffs claimed that the IRS's conduct harmed them and interfered with their childrens' right to receive a desegregated education in public schools. The parents in *Allen* did not seek money. Rather, they sought a declaration that the IRS policy was illegal and future injunctive relief—an order requiring the IRS to deny tax exemptions to a broader group of private schools. The *Allen* parents sued on behalf of their own children and also sought permission to proceed as a class action, whereby they would represent a much larger group, composed of parents of several million black schoolchildren nationwide.

The *Allen* parents may have hoped that the Court would be receptive to their claims because the Court had recently upheld an IRS decision to use the new policy to revoke the tax-exempt status of a private school accused of discriminatory enrollment practices. Bob Jones University ("BJU") sued, claiming that the 1971 IRS policy violated their freedom of religion guaranteed by the First Amendment. BJU believed that the Bible forbade interracial dating and marriage, and until 1971, blacks were completely excluded from the school. From 1971 to May 1975, the university refused to admit unmarried black people, but did allow black people married within their race to attend the school. In 1983, the Court reached the merits of the university's claim and denied relief because "the government has a fundamental, overriding interest in eradicating racial discrimination in education which substantially outweighs whatever burden denial of tax benefits places on [the plaintiffs'] exercise of their religious beliefs."[15] Supporters of integration won an important victory in *Bob Jones,* but that victory was diminished by the Court's rejection of the *Allen* parents' claims one year later, making it significantly more difficult to realize integration in many schools.

While *Allen* proceeded through the lower federal courts, Congress and the IRS engaged in a political showdown over the IRS nondiscrimination policy and guidelines. As part of the executive branch, the IRS has enforcement authority, including devising guidelines to implement congressional laws and exercising prosecutorial discretion in pursuing tax law offenders. This authority requires the IRS to make choices about how to spend limited enforcement resources. Under the Carter administration, the IRS proposed tougher requirements for obtaining tax-exempt status, requiring mostly white private schools that had been found discriminatory by a court or agency, or that were formed or expanded at the time of public school desegregation, and had few or no blacks, to prove that they did not discriminate by such steps as active recruiting to raise the percentage of black students and teachers. This proposal drew over 150,000 protest letters from private educational and religious groups. In response, the IRS included a "safe harbor" for schools if minority enrollment was 20 percent of minority age school children in the "community." Congress, through its appropriations process, however, blocked this and any strengthening of the guidelines until at least 1980. The Dornan amendment specifically forbade the use of federal funds to carry out the IRS's proposed changes in response to *Allen,* and the Ashbrook amendment generally forbade the use of federal funds to tighten tax exemption

requirements for private schools. When these amendments expired in 1980, Congress reinstated them. Additionally, in 1982, Congress tried to halt any effects of the IRS proposal by denying funding for IRS administrative proceedings and court orders entered after the date of the proposal. In the early 1980s, the U.S. Civil Rights Commission and the Civil Rights Division of the Department of Justice criticized the IRS's enforcement of the nondiscrimination policy as inadequate.[16] As of 2000, the 1971 guidelines challenged by the parents in *Allen* remained in effect.

This tension underscores the need for courts to confront these issues. The other branches were deadlocked and an important constitutional issue was posed. But the trial court used the fighting between the legislative and executive branches and heightened political stakes as a reason to refuse to rule on the merits. The trial court dismissed the *Allen* suit in 1979, finding that the plaintiffs lacked standing. The judge expressed concern about the relief proposed by the parents. He said it entailed the court "becoming a 'shadow commissioner of Internal Revenue' to run the administration of tax assessments to private schools," which he deemed clearly "inappropriate and unjustifiable." Judge Hart was concerned about intruding on IRS enforcement discretion and did not reach the Equal Protection question. He emphasized that awarding the relief requested by the parents would be contrary to the congressional intent evidenced in the Dornan and Ashbrook amendments.

The U.S. Court of Appeals for the D.C. Circuit disagreed, finding that plaintiffs had sufficiently demonstrated standing. The appellate panel disagreed with the trial judge about congressional intent and the intrusiveness of the relief sought, underscoring the simplicity of the tax law problem and rebuffing the "shadow commissioner" concern. It determined that when Congress blocked funding for the new guidelines, Congress had not meant to preclude additional judicial remedies. The panel also thought the requested relief could be designed so that it did not interfere significantly with IRS discretion. Because of the posture of the case, the court reached only the standing issue and not the Equal Protection claim.

Eight years after the parents filed suit, the Supreme Court threw out their case. The Court did not purport to reach the merits of the claims, but said that the parents lacked standing, setting out heightened standing requirements of an imminent and personal injury, causation, and redressability. The Court assumed that the IRS regulations would constitute government-sponsored discrimination because, at the outset of a

case, when a defendant moves for dismissal of the lawsuit, plaintiffs' allegations must be believed. They are taken as true (although not yet proven) to gauge whether plaintiffs can state any set of facts and a legal theory entitling them to proceed to discovery and the proof stages.

First, the parents claimed that the challenged government policy harmed them in a concrete, personalized, and imminent way because government tax breaks supported discrimination. But the Court responded that they advanced only a generalized grievance shared by all taxpayers and not an appropriate Article III injury. Additionally, the parents charged that, as blacks, they were particularly harmed by the government's alleged support of racial discrimination. This injury sounds closer to a personalized injury; rather than affecting all taxpayers, it affects a particular subset of them. But the Court found that an impairment shared by all members of a minority group was still too broad, too generalized, too abstract to be judicially recognized. The Court feared that if it accepted that type of injury, "[a] black person in Hawaii could challenge the grant of a tax exemption to a racially discriminatory school in Maine." The Court was concerned about the attenuated tie between litigants and government actions, and likely worried about a potential flood of cases by minority group members. The Court concluded that federal courts are not allowed to hear such controversies because it would give them power not authorized in Article III and broader than that traditionally exercised by federal courts. That history itself is in contention, with some scholars arguing that the federal courts exercised broad authority and fashioned relief that could be viewed as intrusive well before the civil rights era.[17]

The Court did find that the parents stated one injury that satisfied standing requirements. The parents alleged that the IRS's policy impaired the ability of their children to receive a desegregated education. This injury was sufficient for the Court. The majority opinion termed this "one of the most serious injuries recognized in our legal system," citing *Brown* and *Bob Jones*.

Nevertheless, a majority of the Court found that the parents could not satisfy causation, the second element of standing analysis. The Court found that the injury was not caused by the defendants; it was not "fairly traceable" to the IRS's conduct. The Court asked the parents:

1. How many discriminatory schools are receiving tax exemptions?
2. Would withdrawal of the tax-exempt status cause these schools to change their racially discriminatory policies?

3. Would parents transfer their children to public schools if tax exempt status were withdrawn from discriminatory private schools?
4. Would a large enough number of parents and administrators reach decisions collectively which would have a *significant* impact on desegregation efforts? Would it be enough to change the racial composition of public schools?

The Court then said that answering those questions would require a series of speculations. Even if the IRS tightened its tax exemption policy, public schools might fail to integrate sufficiently. The Court said the parents' claim was weakened because the decision making of third parties like private school administrators and parents of white children could affect integration efforts—decision makers independent of the IRS—which might impair integration even if the IRS tightened its tax break policy. The Court said the parents were merely speculating when they alleged that the tax policy impaired the ability of their children to receive a desegregated public education. *Allen*'s causation analysis required plaintiffs to demonstrate a tremendous amount at the outset of the lawsuit, making it virtually impossible to proceed with their discrimination claim. Much of the information the parents would need to make those allegations in good faith would be inaccessible, either in the hands of the IRS, the private schools, or the minds of the parents of white children. This type of requirement makes litigation more expensive and substantively very difficult.

The dissenters, relying on "tax policy, economics and pure logic," argued that plaintiffs had already alleged enough to link the tax relief and support of discrimination for the causation element of standing. Tax relief makes private schools significantly less expensive. This obviously facilitates and supports operation of the schools if they in fact discriminate. The dissenters showed how *Allen*'s causation analysis diverged from some of the Court's more relaxed standing inquiries. For example, in its precedents involving claims of racial discrimination in housing, the Court allowed broad categories of persons (e.g., prospective renters, neighbors, testers) to sue without offering an extensive causal chain at the outset of litigation. "There is, of course, no rational basis on which to treat children who seek to be educated in desegregated school districts any differently for purposes of standing than residents who seek to live in integrated housing communities," the dissenters charged. Both the Burger and Rehnquist Courts exhibited great concern with the workload of the federal courts and strove to improve their ef-

ficiency. One way to control a potential flood of cases is to raise the standing barrier, to make it extremely difficult to bring certain types of cases to the federal court system.

More centrally, the *Allen* majority justified its strict standing inquiry on separation of powers grounds. The majority was aware of the federal courts' role in eradicating race discrimination and the backlash against the courts for those efforts. The majority was also aware of the political controversy surrounding *Allen,* mentioning it briefly. The Court altered constitutional law by devising a new and broad theory of separation of powers to take the federal courts out of this heated debate. The Court argued that enforcement of the laws is the role of the executive, not the judicial, branch. The function of federal courts is to decide *concrete* cases. The Court characterized the parents' case as one "brought not to enforce specific legal obligations whose violation works a direct harm, but to seek a restructuring of the apparatus established by the Executive Branch to fulfill its legal duties." Concerned about the federal judiciary acting as a continuing monitor of the IRS, the Court said that it is more appropriate for Congress to monitor the wisdom and soundness of executive action through legislation, the power of purse, and oversight. In contrast, the court of appeals saw the tax issue as simple, straightforward, and not requiring intrusion. "This case does not involve any arcane question of tax law; its sensible adjudication requires no entanglement with complex, technical, interrelated aspects of the Internal Revenue Code and its administration." But the Supreme Court ignored the hopelessness of the political deadlock for the litigants or, in light of it, interpreted separation of powers to limit the federal courts' role in redressing racial integration claims.

The IRS faced political pressure on many fronts in enforcing the nondiscrimination policy. As described earlier, the IRS dealt with private-school supporters (including religious organizations), civil rights groups, parents seeking integration (including those who filed *Allen*), parents resisting integration, other executive branch officials, and members of Congress. This political activity demonstrates that executive institutions dependent on financing from a legislature and subject to accountability at the ballot box can find it difficult to protect minority interests sufficiently.

In such an intense, politicized environment, it was important to keep the federal courts involved. Particularly through the appellate process, they could have provided an important voice on the constitutional equality issue involved. Since the 1950s, the federal courts' life-tenured judges exerted a powerful influence in combating majoritarian preferences for maintaining

segregation. Indeed, *Allen* dissenters accused the Court of "display[ing] a startling insensitivity to the historical role played by the federal courts in eradicating race discrimination from our Nation's schools—a role that has played a prominent part in this Court's decisions from *Brown* . . . through *Bob Jones*." Congress and the IRS were in effect "subsidiz[ing] the exodus of white children from schools that would otherwise be racially integrated," he said. And the Court was ignoring the detrimental effects of this white flight on integration under the guise of Court-created standing doctrine and malleable separation of powers concerns.

The Court's invocation of separation of powers as grounding for standing analysis also emphasized a limited role for federal courts in order to preserve their credibility and deflect political attack. The Court was clearly wary of a potential nationwide class action, and preferred that Congress and the IRS determine the proper constitutional enforcement level. The *Allen* dissenters rejoined that the analysis of whether a nationwide class was appropriate, and how the class should be composed or subdivided, are separate questions under a different procedural rule that should not affect the standing inquiry. If plaintiffs had been given a chance and proved their allegations of widespread harm, widespread relief would be warranted. To focus so extensively on the nature of relief and potential intrusion at the outset makes it nearly impossible for plaintiffs to bring cases concerning widespread governmental harms. This is unduly limiting because, given the reach of government activities, the harms are frequently widespread.

As Justice Brennan stressed, echoing many commentators, the causation element of standing is just "a poor disguise for the Court's view on merits of underlying claims." If so, what did the majority in *Allen* decide about the merits of the parents' claim? Was the Court deciding that the IRS policy was sufficient? Was the Court deciding that the policy was not a big enough factor in impairing desegregation? The majority purports not to reach the merits, leaving the dispute to the political branches. But the effect of its standing ruling was chilling in that, although it recognized impairment of desegregation as a significant injury, no one can claim the injury without detailed causal data about third parties' future activities, most of which is in the hands of third parties.

The Court might have also wanted to avoid another difficult question lurking in this dispute with potentially broad import for future claims against governmental entities. Are injuries from an administrative decision about allocating enforcement resources cognizable, or is that a mat-

ter of IRS prosecutorial discretion? And what if the IRS, in its discretion, impinges on constitutional rights? Although it buttressed its standing analysis with a separation of powers caution, the *Allen* Court deflected the broader separation of powers question. In a footnote, the majority remarked: "Our analysis . . . does not rest on the more general proposition that no consequence of the allocation of administrative enforcement resources is judicially cognizable." One commentator has noted that because "the Court does on occasion indeed countenance substantial judicial 'restructuring' of both federal and state administrative frameworks, this is simply trying to have it both ways."[18]

In sum, the *Allen* Court's revised standing formula defines a limited role for federal courts with a decidedly conservative bias against even *hearing* claims for relief against other federal branches. Whenever a federal court has separation of powers concerns, a higher standing threshold is posed. This formula favors traditionally recognized economic claims like a breach of a contract or a tort, the common law paradigm. As *Lyons* demonstrates, the formula also favors traditional remedies like money damages over other types of relief. By setting out an elaborate causation requirement and expanding the standing barrier on separation of powers grounds, the *Allen* Court chooses an unduly restrictive definition of Article III cases and controversies. The separation of powers expansion is particularly inapt in our modern administrative state, with its concentration of rule making, enforcement, and adjudicatory authority in administrative agencies. In this setting, new problems amounting to new types of Article III injuries need to be recognized by courts. The IRS, for example, has tremendous power to harm with its guidelines and enforcement decisions. When the harm results from a governmentwide policy affecting a large group, it is a nationwide injury that should be afforded nationwide judicial relief. The definition of a judicially cognizable "case or controversy" must change and develop over time, even if these types of suits were not envisioned by the Framers.[19] If the federal courts have no voice in disputes over executive enforcement of the laws, an important part of our system of checks and balances is lost.

Standing and Federalism Concerns in Race Cases

It is chilling to consider that *Lyons* and *Allen* are not unique among multiple Supreme Court cases involving a mix of racial tensions, charges of

discriminatory government conduct, and reliance on standing to avoid the merits of constitutional equality claims. In other important precedents, the Court used standing to block access for claims of racial discrimination against local justice systems, relying on federalism concerns. *O'Shea v. Littleton* involved a class action suit against Cairo, Illinois, by mostly black and indigent citizens of the town.[20] African Americans in Cairo boycotted local merchants who they believed engaged in racial discrimination. Plaintiffs claimed that as a result of their quest for equal rights, they generated substantial antagonism from white governmental officials, resulting in discriminatory administration of the justice system. They sought an injunction against judges in the county because the judges allegedly set bonds—without regard to the facts of the case—as punishment rather than as traditional incentive to appear at trial. The judges also allegedly imposed stiffer sentences on nonwhites and required members of the class to pay for trial by jury. In denying standing, the Court not only concluded that the alleged injuries did not amount to a justiciable Article III controversy, but also intimated that the federal courts had no power to regulate state court discretion by imposing any kind of mandatory injunctive relief that is supervisory in nature.

In *Rizzo v. Goode,* plaintiffs charged Philadelphia government officials with a pervasive pattern of illegal and unconstitutional mistreatment of the city's minority citizens, suing the police commissioner, city manager, and mayor.[21] The district court found that, during the course of a year, there were sixteen incidents in which the police violated the constitutional rights of minority citizens. One of these compelling incidents is described by the district court and quoted at length:

> On December 1, 1969, at about 11 o'clock P.M. or midnight, Gerald G. Goode, a 25-year old black graduate student at the University of Pennsylvania, six feet one inch tall and weighing approximately 200 pounds, was a passenger in an automobile driven by Mrs. Ruth Rotko, a white woman, the wife of an Assistant District Attorney of Philadelphia. . . . [W]hile their car was stopped for a traffic light, Mr. Goode noticed police officers DeFazio and D'Amico frisking a black man nearby. Mr. Goode rolled down the car window and called to the officers that they had no right to do what they were doing, and that they should leave the man alone. At that time, the officers were approximately 25 feet away from the car, and within hearing range of Mr. Goode's remarks. Mr. Goode did not use profanity or make any personally derogatory remarks.

The traffic light then turned green, and the Rotko car proceeded north for several blocks, until overtaken and stopped by D'Amico and DeFazio, who gave chase in an unmarked police car. Both officers proceeded to the passenger side of the Rotko car, and one of them called to Mrs. Rotko to produce her identification cards. DeFazio ordered Goode to get out of the car. When Goode did not promptly comply, DeFazio opened the unlocked front door of the car, reached through and unlocked the rear door, and opened it. He struck Goode on the knee with a blackjack and yanked him out of the car by his coat. The officers then turned Goode around against the car and patted him down.

Goode demanded to know why he was being subjected to this treatment, but received no reply. The officers attempted to place handcuffs on him, and he swung his arms in an attempt to avoid the handcuffs. As Goode was being pulled from the car and turned around, he stepped on the foot or bumped the leg of Officer D'Amico. After being frisked, Goode turned and again asked for an explanation for the police action, whereupon Officer DeFazio struck him across the cheek and mouth with a blackjack, cutting his lip. Angered by this treatment, Goode told the officers to "get your fucking hands off me."

After handcuffing Mr. Goode and placing him in the police car, the officers returned to the Rotko car and asked Mrs. Rotko for her driver's license and registration card. Officer D'Amico searched the back seat and rear interior portion of the car. Both officers inquired of Mrs. Rotko as to the basis of her acquaintanceship with Mr. Goode. Mrs. Rotko was given a ticket for failing to have her driver's license in her possession, and there was some suggestion that they might arrest her too. In explanation of their arrest of Mr. Goode, Officer D'Amico stated "you can't use profanity with an officer."

Mr. Goode was taken to a police station and detained in a cell for approximately two hours. He was then taken to Episcopal Hospital, where he received several stitches in his lip and a tetanus shot. He was then returned to the police station and, at approximately 5 a. m., was taken to the Police Administration Building at 8th and Race Streets, where he was fingerprinted and photographed. At approximately 9 a. m. the next day he was brought before a magistrate on charges of assault and battery on an officer, resisting arrest, and breach of the peace, and was released on nominal bail. On February 11, 1970, all charges against Mr. Goode were dismissed, upon the joint motion of the Commonwealth and Mr. Goode's attorney.

On the basis of the undisputed and admitted facts, it is entirely clear that there was no probable cause for arresting Mr. Goode, and that the conduct of the police was "in flagrant violation of the law and the Constitution."[22]

The Supreme Court, however, denied standing, holding that plaintiffs lacked the necessary personal stake to request an order changing police disciplinary procedures. Evoking *O'Shea,* the Court reiterated its belief that "past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief if unaccompanied by any continuing, present adverse effects." The Court found plaintiffs' claim inadequate because it rested on what "a small, unnamed minority of policemen might do to [plaintiffs] in the future because of that unknown policeman's perception of departmental disciplinary procedures," and not on what the defendants might do in the future.

The Burger and Rehnquist Courts have also frequently used standing to block access to federal courts for claims by the poor about illegal government conduct.[23] In a case similar to *Allen,* plaintiffs sued over a change in an IRS policy about the level of free medical services that hospitals needed to provide to obtain tax benefits.[24] The IRS had lowered the services requirement in 1969. Previously, hospitals had to provide free care for indigents, but under the revised policy, hospitals could get tax breaks as long as they provided indigents the minimum of free emergency medical treatment. Plaintiffs alleged that they were denied necessary, nonemergency medical services because of the IRS policy. The Court found causation and redressability problems, concluding that it was only "speculative" that the policy caused the lack of services. The Court was again presuming that private third parties beyond the IRS's control would probably not change their behavior to obtain more favorable tax treatment—the hospitals here, the parents of white children, and private school administrators in *Allen.*

In 1975, the Court denied standing to low-income and minority individuals who claimed to have been denied housing opportunities in Penfield, New York, because of the town's exclusionary zoning ordinance.[25] Holding that the facts failed to demonstrate a sufficient causal relationship between Penfield's zoning practices and plaintiffs' injury, the Court distinguished plaintiffs' claims from others where lower courts had allowed standing to challenge exclusionary zoning practices. In those cases, the plaintiffs challenged zoning restrictions as applied to particular projects and were able to show that their immediate personal interests were harmed. For example, a black plaintiff, who wished to live near his workplace and who wished to purchase housing that a developer wanted to build but could not due to existing zoning laws, did have standing to challenge a zoning law as racially discriminatory. Even if a law operates in

a racially discriminatory manner, standing may pose a high hurdle. Further, the Court has limited Equal Protection doctrine so that laws, like zoning practices that are facially neutral as to race, are reviewed under the rational basis test rather than the strict scrutiny test reserved for laws that facially categorize on the grounds of race or ethnicity. This "purposeful discrimination" doctrine is a huge impediment to many discrimination claims.

These rulings underscore how the Court's standing law is often driven by the Court's view of the merits of the challenge and its federalism concerns. Contrasting the cases examined thus far with the voting rights decisions of the 1990s illustrates striking inconsistencies in the Court's application of the malleable standing rules.

Standing Made Easy in Voting Rights Claims of "Reverse Discrimination"

Starting in 1993, the Court decided four important voting rights challenges to majority-minority districts. Governments sometimes configure districts to increase the chance that a representative of a minority group will be elected. In these cases, the Court ruled that redistricting must meet the strict scrutiny test—the most rigorous standard of judicial review—if race was a predominant factor. In *Shaw v. Reno,* the Court found by a 5-4 vote that North Carolina's "bizarre" and "uncouth" plan, tracking the black population along I-85, was unexplainable on grounds other than race and would violate the Equal Protection Clause unless it were narrowly tailored to serve a compelling government interest.[26] In dissent, Justice Blackmun noted, "It is particularly ironic that the case in which today's majority chooses to abandon settled law and to recognize for the first time this 'analytically distinct' constitutional claim is a challenge by white voters to the plan under which North Carolina has sent black representatives to Congress for the first time since Reconstruction."

Soon after *Shaw,* a closely divided Court affirmed a finding that a Georgia congressional district was unconstitutional although its shape was not as unusual as the North Carolina district.[27] The Court applied the new test to racial redistricting of congressional seats in Texas, finding two majority-black and one majority-Hispanic districts unconstitutional.[28] In subsequent *Shaw* proceedings, the Court found North Carolina's districts

unconstitutional when it applied strict scrutiny, although the district court on remand had concluded that the classification survived strict scrutiny.[29]

In some of these decisions, the Court dismissed portions of the challenges to majority-minority districts on standing grounds, ruling that voters from *another* district did not have standing to raise an Equal Protection claim.[30] The harm was too attenuated and not sufficiently personal. This mirrored *Allen*'s caution that allowing attenuated claims could lead to a black person from Hawaii challenging a discriminatory school in Maine. In the redistricting cases, however, the Court expressed no qualms about according standing to voters challenging their own district's composition, even though every eligible person could vote and the plaintiffs' votes counted equally with that of other voters. It is difficult to see how the plaintiffs were disadvantaged in these districts. In North Carolina, whites made up 78 percent of the voting-age population in the 1990s, but 83 percent of the elected representatives were white. Justice O'Connor described the voters' constitutional injury as an "expressive harm" stemming from the message conveyed by some majority-minority districts that "political identity is, or should be, predominantly racial." This expressive harm is quite different from the concrete evidence the Court required of other plaintiffs claiming discrimination against minorities. The Court refused to countenance, for example, an expressive harm to the *Allen* parents from government support for racially discriminatory schools. Although the *Shaw* majority acknowledged the race-based exclusion blacks had faced in voting and districting decisions historically in North Carolina and other states, it vehemently condemned the race-conscious redistricting as analogous to "political apartheid." In addition to easily recognizing a new Equal Protection injury, the Court did not belabor the causation or redressability components of standing as it had in other discrimination cases.

Some federal judges see redistricting challenges as a paradigmatic case for exercising judicial restraint and invoking deference to the political branches.[31] Redistricting is complex, as legislators look to geographic, ethnic, racial, gender, political, socioeconomic, and other factors, achieving compromise through bargaining. Courts could justify deference to those political determinations based on federalism (if the redistricting occurred at the state level) or separation of powers (if at the federal level). If the Court was being consistent in its application of deference, redistricting would be an area to avoid, just as the Court invoked con-

cerns for interfering with local police administration in police misconduct claims and for interfering with the IRS in *Allen*. Commentators, reviewing the redistricting cases, concluded: "As long as the Court both recognizes and denies the importance of race—and both recognizes and denies the collective nature of the redistricting process—it will have trouble developing a set of doctrines that make sense."[32]

David Kairys finds the redistricting cases emblematic of a dual system in which the Court favored white interests from the mid-1970s to 1990s. He critiques the Equal Protection doctrine's requirement of purposeful discrimination rather than standing, saying that "African Americans and other minorities have run into a near impenetrable brick wall" when bringing discrimination claims. The purposeful discrimination doctrine applies only rational basis review—the most modest form of judicial scrutiny—for laws that do not discriminate racially on their face unless the challenger can show that the law's *purpose and effect* is to discriminate. Because the government can almost always advance a permissible reason for its conduct and it is hard to find concrete evidence that the government overtly and intentionally discriminated against minorities, plaintiffs bear a massive burden. "Starting from the premise that the most serious social and institutional forms of racism have been overcome, the proper role for the courts is seen as deference to legislative authority and judicial restraint." Kairys says: "[W]hile challenges to discrimination against minorities or women are greeted with skepticism, deference to government officials, restraint and an obliviousness to reality, affirmative action is an occasion to 'smoke out racism' and remedial redistricting draws a charge of 'segregation.'"[33] This dual system is also an apt description of the Court's differing approaches to standing. In cases where minority plaintiffs challenged government discrimination against racial minorities, the Court voiced federalism and separation of powers concerns to expand standing requirements, characterizing the claimed discrimination injuries in a stingy manner and requiring extensive causal proof of the connection between government conduct and the injury. In the racial redistricting cases noted above and in the affirmative action cases (discussed in chapter 4), plaintiffs easily surmounted those barriers to raise new Equal Protection claims.

This development is not startling given the more conservative composition of the Burger and Rehnquist Courts, which were reacting to Warren Court decisions expanding the rights of racial minorities and recognizing more rights for criminal defendants. Writing in 1985, Gene Nichol

eloquently summarized the inconsistency evident in the Burger Court's standing cases.

> The Burger Court has raised the toughest standing hurdles in cases in which minorities have challenged exclusionary zoning practices, patterns of police brutality, and judicial or administrative bias. Poverty plaintiffs have been barred from challenging discriminatory enforcement of child support obligations, and the tax-exempt status of hospitals that deny them emergency medical services. On the other hand, standing requirements have been eased in cases sustaining the constitutionality of the federal subsidy for the nuclear power plant industry, upholding Secretary Watt's offshore leasing policy, affirming the propriety of tuition tax credits to private schools, and condoning government support for chaplains and Christmas creches. One could perhaps be forgiven for confusing standing's agenda with that of the New Right.

After 1985, the Rehnquist Court continued the standing trend begun with *Lyons* and *Allen*. It often allowed plaintiffs to bring First Amendment religious discrimination and religious exercise claims quite easily, and then issued substantive constitutional rulings favoring established religions. The Court raised the standing requirements in several major environmental cases (discussed in chapter 2), while employing relatively lax standing analyses in other cases, including a case brought by ranchers to challenge government attempts to protect endangered species. It eased access to federal courts for claims that redistricting inappropriately benefited minorities in the voting rights cases and made it easier to pursue "reverse discrimination" suits in affirmative action challenges.

Conclusion

From 1970 through the 1990s, many of the Court's major standing rulings involved racially charged allegations. This intersection of standing and race is not surprising because the Court is highly cautious about its role in addressing sensitive social issues. The Court has restrained federal judges from participating in such disputes, urging them to avoid confrontations with government officials when claims are fraught with separation of powers or federalism concerns. As a result of *Lyons* and similar rulings, lower federal courts must carefully monitor challenges to governmental misconduct, requiring plaintiffs to demonstrate the three elements of standing for each type of relief they seek. The Supreme Court

prefers narrow, piecemeal relief, focused on discreet past events rather than broad injunctions to deter future unconstitutional conduct. Government officials are only beginning to acknowledge and address some of the long-standing, pervasive discriminatory policing tactics like stops for DWH ("driving while Hispanic"). A few state officials have expressed concern about serious discrepancies in use of the death penalty correlating with the race of criminal defendants and their victims. Federal courts play an important role in remedying illegal behavior and retaining constitutional equality and fairness ideals, even in difficult situations like policing and dealing with criminal defendants.

By making it harder for plaintiffs to challenge executive policies that undermine efforts to achieve racial equality, *Allen* skews the development of Equal Protection law and stalls desegregation efforts of federal courts. Many private "segregation academies" are still flourishing at the end of the twentieth century. Helena, Arkansas, for example, is about 50 percent white and 50 percent black, but 90 percent of the children at the Helena public high school are black. Most white students attend DeSoto School, one of many private academies formed in the Mississippi Delta during the post-*Brown* period of mandatory integration.[34] In Little Rock, Arkansas, Governor Orville Faubus in 1957 used the Arkansas National Guard to try to prevent any blacks from attending all-white Central High School, and President Dwight D. Eisenhower sent in federal troops to implement federal court-ordered integration. By 1997, two-thirds of Central High's students were black. To attract more whites, President Bill Clinton named Central High a magnet school and gave it an infusion of federal money. But a civil rights lawyer calls Central "a private school, basically, for white students," because half of its white students are in accelerated learning programs. A 1997 University of Arkansas study concluded that Little Rock's system is sliding toward resegregation although the city buses half of its students.[35]

Although we frequently invoke *Brown v. Board of Education* as our ideal, the situation in Helena and Little Rock are the daily reality in much of the nation forty-five years later.[36] Some scholars trace this problem to the Court's failure to expose the real inequities of segregation in *Brown* and its subsequent hesitancy to articulate a remedy involving close judicial supervision of public schools.[37] But the federal courts' willingness to take on a difficult and divisive issue in *Brown* and the role of lower federal courts in subsequent desegregation cases nevertheless deserve some praise.

The current Supreme Court instead places a high priority on caution when racial tensions intersect with federalism or separation of powers concerns, stalling the development of racial equality principles. The Court has established virtually impossible causation showings, necessitating information in the mind of the opponent or third parties, unlike most areas of law. The Court's relaxed version of standing in the racial redistricting cases, in contrast, allowed the Court to advance a new approach to reverse discrimination claims, which will be explored more fully in the next chapter. Thus, selected Equal Protection claims are permitted to be developed, but the federal courts are prohibited from hearing many integration claims as the Supreme Court transfers to other government officials the responsibility for dealing with some of our most sensitive and important disputes. When those other officials are willing to take the lead and withstand political pressure, equality law can develop. But when the nonmajoritarian federal courts are taken out of the dialogue, pressure to protect minority interests will often wane in majoritarian arenas.

The Supreme Court's recent emphasis on standing contrasts sharply with the traditional view. Traditionally, standing has been treated as a threshold device to ensure that litigants care enough about their case to present issues with skill, zealousness, and appropriate resources. Standing doctrine is not the right place to work out the role of the federal courts vis-à-vis the other federal branches or local police departments. Those difficult questions should be resolved as part of our substantive law, which can develop and change over time. Standing has long been criticized as an area for manipulation, allowing judges to make decisions about the substance of claims without admitting that they are doing so. Highlighting a few of the Court's major inconsistencies during the last three decades demonstrates that the justices have not been avoiding constitutional questions completely. They have expanded Article III law aggressively, making it more difficult for plaintiffs to bring certain types of claims and seek certain types of relief. By restricting lower federal courts from hearing many racially charged claims against the government, the Court surrenders an important constitutional check on government.

4

Avoiding Selected Affirmative Action Challenges

The constitutional validity of affirmative action programs was one of the most contentious and important social and political issues of the late twentieth century. In the 1960s and 1970s, Presidents Kennedy, Johnson, and Nixon instituted affirmative action programs at the federal level to further desegregation and promote equality, first for racial and religious minorities and later for women. Other programs ensued, with public and private entities attempting to equalize hiring and admission opportunities for historically disadvantaged groups by taking race and gender into account as positive factors. Today, affirmative action includes a large range of measures, from making job postings or other information widely accessible to tutorial services to scholarship assistance to granting a preference in admissions or hiring for a minority or female. From the 1970s through 1990s, litigants filed constitutional challenges to affirmative action programs, styled as "reverse discrimination" claims under the Equal Protection Clause. These challenges were grounded in the idea that it is more equitable for the government to make decisions based on individual merit rather than categorically by race or gender about scarce resources like government jobs and contracts or admission to public institutions. Defenders of affirmative action argue that such programs are needed to redress current and past discrimination and thereby ensure fairness and promote diversity.

This disagreement over the constitutionality of affirmative action is central to the legal debate about whether the Constitution should be "color-blind" or "color conscious."[1] Supporters of a color-blind reading say that race-based affirmative action is racist and divisive, stigmatizing minorities and entrenching invidious stereotypes, thereby perpetuating racism. Defenders argue that affirmative action is distinct from racism because it benefits, rather than harms, racial minorities. They assert that

it is unjust and hypocritical to urge a color-blind standard in the face of our country's history of legally sanctioned racial discrimination. They also cite continuing discrimination in concluding that this society is not yet capable of being truly blind to color.

During the 1990s, politicians worried about the "angry white male," and affirmative action programs came under attack in courts and through ballot proposals. By the mid-1990s, leading Republicans publicly attacked affirmative action, while President Clinton, facing election in 1996, was equivocal. Some political strategists saw affirmative action as an issue that would destroy the Democrats' coalition of support from organized labor, women, and racial minorities.[2] Although many writers and some politicians tackled the merits of affirmative action and the media covered it extensively in this period, the political debate and legal challenges have not sufficiently aired the difficult issues just below the surface of the debate, which have significant ramifications for our increasingly multiracial society. We need more empirical information on these programs and their effects. Defenders of affirmative action must acknowledge that some programs failed or were abused. For example, applicants for broadcast or television licenses often received a bonus from the FCC if a woman or racial minority was included to integrate the airwaves, even if that person had no meaningful influence in running the station or on the content of broadcasts. Opponents of affirmative action likewise must acknowledge the important successes of some programs. For example, since the 1970s, law schools have made efforts to admit, recruit, and produce qualified female and minority students. Although the legal profession is still overwhelmingly white and males often hold higher-paying positions, some stellar female and minority lawyers have broken barriers to attain highly visible positions of authority as attorneys general, judges, law school deans, bar leaders, and partners in private firms. Opponents and supporters also disagree about how to remedy past discrimination and the extent of continuing discrimination against minorities. We have not begun to unpack what constitutes "merit" or "quality" in a prospective student or job applicant. We rarely highlight the other preferences embedded in our institutions (e.g., special consideration given for relatives of donors or alumni, athletes, veterans, friends of powerful legislators, or community leaders). We hardly mention the divisions between white men and women if gender-based affirmative action is used alongside race-based programs; a white family may be both harmed and aided by affirmative action, but if the male partner can earn more, the harm

may outweigh the benefit. In short, affirmative action raises hard, complex issues, and we would benefit from sophisticated, detailed looks at the competing equity claims.

This chapter focuses on the Supreme Court's participation in that debate from the 1970s through 1990s, with an emphasis on affirmative action in higher education. The Court's first ruling on affirmative action involved a challenge to a public education program. Education is a critical context because access to education enhances opportunities for women and minorities to earn higher wages, enter segregated professions, and gain access to positions of power. As tuition prices rise, public education is the only way for many families to escape poverty or provide middle-class children with opportunities for upward social and economic mobility. Moreover, with a globalized economy and "increasingly multicultural world, the promotion of a sensitive awareness to the spectrum of viewpoints must be a motivation of higher education."[3]

The Court's initial decision on affirmative action in 1974 contained no majority opinion. The white male plaintiff won because the Court ruled that he should be admitted to medical school. Nevertheless, the Court allowed the school to use race as a factor, albeit not the sole factor, in making future admissions decisions. The Court struggled over the next decade to identify the appropriate level of scrutiny for such claims, and its approach to affirmative action continued to be "splintered and halting."[4] In the 1980s and 1990s, a closely split Court applied a color-blind approach to affirmative action programs and voting rights cases involving racial redistricting. This simplistic approach skims the surface of the debate, obscuring important fairness arguments and greatly limiting the type of affirmative action deemed constitutional. Indeed, the Court has gone to great lengths to avoid robust participation and nuanced elaboration of its views. At various times, justices from different political parties and with different legal positions on the merits of affirmative action have urged avoidance. In the education challenges, the Court has denied certiorari, found challenges moot, used the avoidance canon, and taken measured steps. The Court has carefully avoided gender-based challenges to affirmative action, focusing on racial preference programs, which benefit fewer persons. Although some lower courts condemned race and gender-based affirmative action in education, the Court has refused to address educational programs since 1974, leaving significant questions over how the Court's 1990s color-blind rulings interact with its initial, more centrist educational precedent.

This chapter sheds light on why the Court is avoiding affirmative action in the important context of public education and explores the ramifications of that avoidance. The conservative Court may agree with lower courts that have outlawed any consideration of race. The Court may still be fragmented on this difficult issue, as it was when it first considered it in the 1970s. Some conservative justices, emulating Justice Powell's 1974 ruling, might permit beneficial consideration of race in education even if they deem it inappropriate in public employment and contracting situations. Further complicating the Court's choices, some liberal and conservative justices likely prefer that other constitutional actors resolve this difficult question, even on a piecemeal basis with local differences, instead of the Court declaring as a federal constitutional matter that race is *never* a permissible criterion for government decision making. Perhaps a middle-of-the-road approach is simply the most palatable for deflecting political attacks or other reasons. In any event, the Court's avoidance renders this part of Equal Protection law confusing and stalls its development in any direction.

Court Finds First Challenge Not Justiciable

The first affirmative action challenge to reach the Supreme Court was brought by Marco DeFunis, Jr., who applied to the University of Washington School of Law ("School") in 1971 and was denied admission. Over 1,600 people had applied for 150 spaces in the class. Mr. DeFunis, a white male, sued the School, alleging that its affirmative action admissions policy discriminated against him on the basis of his race, in violation of the federal Equal Protection Clause.[5] The trial court agreed with DeFunis and ordered that he be admitted to the School. While DeFunis was in the midst of his legal studies, the Washington Supreme Court reversed, finding that the School's policy was constitutional because its purpose was to remedy injustices resulting from past discrimination by promoting racial integration and ending discrimination. Unhappy with the Washington Supreme Court's decision, DeFunis appealed to the U.S. Supreme Court.

Many persons and entities were interested in DeFunis's attack on affirmative action, as evidenced by the twenty-six amicus briefs filed. The Court could not deny certiorari because Congress had provided rules of appellate jurisdiction requiring the Court to hear cases appealed from the highest state courts when those courts had denied an individual's claim

relying on a federal right. The Court's review was mandatory in order to protect federal rights from being denied in state courts and to promote uniform interpretation of federal law. Forced to accept the controversial and difficult suit (rather than simply deny certiorari as it could after its appellate jurisdiction changed in 1988), the Court used mootness to avoid reaching the merits. Mootness is a justiciability doctrine that requires that the plaintiff maintain the standing requirement of a personalized, imminent injury throughout the litigation. The Court reasoned that there was no "live" controversy under Article III because DeFunis was in his third year of law school and the School said it would let him finish, regardless of the Court's decision. The Court no longer viewed the dispute as concrete or the parties as sufficiently adverse. Mr. DeFunis did graduate from the School and eventually became managing partner of a Seattle law firm.

The four dissenting justices, the School, and Mr. DeFunis *all* contended that the dispute should be decided on the merits. They argued that the case fit well within several exceptions to the malleable mootness doctrine. The Supreme Court has sometimes disregarded mootness objections and allowed cases to proceed when a defendant voluntarily stops the alleged illegal activity but is free to resume it later. This first exception captures the idea that the courts will not let defendants evade lawsuits by stopping a challenged activity, getting a mootness determination, and then resuming the same activity. But that exception did not fit this case. The School had not voluntarily changed its affirmative action policy; it only admitted DeFunis pursuant to the trial court's order and agreed to let him finish his studies until the Supreme Court requested briefs on the issue of mootness. Its affirmative action policy, which DeFunis deemed responsible for his rejection, remained intact after the Washington Supreme Court's ruling and after the Court found that the voluntary cessation exception to mootness did not apply.

Despite mootness objections, the Court has sometimes allowed cases to proceed when the issues raised are capable of repetition but likely to evade review. This second exception covers injuries that are over quickly and thus will always disappear or become moot before a lawsuit is concluded. For example, the dispute in *Roe v. Wade* could be heard under Article III, even though the plaintiff's pregnancy would surely end before courts could resolve the question. The claimed injury—the government's interference with procreative choice—was inherently time limited. The majority distinguished DeFunis's situation, finding that since he was

nearly finished with law school, the issue would not arise for him again. The dissenters disagreed, arguing that misfortunes such as illness, economic necessity or academic trouble might prevent DeFunis from graduating on time. If this happened, a ruling by the Court on the merits of the School's policy would have an effect on whether he could register in future quarters.

Concluding that Mr. DeFunis could finish his education and thus had no stake in a ruling on the merits, the Court did not even discuss his other possible motivations for pursuing litigation. DeFunis sought to vindicate his claim of a constitutional right to equal treatment in the nation's highest federal court on his claimed injury and prevent the School from continuing to use an admissions policy taking race into account. If the policy was unconstitutional and he could prove the policy caused the School to reject him, he surely suffered damage. For example, he had to bring a lawsuit to secure his admission and overturn the School's policy at considerable personal and financial cost for him and his family. The Court ignored these types of harm because his education was nearly complete and it was not willing to let DeFunis continue his case to secure a ruling from the Court *on behalf of other applicants*.

Mr. DeFunis would have been a good advocate for others protesting the School's affirmative action admissions policy. Unlike some plaintiffs, who might settle to win a spot in law school for themselves and give up the larger fight, DeFunis had already secured his chance for a legal education but was committed to pursuing the challenge. Since the School maintained that its policy was constitutional and DeFunis attacked it, the parties were sufficiently adverse to present a concrete case. They remained truly antagonistic in their legal positions. They briefed and argued the Equal Protection issue, employing their skills and resources to present the factual and legal issues to the Court with zealous advocacy. Given the Washington Supreme Court's approval of the policy in the *DeFunis* litigation, however, the Supreme Court chose to await another lawsuit, speculating that others who were denied admission to the School could bring a lawsuit to the Court relatively quickly.

A third exception to mootness applies to class actions, but DeFunis did not bring his suit as a class action.[6] If he had sued with a large group of plaintiffs, the case would not be dismissed as moot because others in the group would still have something to gain or lose by the Court's decision. For example, a person denied admission a few years after DeFunis was denied and who had not yet started her studies might become the lead

plaintiff for the group. But it is expensive and more difficult to proceed as a class. Lawyers with procedural expertise should be hired and the courts must agree that proceeding as a group is proper, determining that the plaintiffs share common interests and pose substantially similar questions of law or fact. Although the legal issue of whether the School's affirmative action policy squares with the Constitution would be shared by all plaintiffs, a judge may deny class treatment if significant differences predominate over the common legal issue. Important factual differences in applicants' packets and admissions determinations make class treatment less likely. On remand, DeFunis moved to continue the suit as a class action, but the Washington Supreme Court denied the motion.

The dissenters also urged the Court to reach the merits of DeFunis's suit because of the enormous public interest in the affirmative action issue, and they raised efficiency arguments against avoidance. They asked, why wait for more applicants to be denied and to go through the pain, expense, and delay of lawsuits before the merits of the School's policy are addressed by the Court? Criticizing the Court for "straining to rid itself of this dispute," they argued that the Court "clearly disserves the public interest." "The constitutional issues which are avoided today concern vast numbers of people, organizations, and colleges and universities. . . . Few constitutional questions in recent history have stirred as much debate, and they will not disappear." Predicting that the Court would face the same issues again, the dissenters worried about the costs of repetitive litigation and warned that the avoidance doctrine should not be used for "sidestepping resolution of difficult cases." The majority did not respond to the public interest argument in *DeFunis*, but Justice Stevens addressed it in a subsequent case, when he complained that the Court strained to reach constitutional issues that were not necessary to decide. He argued that the justices do not sit as "statesmen" to provide general legal advice; they sit only to decide concrete cases.[7]

Additionally, some justices and commentators believe it is politically wise for the Court to wait before reaching the merits of important controversies—to let the issue "percolate." They reason that delay allows for more public debate and for a variety of lower courts to deal with differing factual and legal claims. This lower court debate can in turn inform and improve the Supreme Court's decision making. Some justices might stall because the time afforded during the debate—as well as broader public engagement in debate—could help prepare the public to accept the Court's decision.[8]

The concern with public receptivity should not be a major barrier to Court elucidation of constitutional principles; the Court has a unique function of interpreting the Constitution for others' benefit and serves to shape public opinion with its approval or condemnation of policies. As far as gathering sufficient information before ruling, the Court had the benefit of the two contrary *DeFunis* decisions from the Washington courts and many amicus briefs. Admittedly, the case presented only one factual situation, and affirmative action plans vary significantly. The Court, however, could address that particular plan without precluding other approaches to substantially different programs. It could also alter its approach to similar fact patterns with experience over time. With hard issues, the Court may need to apply a more flexible approach to preserving precedent. Justice Brandeis once argued that normal rules about adherence to precedent should be given less weight on constitutional questions because of the importance of the questions and the need for adaptation over time.[9]

The percolation argument is troubling because it underestimates the costs of avoidance. When the Court avoids the merits of important constitutional questions with ramifications for many people and entities, some suffer from the Court's silence and the lack of uniformity in constitutional law. In the debate over affirmative action in higher education, the Court's avoidance leaves the power to others like lower federal and state courts, attorneys general, and university administrators. People who disagree with the Court's leanings on the affirmative action issue might view that as a positive development. For example, after the Supreme Court's mootness ruling, the Washington Supreme Court reinstated its judgment that the School's policy was constitutional. State courts are not bound by Article III justiciability concerns, which only proscribe the types of cases federal courts can hear. Under Washington's law, the case was actually saved from mootness by its "great public interest."

Thus, the U.S. Supreme Court's mootness ruling allowed the Washington Supreme Court to have the "last word" within the state on the federal question of the constitutionality of the School's affirmative action program until the Supreme Court addressed the issue. But the Court gave Washington this power by default, through a decision based on the technicality of mootness, rather than by explicitly discussing the need for deference to other political actors. When the Court avoids a controversy in order to promote deference, it may avoid a constitutional ruling in the affirmative action area, but it alters the federalism balance.[10] If justices are

motivated by federalism concerns, they should elaborate on this ground to give explicit guidance about appropriate decision makers. Then we could react to this ground, debating whether the Court advances a beneficial level of deference by giving states and localities control over the equality issues and educational autonomy issues presented by *DeFunis,* or whether the Court's approach delegates too much power to others on federal constitutional questions.

Additionally, when the Court attempts to avoid a constitutional question, it retains the status quo and does not displace existing precedent. Thus, by default in *DeFunis,* the Court did not extend the Equal Protection Clause to claims of reverse discrimination. Moreover, by deferring to other political actors on the Equal Protection issue, the Court does not promote national uniformity in constitutional interpretation. Rather, the Court fosters a piecemeal approach with variance among courts, regions, and states, resulting in similarly situated persons being treated differently. Such percolation must be assessed in light of the federalism balance, the costs and delay imposed for litigants, the loss of protection for claimed constitutional rights or defenses, and the lack of evenhanded constitutional policy.

In our large country, with multiple layers of courts and government, the ideal of uniformity may be impossible or its virtues at least overstated. Justice Stevens once called it "an ungovernable engine" which had already left the station.[11] Moreover, even clear and consistent precedents do not have immediate widespread results and acceptance. The Supreme Court and other courts are part of a larger societal and political debate about constitutional standards. Certainly, some behavior is changed because of court rulings: doctors alter their behavior to conform with what courts deem acceptable, or university administrators, cautious of running into legal challenges, avoid conduct that is pronounced problematic. The common law system yields those judgments gradually, as the law develops slowly through numerous fact situations. Nevertheless, the Supreme Court can send direction-shifting signals with constitutional rulings (e.g., *Brown, Roe*) even when the rights recognized are not implemented uniformly and immediately throughout the nation.[12]

As the dissenters predicted, the issue of affirmative action in higher education returned to the Court a few years later. In the meantime, three state supreme courts had ruled on the issue, with conflicting results and divergent approaches. The contrast between *DeFunis* and *Bakke* demonstrates how avoidance techniques can be used by the Supreme Court to

"save face." As the fragmented decision in *Bakke* reveals, the Court was unprepared to decide coherently in the mid-1970s the extent to which affirmative action in higher education was constitutional.

Bakke: *A Splintered Ruling on the Merits*

In its initial classes in the late 1960s and early 1970s, the medical school at the University of California at Davis ("Davis") admitted few minorities. To redress this absence, the faculty instituted a "special admissions" program designed to increase representation of "disadvantaged" persons in the student body by reserving sixteen of the one hundred spots available in the class for special admissions selections. Davis used a two-track system of reviewing applicants, sending those who requested consideration as disadvantaged into a separate pool. The Admissions Committee considered most applicants, while a different committee, comprised largely of minorities, considered those in the separate pool. The minority admissions group then made recommendations to the Admissions Committee until the sixteen spaces were filled. Racial and ethnic minorities were admitted through both the regular and special admissions processes. Although disadvantaged whites applied for special admission, none were selected. Students admitted through the special admissions program had significantly lower grade point averages (GPAs) and test scores than applicants admitted through the regular process.[13]

Schools have struggled with issues of promoting both quality and equality in the admissions process as more women and minorities sought educational opportunities. In order to counter potential bias in standardized tests, some schools use more than test scores and grades to evaluate applicants. They weigh reference letters, community service activities and other factors in ranking applicants. The federal Office of Civil Rights is pursuing "disparate impact" theories in revising testing guidelines and providing legal advice to colleges on how to evaluate grades and test scores. Test company lawyers note that the Supreme Court and federal appellate courts have "been silent or unclear on disparate impact in education matters."[14] Even if grades and tests are the primary measure, weighting grades and test scores is not always simple. GPAs vary in significance depending on the institution and major; high grades may reflect rigorous standards or grade inflation. How does a 3.98 from a local community college stand up against a 3.1 from a top-ranked national school or program?

Allan Bakke applied to Davis's medical school in 1973 and 1974. He was denied admission both times and blamed Davis's affirmative action program. Bakke presented significantly higher paper credentials (his GPA and test scores) than persons admitted under the special program, and his overall rating based on the Admissions Committee's review was relatively high. When he was not admitted the second time, he filed suit, claiming that he was denied admission solely on the basis of his race and that Davis's program violated federal Equal Protection, federal civil rights laws, and the California constitution.

Davis defended the constitutionality of its program with several arguments. First, the program was necessary to remedy past discrimination in medical school admittance and other barriers minorities faced in the medical profession. Until the early 1970s, a tiny fraction—less than 2 percent—of the doctors, lawyers, and medical and law students in the United States were minority group members. Davis's first class, in 1968, contained three Asian Americans and no other minorities. That same year, the Association of American Medical Colleges (AAMC) agreed that "medical schools must admit increased numbers of students from geographical areas, economic backgrounds and ethnic groups that are now inadequately represented." In response, the Davis medical school faculty fashioned and implemented a special admissions Task Force program, concerned with increasing enrollment of "African Americans," "Mexican Americans," and "Native Americans."[15] The following year, an AAMC committee suggested that by the 1975–76 academic year, 12 percent of all first-year medical school classes be composed of African Americans. Although this goal was not met, over one hundred schools responded by setting up programs similar to the one at Davis. A census taken prior to the *Bakke* decision showed that "Negroes" and "Chicanos" constituted approximately one quarter of California's population. Davis officials thought reserving 16 percent of the positions in the medical school for disadvantaged minorities was justified.

Second, Davis asserted that an increase in minority doctors would provide needed medical services for underserved minority communities. A related community service argument was that minority doctors would be able to develop a better rapport with patients of their own race and would have a greater interest and sensitivity to their problems. Minority communities nationwide are, and have been, drastically underserved by professionals such as doctors and lawyers. Even by the mid-1990s, white doctors rarely practiced in minority communities. White medical

graduates, according to one study, "were more likely to go to poor white areas than to affluent black and Latino neighborhoods."[16] In predominantly white suburbs like Bethesda, Maryland, there is approximately one pediatrician for every forty children. In the poorer areas of nearby Washington, D.C., there is one pediatrician for every 3,700 children. Additionally, a disproportionate percentage of minority doctors care for such underserved populations. For example, half of all patients seen by young black physicians are black. Similarly, minority doctors care for a disproportionately large number of poor patients.[17] Davis also believed integration of the school and profession would provide diversity and enhance students' educational experience by making both students and faculty more sensitive to the needs of minority communities.

Mr. Bakke sued Davis in the state court system. The trial court found that the program violated Title VI—a federal civil rights law—as well as the California and federal Constitutions. The court ruled that race cannot be taken into account in a public school's admissions process. Davis was not ordered to admit Bakke because the trial court found that Bakke had not shown that he would have been admitted if the special program were not in place. The California Supreme Court agreed that the special admissions program violated the federal Constitution and did not rule on Bakke's other claims. Unlike the trial court, however, the California Supreme Court thought that Bakke shouldn't have to carry the burden of showing that he would have been admitted. Accordingly, the court directed the trial court to issue an order that Bakke be admitted to medical school. Davis appealed to the U.S. Supreme Court, which issued an extremely splintered ruling with no majority rationale. In a sense, both parties won: the Supreme Court ruled that Bakke should be admitted but allowed Davis to use race as a factor, albeit not the sole factor, in making future admissions decisions.

The U.S. Supreme Court had briefly avoided revealing its fragmentation over affirmative action with the mootness ruling in *DeFunis,* but time did not dissolve this division. In *Bakke,* the justices provided no majority opinion and no unified constitutional approach to affirmative action in their lengthy opinions. A significant portion of justices urged or used avoidance techniques to duck the merits of the Equal Protection challenge. For example, during internal deliberations, Justice Thurgood Marshall urged Justice Brennan to dispose of *Bakke* without reaching the merits, fearing that the "Nixon four" and Justice Byron White would vote to condemn quotas. But Brennan, after his dissent in *DeFunis* castigating

the Court for avoiding this important issue, said that he preferred "losing on the merits to seeing the Court once again avoid decision of this issue after having granted certiorari."[18] As detailed below, the justices battled fiercely about both substance and procedure, about the validity of the Davis program and how the Court should approach its decision. Reviewing the avoidance claims made and rejected by the justices, as well as the avoidance techniques used by the four justices advocating color-blindness, shows how important procedural skirmishes can be and how easily avoidance tools are manipulated.

A Relaxed Standing Approach for Reverse Discrimination Claims

Unlike *DeFunis,* the Court in *Bakke* barely addressed standing, limiting the discussion to a footnote. Eight of the nine justices assumed standing only by ignoring the Court's normal caution when dealing with apparently feigned disputes and by adopting a relaxed standing approach. The simple distinction between the two cases is that Mr. Bakke retained standing because he had not been admitted to medical school during the litigation, while Mr. DeFunis lost standing because he was nearly through law school when the Court finally heard his case. A closer examination, however, reveals that the Court had sufficient reasons for denying standing in *Bakke.*

The Court generally requires a plaintiff to show a substantial likelihood that the defendant's conduct caused plaintiff's injury and that the injury would be redressed by a favorable ruling. As detailed in other chapters, the Court has developed heightened standing requirements in cases involving minority plaintiffs challenging governmental racial discrimination (e.g., *Lyons* and *Allen* in chapter 3) and environmentalists challenging government activities that threaten the environment or species (*Lujan* and *Chicago Steel* in chapter 2). In *Allen,* the parents of black schoolchildren were required to show detailed causal links between the tax code and racial discrimination at private schools. In *Chicago Steel,* the Court set out a tough redressability standard for environmentalists claiming injury due to a company's late filings about toxic threats. On the other hand, Mr. Bakke was allowed to sidestep the heavy burden of proving causation and redressability. Causation was essentially assumed as the Court accepted Davis's concession of Bakke's injury and the California Supreme Court's analysis, which placed the burden of proof on Davis.

Generally, a plaintiff bears the burden of proof in a civil lawsuit. The Court characterized Bakke's injury as an inability to *compete* equally with applicants of other races for the one hundred spots at Davis and then found that denial of opportunity would be redressed if the special admissions program were found unconstitutional. The question of Bakke's admission was characterized as secondary, "merely one of relief." Therefore, the Court found: "[E]ven if Bakke had been unable to prove that he would have been admitted in the absence of the special program, it would not follow that he lacked standing." In contrast, standing analysis under *Allen* presumably would require a plaintiff to show that the special admissions program caused Bakke's rejection. Otherwise, the claimed injury would only be "speculative."

Further, cautious of its Article III limitations, the Court is usually guarded about exercising jurisdiction over feigned disputes and does not let parties collude to establish jurisdiction. Based on this caution, the Court found the *DeFunis* dispute moot even though both the School and DeFunis sought an answer on the merits of the constitutional question. Davis's concession of injury also raises the specter of a feigned dispute. The Urban League argued that the parties stipulated to jurisdiction in order to gain an advisory opinion on a critical issue "with a sparse record" that did not amount to an Article III case or controversy. The League emphasized the trial court's finding that, regardless of the affirmative action policy, Bakke was unlikely to have been admitted. Bakke did not make the alternate list either time he applied, and there were more than a dozen students with higher Admissions Committee ratings or "special skills" who would have been admitted ahead of him. The parties responded that a denial of admission for Bakke was not certain because others might have declined offers of admission and that the ratings were not wholly determinative of admission.

The timing of *Bakke* is not a complete explanation for its relaxed standing inquiry. Although the Court was more relaxed about standing in some 1970s cases, during the same period it also imposed heightened standing barriers for plaintiffs challenging racist conduct of police and other government officials (chapter 3). And the Court's inconsistent application of standing principles did not end with its development of heightened standing requirements in the early 1980s. In 1993, the Court applied *Bakke*'s minimal standing analysis to another reverse discrimination plaintiff challenging an affirmative action program that set aside 10 percent of public contracting funds for minority-owned or female-owned businesses. The ruling

is canvassed briefly because it illuminates the contrast between the *Bakke* approach and the Court's other standing cases.

There is a long history of discrimination in the construction industry. One striking example involved the construction of the Bay Area Rapid Transit system, which received $80 million in federal funds and was expected to employ eight thousand people. Two years after construction began, there were no blacks employed at all in the construction of the system.[19] Minority and women-owned businesses are still underrepresented in the construction industry. Discrimination in both contracting and in access to capital continues to limit the ability of minority and women-owned firms to reach their full potential. Minorities make up 20 percent of the population, yet minority-owned firms represent only 9 percent of all construction firms and receive only about 5 percent of all construction receipts. Women own one-third of all firms, yet get only 19 percent of the business receipts. White-owned construction firms receive fifty times more loan dollars than black-owned firms with identical equity.[20]

The challenge that reached the Court involved a program in Jacksonville, Florida, requiring that 10 percent of city contract funds be set aside for female or minority-owned firms. The Northeastern Florida Chapter of the Associated General Contractors of America ("Chapter"), a group of individuals and businesses engaged in the region's construction industry, sued the city in 1989, claiming the program constituted reverse discrimination against white male contractors in violation of the Equal Protection clause. The Chapter alleged that its members regularly bid on the city's construction work and would have been entitled to bid on the 10 percent of contracts set aside if the law was not in place. Although the federal trial court found for the contractors on the merits, the federal appellate court ruled that the Chapter did not have standing to sue because it failed to show that one of its members would have secured one of the disputed contracts if the set-aside law were not in place.[21]

The Chapter appealed and the Supreme Court granted certiorari. The city subsequently narrowed the scope of its law to cover only African American firms and to provide for participation goals rather than a mandatory 10 percent set-aside of its construction contract funds. The city argued that the case was moot because of these changes, but the Court refused to dismiss the claim. Instead, in a very cursory analysis, the Court found that the Chapter had cleared the usually high hurdles of injury, causation, and redressability to secure standing. The Court explained that the Chapter "need only demonstrate that its members are able and ready to bid on contracts

and that a discriminatory policy prevented them from doing so on an equal basis." Relying on *Bakke,* the Court did not require the plaintiff to show that a Chapter member had actually bid on a project or that its bid would likely have been accepted but for city's set-aside policy. If the Court had instead applied *Allen,* it would only be "speculation" to say the set-aside law caused an imminent injury to the nonminority contractors. The *Jacksonville* Court expressed no concerns about generalized grievances, even though a broad group of contractors could state an Equal Protection claim under its reasoning. Could all white male contractors nationwide claim that they had been barred from competing equally for the city's contracts? The Court in *Allen* raised the similar specter of a parent of black schoolchildren in Hawaii complaining about tax support for discriminatory schools in Maine to reject plaintiffs' claim on standing grounds.[22] Finally, the *Jacksonville* Court did not focus on redressability, but simply assumed that finding the program was unconstitutional would remedy the denial of opportunity for equal competition.

Thus, the Court erected a lower standing hurdle for white plaintiffs challenging affirmative action programs than the one facing minorities claiming racial discrimination. The Court distinguished the standing approaches and outcomes by describing the claimed injuries differently. Even though the Court's simpler definition of injury in *Bakke* and *Jacksonville* makes sense, the contrasting definitions show how much flexibility judges have in applying standing doctrine. How they choose to characterize an injury is extremely important.[23] It is so easy for the highly educated, achievement-oriented justices to identify with reverse discrimination claims. They understood Bakke's argument that the special admissions program was a denial of educational opportunity for "innocent" white males. This type of injury also fits well with the traditional, individualized focus of the Court's Article III interpretation. In part because Supreme Court justices are predominantly white and from privileged backgrounds, it is harder for them to recognize other kinds of injuries, be they injuries based on complex, interconnected causes of racial discrimination or injuries to the environment that may harm large groups of citizens.

The Jurisdiction Question

Despite Justice White's urging, the Court did not avoid the merits in *Bakke* through standing. Justice White urged another avoidance tech-

nique: he argued that the Court (and the lower courts) never had jurisdiction to hear the case. Courts frequently refuse to hear cases if a statute does not provide an explicit private cause of action and courts require litigants to exhaust their administrative remedies first. At the U.S. Supreme Court, Davis argued that Bakke had no private cause of action because only the federal government could pursue violations of Title VI. That portion of the Civil Rights Act of 1964 provides that no one shall be excluded from a program receiving federal financial assistance because of his or her color, race, or national origin.[24] Whether Title VI allows private parties to sue was a significant threshold question which White urged his brethren to address before ruling on the "novel and difficult" statutory question of whether Davis violated Title VI or reaching the Equal Protection issue.

Reviewing the text and legislative history of the statute, White argued that the government must go through specific administrative remedies before resorting to a cutoff of federal funds or a lawsuit against universities that discriminate on the basis of race. Congress was concerned with giving universities sufficient chances to comply before they lost federal funding. Private litigation, on behalf of minority or nonminority individuals, could circumvent administrative requirements and interfere with executive branch discretion to ensure compliance through less disruptive means and enforce the law at what it and Congress deem an appropriate level. White also emphasized that Title VI does not contain a "citizen suit" or explicit "private party suit" provision.

The other eight justices readily dismissed White's protest and addressed the merits of whether the Davis program violated Title VI or the constitutional Equal Protection standard. Justices Blackmun, Brennan, and Marshall, who found Davis's program constitutional, assumed that Bakke had a right of action under Title VI, essentially equating the Title VI and the Equal Protection constitutional standard. Justice Powell responded to White's jurisdictional objection in a cursory fashion, finding it "unnecessary" to resolve this "difficult" question or the related exhaustion of administrative remedies question. This is surprising in light of a precedent barring review in cases when a private cause of action is not explicit in a statute or when administrative remedies have not been exhausted. Admittedly, the Court became more cautious about implying private causes of action without clear statutory support after *Bakke,* in the late 1970s. The four justices who rejected any consideration of race in admissions and Powell agreed that Title VI provides a cause of action for

private litigants. They also reasoned that Davis waived its jurisdictional objection by raising it in a "tardy" manner, only when the dispute reached the Court. This is also surprising because the Court generally allows litigants and judges to raise jurisdictional objections at any stage in the proceedings because they are deemed so critical to limiting the power of the federal courts. Thus, it is difficult to square much of the jurisdictional reasoning of the justices in *Bakke* with other precedents limiting judicial review when serious jurisdictional questions are posed. Most justices agreed to proceed because they found a private right of action or because they conflated the Title VI and constitutional analyses.

An Attempt to Confine the California Rulings

In another avoidance attempt, four justices urged the Court to affirm the California ruling regardless of the justices' views of the legality of Davis's program. Because these four justices and Powell found the program illegal and agreed that Bakke was unlawfully excluded, they would affirm the victory for Bakke. They argued that because five justices agreed with the ultimate *judgment,* deciding the case would amount to an impermissible advisory opinion not altering the outcome. The four justices read the California opinion narrowly, arguing that the judgment only bound Davis in Bakke's situation and would not apply to other applicants. Powell, however, refused to view the judgment as confined to the parties. He joined the four justices who approved of Davis's policy to interpret the California opinion as implicating the entire Davis policy and enjoining Davis from *ever* using race as a consideration in admissions decisions. Although the litigation only involved Mr. Bakke, not a class of applicants, this conclusion seems reasonable because Davis sought a declaration from the California courts that its policy was constitutional, Davis lost on this ground, and the highest California court issued a broadly worded ruling prohibiting Davis from using race as an admissions criterion in the future.

In contrast, the Court in *Lyons* refused to allow a choke-hold victim to seek injunctive relief directed at future LAPD conduct, instead requiring that persons seeking injunctive relief against a government policy show a substantial likelihood that the policy will harm them personally in the future (see chapter 3). The victim had standing only to raise the issue of re-

covery for his own prior injury; anything directed toward future police activity was too "speculative." This narrow framing of the relief available from a federal court, based on federalism concerns, posed an additional burden for Mr. Lyons to demonstrate an imminent, personalized injury that the litigants in *Bakke* did not bear. The *Lyons* Court expressed a preference that the legislative and executive branches address such widely shared complaints. Both Mr. Bakke and Mr. Lyons raised Equal Protection issues and the federal government has taken a lead in nondiscrimination law since the Civil War. Perhaps *Bakke* posed fewer federalism concerns than *Lyons,* but *Bakke* could be characterized as an example of the Supreme Court through constitutional law intruding on a traditional area of state control, i.e., education. Courts have significant flexibility in characterizing the claimed injury and level of federalism intrusion as they make standing determinations. The Court has relied increasingly on federalism to limit the scope of federal authority over equality issues, carving out a wider sphere of autonomy for traditional state law areas, as the 1990s federalism cases demonstrate (chapter 7). In *DeFunis,* as in *Lyons,* the Court refused the reverse discrimination dispute as nonjusticiable. It rejected exceptions to mootness, despite the import of the law school's unchanged policy for other applicants under the Washington Supreme Court's opinion. Although *Bakke* was not a class action, the Court chose to address rather than avoid the claims of others in reviewing the Davis policy, again demonstrating the elusiveness of applying avoidance techniques evenhandedly.

The Last Resort Rule: Addressing the Merits of Title VI

The conservative wing of the Court, which unsuccessfully urged avoidance by confining the scope of the California ruling to Mr. Bakke, relied on another portion of the avoidance doctrine, the "last resort rule," which instructs federal courts to rule on nonconstitutional grounds (e.g., a statutory basis) when those are fairly presented. These justices praised avoidance as the most "deeply rooted" doctrine in constitutional adjudication, concluding that their brethren should not have reached the constitutional question of whether race is ever an appropriate consideration in admissions decisions. Drawing on separation of powers and federalism concepts, they reasoned that avoidance "reflects both our respect for the

Constitution as an enduring set of principles and the deference we owe to the Legislative and Executive Branches of Government in developing solutions to complex social problems." The justices continued: "The more important the issue, the more force there is to this doctrine. In this case, we are presented with a constitutional question of undoubted and unusual importance." This seems backward. The more important a question is, the more reason there is to reject avoidance and provide guidance.

The Court does not always employ the last resort rule, especially when parties choose to focus only on the constitutional claim. The *Bakke* parties had only argued the Equal Protection claim in their briefs to the Court, and the Title VI grounds had not been considered since the trial court level. But in an internal memorandum, Justice White urged the Court to pay attention to the potential statutory ground of decision.[25] The Court then requested additional briefing from the parties on Bakke's Title VI claim.

The conservative wing—Justices Stevens, Warren Burger, William Rehnquist, and Stewart—concluded that Title VI requires public universities receiving federal funding to employ a color-blind approach in admissions decisions. Although they advanced this approach as a matter of statutory interpretation, relying on Title VI's text and legislative history, the color-blind approach has now been adopted as an Equal Protection mandate by a majority of the Court outside the educational context. Why did four *Bakke* justices ground their theory in Title VI? Perhaps they were attempting to advance a theory of equality without precluding Congress from endorsing a different view by explicitly altering Title VI if Congress disagreed with the color-blind approach. Or perhaps they relied on statutory grounds because they could not garner sufficient votes to advance a color-blind constitutional interpretation, while simultaneously attempting to dissuade other justices from expounding a different constitutional interpretation. But their endorsement of the last resort rule failed because only four justices were willing to rule on the statutory ground. This choice highlights the malleability of the last resort rule. Justices can rely on statutory grounds sometimes, but proceed to constitutional grounds when they garner sufficient votes. If parties press only constitutional claims, justices are sometimes willing to ignore potential statutory grounds to resolve disputes. And the last resort rule is only one of multiple avoidance strategies. As this *Bakke* review makes clear, if the justices wanted to avoid the merits of the constitutional challenge in *Bakke,* they had multiple grounds to do so.

Addressing the Merits of the Constitutional Challenge

Five justices based their differing rulings on constitutional grounds. Justice Lewis Powell, author of the most significant opinion, found that the Davis program violated Equal Protection by using race as a determinative factor in admissions decisions. He made clear, however, that the Constitution, in his view, condoned the use of race as one factor among others in admissions determinations. Because Powell viewed all racial and ethnic classifications as inherently suspect—even those benefiting minorities—he applied strict scrutiny, requiring the state to show that its racial classification is necessary to safeguard a compelling interest. Although Davis offered some compelling interests, Powell was not persuaded that the program was *necessary* to satisfy those interests. Powell found compelling Davis's goal of achieving a diverse student body to promote an educational atmosphere of "speculation, experimentation and creation." He saw ethnicity and race as factors in creating diversity, but noted the importance of other types of diversity (e.g., selecting students with geographic as well as rural and urban diversity, choosing musicians and football players, potential stockbrokers, and politicians). Powell praised Harvard's policy, in which race is a "plus" factor considered among other factors in comparing minority and nonminority applicants, although Harvard concedes that race is sometimes the determinative factor in close calls. Powell likewise approved of faculties considering some subjective factors beyond GPA and test scores (e.g., letters of recommendation or community service activities). Contrasting Harvard's flexible approach with Davis's separate admissions tracks and specific number of reserved spots for the disadvantaged track (for which no disadvantaged white applicants were accepted), Powell concluded that Davis's methods were not necessary to achieve the compelling diversity goal.

Although Powell recognized that minority students can be isolated unless a significant percentage are present, he insisted on a more costly and time-consuming individualized admissions focus. He concluded that the Davis program's racial classification "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." This focus on innocence casts the Equal Protection question narrowly, requiring attention to individuals rather than groups. For a fair competition, all individuals must be weighed against one another, rather than grouping persons to determine

the final mix. In Powell's view, Mr. Bakke and other white applicants cannot bear the weight of "redressing grievances not of their making." Powell clearly rejected the school's justifications for the program based on countering the effects of general societal discrimination and reducing the generalized deficit of historically disfavored minorities in medical schools and the profession. His focus on current policies as responses to *specific findings* by government officers of historical discrimination requires states to dredge up difficult discriminatory practices in their past to defend prescriptive policies geared to achieving future racial or gender balances. Powell recognized the state's argument that minority medical graduates are needed to practice in underserved communities. He concluded, however, that Davis made virtually no factual showing that its special admissions program was needed or even geared to achieving the goal of making health care accessible for all Californians.

Powell buttressed his Equal Protection approach with First Amendment analysis because he viewed the latter as encompassing academic freedom. He emphasized the importance of academic freedom, which allows faculties a sphere of autonomy to make their own judgments about students, curriculum, and research. He concluded, however, that the Constitution limits academic freedom by guaranteeing equality to all applicants. Powell advocated giving universities flexibility (e.g., approving a Harvard-type program) in part because of his tentativeness about the proper judicial role in redressing discrimination. He rejected the argument that more deference was owed to the Davis program because it employed racial classifications to benefit, not disadvantage, minorities who suffered historic discrimination. He highlighted the difficulty of ranking harms to various minorities (citing discrimination against Jews, Catholics, and eastern and southern Europeans) and determining when redress is sufficient. Even if such discrimination rankings were politically feasible and socially desirable, he concluded that they are not within judicial competence.

Such determinations are difficult for other institutions beyond the judiciary. In California and other parts of the United States, for example, Asians have faced tremendous historic legal obstacles to equal treatment.[26] In some instances, they face continuing discrimination. Yet some Asians might benefit more from admissions policies at California public universities that are not grounded in racial preferences allotting spaces among various racial minorities. If schools relied only on grades and test scores, more Asians would likely be admitted. Thus, university affirma-

tive action policies are generally thought to be of most benefit to African Americans, Latinos, and Native Americans. Indeed, several Asian Americans were admitted in the first medical school class at Davis. Asians, like other minorities, have historically been underrepresented in the medical profession, but the primary focus of the Davis policy was on increasing admission of other minority group members. The question of who should decide such matters contains important constitutional implications. Is a court or an academic institution best suited to balance these competing considerations? Will the Supreme Court defer somewhat to local constitutional interpreters or, will it impose a constitutional approach (e.g., color-blindness) on all decision makers?

Powell proposed a narrow judicial role in evaluating past and present discrimination. His solution was to give universities some flexibility and remove difficult affirmative action issues from courts. Always a centrist and one who shied away from judicial involvement in divisive controversies, this is a classic Powell strategy. Powell's opinion has been chastised for "pretense and self-contradiction" in trying "to have it both ways." One critic chided: "Only a mind as subtle (or confused) as Powell's" could find the Davis program unconstitutional and the Harvard approach constitutional.[27] Yet, amidst great division within the Court, his opinion is the enduring one, finding the Davis program unconstitutional but allowing the use of race as a "plus" factor and maintaining a bottom line of university flexibility in admissions decisions.[28]

Powell also attempted to leave open avenues for other constitutional actors, beyond faculty and university administrators, to engage in the affirmative action debate. He emphasized that *Bakke* did not reach the question of Congress's power to write legislation remedying effects of past discrimination and did not call into question congressionally authorized administrative actions to pursue racial discrimination. This narrow judicial role is another avoidance strategy used to minimize the impact of a decision by engaging only in a "measured step." Powell hoped to promote deference to nonjudicial officers and signal that it was their responsibility to evaluate the most appropriate methods of redressing discrimination. In essence, he said that the ball was now in their court.

Powell's *Bakke* opinion and his subsequent opinion in *Plyler v. Doe* underscore his belief that education is a critical gateway for opportunity central to our democracy. In *Plyler,* a closely divided Court found an Equal Protection right to public education for children of undocumented aliens, with Powell casting a decisive vote for the children.[29] As a member

of the school board, Powell helped keep the public schools in Richmond, Virginia, open during a campaign of "massive resistance" to *Brown v. Board of Education*.[30] Powell worried that without education, a "subclass of illiterate persons" would present problems of "unemployment, welfare, and crime."[31] Powell recognized in *Bakke* the need for coherent judicial interpretation of Equal Protection to provide continuity from one generation to another. He did not want Equal Protection law to be based upon "shifting political and social judgments." Yet his opinion did not provide stability as the Court and other constitutional actors continued to deal with challenges to various affirmative action programs over the next three decades.

Certainly, the confusion is not all attributable to Justice Powell. The Court's *Bakke* decision was extremely fractured. As noted, four justices did not address the Equal Protection challenge. The remainder offered numerous opinions about Equal Protection's application to the dispute. Four concurred in the Court's judgment in part and dissented from Powell's opinion. Justices Blackmun, Brennan, Marshall, and White believed that the Davis program did not offend the Constitution but agreed with Powell that race can be a factor in admissions determinations. Justice Brennan authored the primary opinion for this group, reasoning that state discrimination in favor of historically disadvantaged minorities is distinct from racism. He argued that government programs to remedy past discrimination are subject to intermediate scrutiny, requiring only that the means chosen are substantially related to an important state goal. Recognizing the potential danger of any racial categorization, these justices wanted something more searching than the rational basis test but something less stringent than Powell's strict scrutiny standard.

Justice Marshall (the Court's first member of a racial minority group and its only racial minority during *Bakke*) wrote separately, in a moving opinion, detailing the history of the "ingenious and pervasive forms of discrimination against the Negro" in our country. He included the period after the Civil War, when the Court assisted in stripping African Americans of new civil rights. He described the federal government's role in segregating work spaces, cafeterias, and bathrooms in federal buildings and the galleries of Congress. He cited modern discrimination in education and employment, including salary differentials. "The median income of the Negro family is only 60 percent that of the median of a white family, and the percentage of Negroes who live in families with incomes below the poverty line is nearly four times greater than that of whites." He

linked educational opportunities to financial and other successes. "It is because of a legacy of unequal treatment that we now must permit [universities] to give consideration to race in making decisions about who will hold the positions of influence, affluence and prestige in America." Painting a very different picture than Powell, he connected historic official discrimination to its current lingering effects. Marshall concluded: "At every point from birth to death the impact of the past is reflected in the still disfavored position of the Negro." Finally, he assessed differently the responsibility and competence of judges to evaluate discrimination charges, believing that the Constitution imposes a duty on courts to recognize those effects when the state attempts to redress them.

Justice Blackmun found the Davis program within constitutional bounds, though perhaps barely so. In a frank and persuasive opinion, he argued that the difference between the Davis and Harvard admissions programs was not "profound," but "thin and indistinct." Blackmun agreed with Powell that the judiciary is ill-equipped to determine who should be admitted, but he would leave the decisions to educators. He cited established government preferences the Court has upheld, such as those for veterans (which disadvantage women) and programs for Native Americans (which disadvantage non-Indians).[32] Blackmun noted:

> It is somewhat ironic to have us so deeply disturbed over a program where race is an element of consciousness, and yet to be aware of the fact, as we are, that institutions of higher learning . . . have given conceded preferences up to a point to those possessed of athletic skills, to the children of alumni, to the affluent who may bestow their largess on the institutions, and to those having connections with celebrities, the famous, and the powerful.

Why do racial preferences in admissions so captivate Americans when other preferences do not? In a similarly astute manner, Blackmun challenged the conservatives' color-blind theory: "In order to get beyond racism, we must first take account of race." Consciousness of race "is a fact of life"; the sooner we stop "shutting it out and away from us, the sooner will these difficulties vanish from the scene."

Thus, the *Bakke* Court reached the merits, despite deep disagreement over the validity of Davis's policy and the appropriate role for the Court in such controversies. Justice Powell's constitutional interpretation garnered no other vote. Four conservatives advanced a color-blind approach to Title VI, and four liberals approved certain racial classifications as a constitutional matter.

More Decisions on the Merits in Some Affirmative Action Cases

For a decade following *Bakke,* the Court struggled with a variety of affirmative action issues, including whether to adopt strict scrutiny for all racial classifications, whether to adopt a color-blind or color-conscious approach to discrimination claims, and about the appropriate role of courts versus other governmental entities in eradicating discrimination. During the 1970s and 1980s, the Court issued a series of fractured decisions about affirmative action, often without majority opinions, using a narrow, case-by-case approach. Several critical cases were 5-4 decisions and some overruled or conflicted with recent precedent. They provide a messy patchwork of reasoning. By the 1990s, a narrow majority of the Court coalesced around certain issues. Although the Court has not decided another case involving affirmative action in education, its resolution of other affirmative action disputes provides important background for its avoidance of higher education cases.

In *Fullilove,* the Court approved a 1977 congressional contracting program providing that 10 percent of federal works monies to local governments be directed to procuring goods or services from minority-owned businesses ("MBEs").[33] Without a majority opinion, six justices upheld the program against facial attack in 1980, with three opting for an intermediate level of scrutiny and three for a higher standard. The justices showed significant deference to Congress for its comprehensive remedial power in enforcing Equal Protection guarantees, rejecting the notion that Congress must always act in a color-blind fashion.

In contrast, six years later the Court condemned a plan allowing minority teachers with less seniority to be retained while more senior teachers were laid off.[34] The *Wygant* Court was again bereft of majority reasoning. Using strict scrutiny, the plurality reasoned that the plan was not narrowly tailored to remedy past discrimination in the particular school district, that the district could not address general societal discrimination, and that its justification of providing role models for minority students was insufficient. Justice O'Connor wrote separately, concurring in part and in the judgment, leaving the door open for other public employer remedies which "further a legitimate remedial purpose" without imposing disproportionate harm or "unnecessarily trammel[ing] the rights, of innocent individuals." She concluded the layoff plan was not adequately tailored to any employment discrimination.

In two final cases from the mid-1980s, the Court approved of affirma-

tive action plans, which were designed to address lower court findings of race discrimination. In *Local 28, Sheet Metal Workers,* the Court approved of membership quotas issued by a court after its finding that a union had violated Title VII.[35] A plurality found that the narrow plan would satisfy even strict scrutiny. Justice Powell concurred in the judgment but seemed to agree with much of the plurality's reasoning. The four dissenters addressed only the statutory grounds. Justice O'Connor said she would reach the statutory, but not constitutional, grounds. She also noted: "I agree with Justice White, however, that the membership 'goal' in this case operates as a rigid racial quota that cannot be met through good-faith efforts by Local 28." In *Paradise*, the Court upheld an Alabama public safety department one-for-one promotion plan which required that one minority person be advanced for every white person advanced.[36] The same plurality as in *Sheet Metal Workers* relied on the trial court's finding of intentional discrimination by the department in past hiring and promotion practices and found a compelling government interest in eradicating discrimination. Justice Powell concurred only in part, believing that precedent confined appellate review and that the district court did not abuse its discretion in fashioning the remedy.

A few years later, the Court announced a different standard when it struck down the Richmond City Council's plan to remedy past and present inequalities in the construction industry in *Croson*. Richmond had set aside 30 percent of city contracts for minority subcontractors. Largely relying on *Fullilove,* the trial court had approved the plan. The Supreme Court recognized the confusion in the lower federal courts caused by its recent decisions and announced strict scrutiny as the standard for reviewing all state and local government facial racial classifications. Six justices found the program not narrowly tailored to address past discrimination in Richmond contracting. The Court expressed concern about the "gross overinclusiveness of Richmond's racial preference"; the wide geographic scope of the program (which was not limited to local African American contractors); the amount and rigidity of a 30 percent subcontracting funds set aside; and the politics of the Richmond City Council (made up of mostly African Americans at the time the program was approved). The majority distinguished *Fullilove* by citing congressional authority under the Fourteenth Amendment to combat discrimination. Interestingly, Justice O'Connor, writing for the majority, emphasized that not all affirmative action programs are automatically unconstitutional. The dissenters protested restrictions on state and local authority to combat discrimination and argued that the plan was narrowly

tailored to address significant discrimination, setting aside only 3 percent of overall city contracting monies in a city that was 50 percent African American with few MBEs.

The Court did not at first apply the *Croson* approach in reviewing federal affirmative action programs. The following year, in *Metro Broadcasting,* the Court by a 5-4 margin upheld a Federal Communications Commission plan allotting preferences in awarding broadcast stations to minority-owned entities.[37] The Court emphasized that the stations are in limited supply, regulated by the government, and bear unique public service responsibilities. The Court applied intermediate scrutiny, reasoning that Congress supported the FCC plan and that Congress, pursuant to the Fourteenth Amendment, can implement even an affirmative action program that is not designed to remedy specific past discrimination. The Court permitted a focus on present as well as historical conditions for minorities, noting that the government had implemented the broadcasting preference to plan for future diversity after acknowledging the low percentage of broadcast outlets owned by minorities.

Yet five years later, in another 5-4 ruling, the Court overruled *Metro Broadcasting*'s adoption of intermediate scrutiny. Between 1990 and 1995, four of the five justices in the *Metro Broadcasting* majority left the Court, but none of the dissenters did. The new majority described *Metro Broadcasting* as a "surprising turn" which departed from a better precedent like *Croson*. In *Adarand,* the Court made the standards for reviewing all affirmative action programs congruent, holding that strict scrutiny should be used to evaluate federal affirmative action programs that classify on the basis of race or ethnicity. The government had sought to direct a greater percentage of federal highway funds to businesses controlled by minorities and women, finding that the ability of such businesses to compete in the free enterprise system has been impaired by diminished capital and credit opportunities ("social" disadvantage). The government presumed that such businesses were economically and socially disadvantaged but allowed other bidders to rebut that presumption and require a showing of disadvantage by the bid winner. The *Adarand* dissenters urged deference to Congress and argued that the use of race to disadvantage is very different, morally and constitutionally, from the use of race to advantage minorities.

An important division existed among the five justices who found the federal program unconstitutional in *Adarand*. Justice Scalia refused to join Justice O'Connor's plurality opinion because of her unwillingness to

condemn all affirmative action programs. Speaking for three other justices, she avoided the question of whether the *Fullilove* program, upheld in 1980, could withstand strict scrutiny, noting: "[W]e wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'" She then expanded on reasons for preserving flexibility in applying the standard in future decisions: "The unhappy persistence of both the practice and lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." The plurality cited *Paradise* as an example of when it is appropriate for government to respond to "effects of racial discrimination." In contrast, Justice Scalia insisted that the government can never have a compelling reason for using race, even to remedy past racial discrimination, and warned that the "benign" use of race still reinforces prejudicial, stereotypical thinking. He concluded: "In the eyes of government, we are just one race here. It is American."

Thus, by the mid-1990s, the Court had narrowly coalesced around the strict scrutiny test for affirmative action, while purportedly not condemning all programs. Numerous questions lingered for politicians and the public as they struggled with the constitutional scope of a variety of affirmative action programs. Neal Devins says that the decisions are so highly indeterminate as to be "essentially nonbinding," and they thus encourage resolution in the political, rather than judicial, processes.[38] Maybe the Richmond program was an easy case, but what about the validity of other affirmative action programs? What remained of *Bakke* after *Adarand*?

In addition to its refusal to provide clarity about race-based affirmative action, the Court avoided considering the constitutionality of gender-based affirmative action programs during this period through measured opinions and denial of certiorari. Although many of the challenged programs benefited both racial minorities and women (e.g., the one challenged in *Adarand*), the Court did not review cases in which gender-based programs were challenged. Even when a challenged affirmative action program covered both women and racial minorities, the Court focused narrowly on the facts of the specific challenges before it, striking down only the portions of the plan based on race and not reaching gender. The Court ruled that strict scrutiny will be used for racial classifications, whether they disadvantage or benefit minorities. The Court has ruled that facial gender classifications that disadvantage women are subject to intermediate scrutiny but has never considered a classification

benefiting women (chapter 6). The Court may simply have been issuing measured steps in a sensitive area, but it also focused its political capital on the most divisive portion of affirmative action, the programs benefiting racial minorities. This produces a strange anomaly: it is easier for the government to help white women under the new approach than people of color. Yet, as a group, white women are still better represented and wield more clout than racial minorities in the political process. The Court casts a shadow over affirmative action programs, but focuses on a more politically acceptable result for the majority, one at least more acceptable to many white women and their families who benefit from affirmative action. Perhaps the Court will condemn gender-based affirmative action programs as it agrees to hear such challenges. For now, those and other questions face public entities and lower courts as they struggle to understand the contours of the Court's affirmative action rulings. Thus far, the federal circuits have split as they apply the color-blind precedents to gender-based affirmative action.[39] Justices Stephen Breyer and Ginsburg dissented from the Court's denial of certiorari in the late 1990s to an appeal by the city of Dallas after the Fifth Circuit Court of Appeals struck down a promotion plan beneficial to women and minorities.[40] Earlier, the Court refused to hear an appeal from a District of Columbia Circuit ruling, authored by Clarence Thomas, which invalidated the FCC's gender preference, diverging in part from the Court's race ruling in *Metro Broadcasting*.[41]

The Court's Avoidance of Educational Affirmative Action Disputes in the 1990s

In the late 1990s, ambiguity in the Court's affirmative action rulings and general divisiveness on the issue led to sharp divisions among lower federal courts reviewing challenges to educational affirmative action programs. The Supreme Court refused to review the merits of three important, nationally watched federal appellate court rulings limiting affirmative action programs in higher education. This section emphasizes the impact of the Court's avoidance in this area, one in which we need certainty and consistency for uniform interpretation so as to fully guarantee Equal Protection.

Hopwood concerned a program, much like the one challenged in *Bakke,* at Texas' premier public law school, which is highly ranked nation-

ally. A federal appellate court found the program unconstitutional and declared that Justice Powell's reasoning in *Bakke* did not survive *Adarand*. The Court also refused to hear a case from Maryland in which the Fourth Circuit invalidated race-based scholarships as unconstitutional. The final dispute was a challenge to a California ballot initiative banning preferences in public contracting, employment, and higher education. A federal appellate court found no constitutional violation in the ban.

Many university administrators and some courts still rely on Powell's *Bakke* reasoning to retain some affirmative action mechanisms. However, the fractured nature of that Court and the 1990s Court leaves room for lower-court judges to issue inconsistent decisions regarding *Bakke*'s validity. Perhaps a majority of the current justices approve of these important, visible Texas, Maryland, and California rulings, where lower federal courts struck down affirmative action programs. These challenges resulted in victories for opponents of race-based affirmative action in the country's two most populous states, while similar programs in other states survive, clinging to *Bakke* and the narrowness of the Court's recent rulings. But the justices have neither explicitly approved of the appellate panels' warning nor told us that they view educational affirmative action as significantly different from the government contracting or employment context.

Hopwood: *Texas Affirmative Action Policy Reminiscent of* Bakke

In 1996, a panel of three Fifth Circuit judges found the University of Texas School of Law's affirmative action program unconstitutional.[42] Four white applicants who had been refused admission to the highly selective school complained that the program violated Title VI and Equal Protection. In a broad constitutional ruling, the court in *Hopwood* forbade the school from using race as a factor in admissions and applied a color-blind approach to other critical issues for educational affirmative action programs. The judges reasoned that Justice Powell's opinion in *Bakke* was "not binding precedent," and they disagreed with him that diversity could be a compelling government interest sufficient to withstand strict scrutiny. They also found that addressing the present effects of past discrimination is not a compelling interest. The judges did not focus on well-documented past discrimination and present inequalities in the Texas educational system or even at the University of Texas ("UT"). The court regarded the law school as the only

appropriate measuring unit and focused on current discrimination. The court would allow affirmative action only to remedy past wrongs after legislative findings of *present effects* of past segregation and only if any race-conscious remedy was limited carefully. The Fifth Circuit asserted that it is impossible for systems in which race is considered a "plus" factor not to degenerate into impermissible quota programs. In sum, the court approved of a sharply limited range of reasons and means for affirmative action programs in state education.

This constitutional ruling is particularly disturbing in light of the history of discrimination and the current educational segregation in Texas. Not only did Texas discriminate in according minorities voting and other important political rights for many years.[43] From its elementary schools to its premier law school, Texas officially segregated learning institutions and then officially resisted federal and local desegregation orders after *Brown v. Board of Education*. The law school was part of that history. In the 1940s, Heman Sweatt challenged the law school's refusal to admit blacks.[44] When he won in the state courts, Texas "created a makeshift law school that had no permanent staff, no library staff, no facilities, and was not accredited" to evade integration.[45] After the U.S. Supreme Court ordered Sweatt admitted in 1950, the law school began integration efforts. But, as the *Hopwood* district court recounted, Mr. Sweatt soon left the school "after being subjected to racial slurs from students and professors, cross burnings, and tire slashings."

Educational inequalities and segregation continued into recent decades. Federal executive and judicial officials, pursuant to Title VI, undertook enforcement efforts and monitored integration compliance through the 1990s. The *Hopwood* district court found that, as of the mid-1990s, although the Texas public school population was approximately half white and half non-white, minority students primarily attended majority minority schools and white children primarily attended white schools. Desegregation lawsuits were pending against forty school districts. The court attributed some of the lack of equal educational opportunity to socioeconomic disparities. Black and Latina/o children were twice as likely to live in poverty as white children in Texas.[46] But the court found the gap exacerbated by historic and current differences in the educational preparation of minorities. Although the district court also found the law school's affirmative action program unconstitutional, it emphasized this important historical and current educational context. It linked inferior

schooling opportunities for many Latinas/os and African Americans in Texas to the need for affirmative action efforts at graduate levels of the state educational system. Differential funding of primarily white and primarily black campuses also fostered concern about inequalities.

Two of the three appellate panelists determined that the school's history was not sufficient to justify the challenged program. They emphasized that, by the late 1960s, the law school had officially stopped discriminating and begun to recruit minority students. The "vast majority of the [current] faculty, staff, and students . . . had absolutely nothing to do with any discrimination that the law school practiced in the past." The panel thus easily rejected the school's concerns with redressing the current effects of past discrimination, improving the educational environment for minority law students and alleviating the school's poor reputation in the minority community.

Moreover, these judges did not find Powell's *Bakke* opinion controlling. Troubled by the Texas program, they were likely concerned that a ruling that only told faculty and administrators to come up with a more narrowly tailored program would prove ineffective to redress the constitutional violation. They believed that the district court's approach would still allow the law school to use differing presumptive admit-and-deny levels for minorities and nonminorities, and would likely lead to the same admission results, with the school achieving its aspirations of classes comprised of 5 percent African Americans and 10 percent Mexican Americans. If the panel was attempting to apply seriously the Court's almost always color-blind theory of justice to these new facts, its broad approach will likely promote a change in the policy and better protect the Equal Protection rights of prospective nonminority students. The panel was arguably heeding the directional signal of the Court. Certainly, the Court did not foreclose this type of a ruling with its narrow and splintered precedents.

The third panelist, however, wrote separately to emphasize the breadth of his colleagues' ruling and to urge a narrower approach. The judge pointed out that the Court's affirmative action rulings left many gaps to fill, that the Court did not define a "compelling interest" or provide examples, and that the Court did not explain what precedent survived its recent rulings. The *Adarand* Court did not actually apply strict scrutiny to the facts before it, but remanded for further adjudication. After four more years of litigation, the Tenth Circuit declared the dispute moot and

vacated the lower court opinion because the contractor had been classified as socially disadvantaged under revised guidelines. In what must have been a frustrating end to the lengthy, expensive litigation, the contractor protested the mootness determination. The *Hopwood* panelist argued, "[A]s a practical matter, *Adarand* resolves very little. In fact, the much-heralded change is quite limited: Race-based classifications, imposed by the federal government, are now subject to strict scrutiny." Finally, the panelist emphasized that Justice O'Connor's pivotal opinions in recent cases had made clear that the rulings were "not the death knell of affirmative action."

The judge continued: "[I]f *Bakke* is to be declared dead, the Supreme Court, not a three-judge panel of a circuit court, should make that pronouncement." The circuit court should not "rush in where the Supreme Court fears—or at least declines—to tread." Because achieving diversity in public graduate education differs from the public contracting and employment settings the Court had considered, a more "surgical" and "principled" option for resolving the dispute was needed. Relying on Powell's reasoning in *Bakke* and O'Connor's critical concurrence in *Wygant,* which cited *Bakke,* the judge accepted the law school's diversity justification as a compelling interest: "Although its precise contours are uncertain, a state interest in the promotion of racial diversity has been found sufficiently 'compelling' at least in the context of higher education to support the use of racial considerations in furthering that interest." Like the program at Davis, however, the Texas program used separate presumptive "admit" and "deny" levels for minority and other applicants; separate evaluation processes, with color-coded files and a separate minority subcommittee whose decisions were "virtually final"; and separate waiting lists. Based on these factual findings, the Texas program would have difficulty passing muster even under *Bakke*. By finding the program unconstitutional *simply because it was not narrowly tailored to achieve diversity,* the Fifth Circuit could avoid some difficult issues and avoid direct conflict with *Bakke*.

This division among the appellate panel demonstrates the difficulty lower federal courts and state courts face when the Supreme Court issues measured steps and fractured rulings. Minimalist rulings by the Court leave a vacuum in which lower courts can exercise great power, which they do not always appreciate. After the Supreme Court remanded *Adarand,* the trial judge complained:

> The prudence of remanding this case to the trial court is difficult to perceive. Both parties have stipulated to the absence of any dispute of material fact. . . . [H]igher courts are better equipped to decide as a matter of law whether. . . . The statutes involved can be described as in furtherance of a compelling interest and narrowly tailored to meet that interest. As such, concerns of judicial efficiency and the desire to resolve disputes quickly would have favored the resolution of the remaining legal issues by the higher courts.[47]

Further, the Court does not always step in quickly to fill the vacuum once lower courts have divided on an issue. Justices sometimes wait for a circuit conflict to "deepen" or for the public to react to lower court opinions before it expends its political capital. The Supreme Court denied certiorari in *Hopwood*. Maybe some justices agreed with the two Fifth Circuit panelists on the merits. Others made it clear that the case was not a good vehicle to resolve the affirmative action issue because of a procedural problem, and they minimized the precedential value of the case for other courts. President Clinton's only appointees, justices Ginsburg and Souter, issued a "stunning" concurrence in the denial, "downplaying the Court's non-action."[48] They believed the dispute was moot, emphasizing that the lawsuit involved only the admissions process in place when the plaintiffs applied in 1992. That process had been changed prior to trial, and those sued were not defending the old program. Indeed, the law school had pledged not to reinstate it. Nevertheless, the school sought the Court's review because of the breadth of the Fifth Circuit ruling and its restrictions on using race in admissions. Ginsburg and Souter noted that the record was not sufficient to assess the school's current use of race in admissions and declared: "This Court reviews judgments, not opinions." This view comports with the ban on advisory opinions and the adequate and independent state grounds doctrine (aspects of the avoidance doctrine), which counsel that if a court's ruling will not change the outcome of a dispute, the court has no jurisdiction.

If Souter and Ginsburg convinced other justices with their mootness argument, we would be back to the *DeFunis* problem. How will a challenge to an educational affirmative action program ever reach the Court? During the years of lower court litigation, defendants can continually avoid an adverse determination by altering their policies. The only way to ensure that the dispute will survive through appeals is to bring a class action. But, based on the Fifth Circuit's ruling, the four *Hopwood* plaintiffs

were entitled to reapply without further application fees. A ruling on the merits from the Supreme Court (agreeing or disagreeing with the Fifth Circuit) would impact the law governing the school's future affirmative action program, which would be in place when the plaintiffs reapplied. The two justices, however, recommend a piecemeal approach, under which plaintiffs must sue again if they are denied admission later and believe that the new policy does not conform to the Fifth Circuit's *Hopwood* ruling. Additionally, if the justices viewed the dispute as moot as of the time of trial, then the trial and appellate judges had no jurisdiction. The Court should have declared *Hopwood* moot and vacated the lower court opinions, as it did in *Yniguez* (chapter 1). Instead, the Court let the lower court opinions in *Hopwood* stand, despite the belief of two justices that the case became moot earlier.

The *Hopwood* litigation continued. In 1999, a trial judge, after hearing four days of testimony, found that the plaintiffs probably would not have gotten into the law school under a race-neutral admissions system. He awarded each $1 in damages and halved the requested attorneys' fees to $776,760. The judge also enjoined the school from using race as a criterion in future admissions decisions. Both sides appealed.[49]

The Aftermath of Cert Denial in Hopwood

Although a denial of certiorari does not constitute a precedent on the merits, the Court's refusal to address the appropriate scope of affirmative action in educational programs gives more weight to *Hopwood* as a practical matter. In the absence of guidance from the Supreme Court, litigants and other courts look to appellate court decisions like *Hopwood.* The ruling binds only federal courts in the Fifth Circuit, leaving other courts—state and federal—free to read the Court's affirmative action precedents differently and approach other fact situations differently. Significant litigation over educational affirmative action continued and, as of late 1999, the federal circuits were fairly evenly split over the validity of *Hopwood.*

Even within Texas, politicized battles over how to interpret *Hopwood* ensued. The federal Department of Education interpreted the ruling to apply only to the law school's 1992 admissions program. This approach is consistent with justices Ginsburg and Souter's narrow framing of the issue in denying certiorari. But the Texas attorney general in 1997 read *Hopwood* to ban any use of race in admissions and scholarships in the

Fifth Circuit. His reading mirrored the broad reasoning of the Fifth Circuit, which held that, to the extent federal orders requiring race-based remedies for past discrimination and current segregation in the UT system were inconsistent with its reasoning, they were unconstitutional. The panel directly called into question the validity of other state affirmative action programs beyond the law school's 1992 procedures. Political tensions were clear in this dispute. The Clinton Department of Education hinted about withholding $500 million in federal higher education funding if its investigation found "vestiges of segregation and if [Texas] failed to use all possible remedies, including affirmative action, to correct them." Republican Representative Phil Gramm of Texas accused the Department of Education of flouting a federal court's command. The U.S. solicitor general disagreed with the Department of Education and proclaimed *Hopwood* the law within the Fifth Circuit (Texas, Louisiana, and Mississippi).[50]

By doing this, the United States appeared to endorse a broader reading of the opinion than did justices Ginsburg and Souter. Could the law school's minority student organizations—which were denied an opportunity to intervene in *Hopwood*—or other litigants pursue the constitutionality of the school's current affirmative action program in state courts, hoping for a more favorable ruling on Equal Protection grounds? What about challenges involving affirmative action efforts in other UT departments? Under the Court's reasoning in *Yniguez,* a federal circuit's ruling does not bind state courts in the same circuit. As of late 1999, the federal Department of Education's Office of Civil Rights was still investigating the higher educational system in Texas for vestiges of discrimination.[51] The same year, the new Texas attorney general rescinded a 1997 legal opinion barring Texas colleges from offering race-based scholarships.[52] Clearly, important disagreement remains among judges and other constitutional interpreters on how broadly to construe a federal court's ruling, which will lead to more disuniformity in federal law.

Politicians will certainly participate in shaping the national interpretation of *Hopwood*. For example, attorney general Michael Bowers recommended after the ruling that the Georgia university system rescind all of its race-based admission and financial aid policies. Based on *Hopwood* and other court decisions, he argued against race-based affirmative action on constitutional grounds. The chair of Georgia's Board of Regents, Juanita Baranco, responded that those court opinions did not bind Georgia, and that other perspectives on the use of race in educational decisions exist.[53]

Many politicians will use *Hopwood* to attack race-based programs benefiting political minorities. Other politicians may support affirmative action to court voters. Federal Equal Protection law will remain uneven or divergent in different states (at least for some time) as the battle is fought in the local trenches, and without conclusive word from the Supreme Court or national political leaders.

Although we cannot know its full impact at this juncture, *Hopwood* appears to have immediately influenced higher education nationwide. One commentator wrote that the ruling "casts a shadow over every educational affirmative action program in the country."[54] Many educators fear that its condemnation of any consideration of race will be applied to public universities and even private institutions receiving federal funds. Some educators worry that fewer prospective minority students will apply for educational opportunities and financial assistance, as apparently happened in California shortly after the enactment of an anti–affirmative action ballot measure. These fears may be exaggerated, based on an unduly broad reading of *Hopwood* that other courts may not follow. But university administrators are likely to perform their roles with caution, wary of being targeted by national interest groups pressing reverse discrimination challenges such as the Washington Legal Foundation or the Center for Individual Rights. The latter group advertises in student newspapers at elite colleges, seeking potential plaintiffs. In addition to unwelcome publicity, these law suits bring expense for schools, in terms of money, personnel time, and morale. Given those legal process and political considerations, even schools committed to diversity may pause.

At the UT School of Law, the numbers of blacks and Mexican Americans enrolled dropped significantly after 1996 (from 65 to 5 blacks, and from 70 to 18 Mexican Americans in the Fall 1997 class). Undergraduate enrollment for those groups at UT also declined. With the law school's requirement of admitting classes that are 85 percent Texas residents, this undergraduate population is crucial for law school composition. Nationwide, law school enrollment in the late 1990s stood at 85 percent white and 6 percent black, with smaller percentages of Latinas/os and Native Americans enrolled. Blacks, for example, made up only 3.2 percent of lawyers nationwide in the late 1990s. If law schools and colleges adopt *Hopwood*'s constitutional analysis or are cautious because of the ruling, American educational institutions and professions will be even more overwhelmingly white.

The Court Refuses to Hear Scholarship Challenge

One year before its denial of certiorari in *Hopwood*, the Supreme Court refused to hear a case in which the Fourth Circuit found that the University of Maryland's ("University") race-based scholarship program offended Equal Protection.[55] Like Texas, Maryland had a history of racially segregated educational institutions and resistance to desegregation. In 1930, the University's law school rejected Thurgood Marshall's application. He later successfully sued the school on behalf of another black applicant.[56] In 1949, the University's president suggested that the school be privatized to avoid admission of black graduate students. The University excluded African Americans from its flagship campus until the mid-1950s, and it remained essentially all-white until the 1980s. The district court emphasized that the University's "active resistance" continued into the 1970s, and the state was under orders from federal officials to improve educational integration through the 1980s. By the mid-1990s, 12 percent of the students were black, although the state's population was about 25 percent black.[57]

A Hispanic student, represented by a national conservative group, challenged the Banneker scholarship program, which began in 1978 as part of efforts to desegregate the student body. The program allows one percent of the University's financial aid budget to be devoted to thirty high-achieving African American students. The state also implemented other race-based scholarships to promote integration, including funds directed at sending white students to four historically black campuses. The Fourth Circuit ruled against the University, reasoning that the University did not show sufficient evidence of present effects of past discrimination to justify the program. Moreover, the program was not narrowly tailored to redress underrepresentation and attrition problems for African Americans cited by the University. Race-neutral alternatives must first be tried and proven unsuccessful, said the Fourth Circuit.

Signifying the national importance of the issue, numerous groups filed amicus briefs with the Fourth Circuit. The U.S. Department of Justice, the NAACP Legal Defense Fund, and a group of educational institutions urged the Supreme Court to reverse the ruling. Approximately two-thirds of U.S. colleges offered some race-based scholarships as of 1995, and the Court's denial of certiorari caused concern among some educators about the continued validity of those programs. Public and private race-based programs probably comprise about 4 percent of undergraduate scholarship funds

nationwide, according to a 1994 Government Accounting Office report. Public and private programs direct financial aid to a wide variety of groups, including blacks, whites, Chinese Americans, Greek Americans, Italian Americans, Baptists, Christians, Jews, foreign students, lineal descendants of Confederate soldiers, and students of Huguenot ancestry. Federal executive officials had waffled and differed on the issue. The first Bush administration had declared that scholarships available only to racial minorities were illegal. But when that policy "triggered political uproar," the Bush White House asked education officials to study the matter further. Clinton administration officials found such programs legal to remedy past discrimination or achieve diversity.

The Supreme Court refused to hear the challenge. The NAACP cautioned that it would be overreaching to view the Court's refusal to hear the case as a resounding victory. In contrast, the plaintiff's lawyer viewed the court's signal more favorably as a general defeat for universities with minority scholarship programs in place. Emphasizing that the University had excluded all blacks until recently, he proclaimed: "If the University of Maryland is not allowed to offer these kinds of scholarships, I don't know who is."[58] Maryland officials worried about attracting black students. Journalists, while acknowledging that the Court's denial of certiorari does not set national precedent, stated that "it was a clear sign that the justices did not find the appeal worthy of full-scale analysis at the highest judicial level"[59] and "strongly suggests that a majority of the justices do not dispute the lower court's conclusion."[60] The justices would likely disagree that their action sent or contained such signals. But the ruling and denial of certiorari are bound to worry cautious college administrators, even outside the Fourth Circuit. Will the case call private scholarship programs into question, such as the Gates Foundation's 1999 program for minority students? The most we can be certain of is confusion, differing approaches by university administrators nationwide, and a continuation of the struggle on the political front.

The Court issued two denials of certiorari in important affirmative action challenges in the mid-1990s. Although the Court had not applied the *Croson* and *Adarand* color-blind approach to strike down any educational programs, it let the lower rulings doing so stand, and prospects seemed bleak for proponents of educational affirmative action. Many persons on both sides of the issue hoped for elucidation from the Court. In 1997, the Court struck a third blow when it declined to review a federal appellate court ruling that upheld California's anti–affirmative action law.

California's Anti–Affirmative Action Initiative

Proposition 209, which eliminated some public affirmative action programs in the nation's most populous state, was a critical feature of the national assault on affirmative action. President Nixon, who did much to institutionalize affirmative action, saw it as a "beautiful wedge issue which would fracture the Democratic party's old coalition of labor, Jews, and blacks."[61] Pat Buchanan predicted that in California, affirmative action was the issue to split Bill Clinton's coalition and to steal votes back from Ross Perot. In addition to its large population, Republicans focused on California's increasingly multiracial demographics. Whites made up less than 60 percent of the population at the time of 209's passage; California's public schools have over 5.5 million students, of which about 60 percent are non-white. The electorate, however, is approximately 80 percent white. Troy Duster suggests that the 209 campaign was designed in part to lull students and parents into a false sense that the end of affirmative action would mean that all qualified and interested Californians could gain admission to highly competitive public schools. But nearly half of Berkeley's applicants maintained a 4.0 GPA and many more had GPAs above 3.8 in 1995. Competition remains fierce at other UC campuses, and ending affirmative action will not ensure sufficient space for many of California's qualified students.

In 1996, California voters adopted 209 by a margin of 54 to 46 percent. The law was unique in that it lumped higher education programs together with employment and contracting programs. Although 209's scope was uncertain, its anti–affirmative action thrust was clear. National media extensively covered the debate over 209, and its passage fueled proposals for banning affirmative action in local, state, and national political bodies.

Proposition 209 amended the California constitution to provide that "[t]he state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education or public contracting."[62] The California voter's pamphlet defined affirmative action programs as those intended to increase opportunities for women and racial and ethnic minority groups, and said the law could stop or significantly change existing educational programs, including voluntary desegregation, magnet funding, counseling, tutoring outreach, and financial aid where those programs amounted to race and gender

preferences. Notably, the pamphlet stressed that 209 would prevent state universities from using race and gender as factors in admissions decisions. Proposition 209 was labeled the "California Civil Rights Initiative." The authors, college professors Glynn Custred and Thomas E. Wood, drafted the law in 1992 in response to their frustrations and disenchantment with affirmative action in academia.[63] Supporters of 209 drew on the language of the federal Civil Rights Act of 1964 and said: "A generation ago, we did it right. We passed civil rights law to prohibit discrimination. But special interests hijacked the civil rights movement. Instead of equality, governments imposed quotas, preferences, and set-asides."[64]

In the early 1990s, California's economy received two major blows. First, the national recession caught up with California. The military began scaling back by closing down bases, and defense contractors located in California began closing down factories and laying off workers. At the same time, the state's population increased by 18 percent, school enrollments by 23 percent, welfare rolls by 31.5 percent, and Medicaid by 49 percent. Some blamed the poor economy and state budget problems on illegal immigrants, primarily Latinas/os. Governor Pete Wilson proposed that citizenship be denied to children born on U.S. soil to illegal immigrants and that health and education benefits be denied to anyone in the state illegally. Although the legislature did not jump on either of these ideas, the voters followed up on Wilson's second proposal by passing Proposition 187, which cut all state aid, including health care and education, to illegal immigrants and their children. California's Democratic party lost badly on 187 and knew that many white voters wavered between equality ideals and loss of political clout.[65]

The drafters of Proposition 209 included a ban on gender preferences as well as racial ones to avoid charges of racism and to withstand court challenges.

> Initiative foes wanted Proposition 209's ballot title and summary to mention affirmative action. Supporters wanted the state legislative analyst's office to drop various references to affirmative action in its report on the initiative's impact. Each side emerged from the court fight with wins and losses. But the pro-209 camp walked away with the key victory. The title of the initiative—which voters [would] see on the ballot—describes the measure as a "prohibition against discrimination or preferential treatment."

Girardeau Spann describes how the 209 debate affected national political attention to affirmative action: "As Proposition 209 gained grass

roots popularity, it also began to gain the support of national politicians and high-profile institutions. Republican success in the 1994 elections moved anti–affirmative action sentiment from the conservative fringe to the middle of the political spectrum." Republican presidential candidates Bob Dole, Phil Gramm, and Pete Wilson announced that they opposed racial preferences. Governor Wilson had supported affirmative action previously, but as he ran for U.S. president in 1996, he viewed 209 as a "wedge issue" that would help him, as his reliance on the issue of illegal immigration had aided him in his 1994 gubernatorial campaign. He pushed University of California Regent Wardell Connerly, an African American, to ask the Regents to consider ending the use of race, religion, sex, color, or ethnicity in admissions and hiring throughout the UC system. The Regents did bar race and gender preferences in UC admissions, hiring, and contracting. When Connerly took over the initiative's campaign, Wilson raised money and asked state legislators to have their staffs collect signatures. A group supporting the measure spent more than $3 million to ensure its passage. The governor intervened to save the measure at the final hour, circulating the petition to garner sufficient votes.

Californians interpreted the proposed law in very different ways. Some argued that it bans "discrimination" and "preferences" but does not reach all affirmative action programs that do not amount to preferences, such as recruiting of racially diverse and female applicants, mentoring, and assistance to minority and female students. Others read it as "staggering in scope, and irreverent in demeanor. It seems to condemn all affirmative action programs—regardless of their remedial justification or prospective promise—in a brazen rebuke of the social policymakers who spent decades putting those programs in place." This disagreement was not frivolous; two governmental bodies charged with interpreting the law disagreed on its meaning. The state legislative analyst and the California Court of Appeals both construed 209 prior to the vote. The Legislative Analyst's Report said the initiative would save $38 million by eliminating magnet schools and racially isolated minority school programs. The analyst's broad reading of 209, viewing current outreach programs as preferences that 209 would prohibit, was included in the ballot pamphlet. The court interpreted 209 as not condemning such programs because they are standard devices to combat prohibited discrimination. In addition to the "discrimination" versus "preference" ambiguity, proponents and opponents disputed the law's effect on current gender-based affirmative action efforts. Scholars such as Erwin

Chemerinsky feared that it would reduce existing legal protections for women while others claimed that this argument was merely a "scare tactic" to rally middle-class white women against 209. Not surprisingly, voters shared this confusion. A preelection poll showed that many Californians favored "equal opportunity" efforts (such as minority recruiting) but opposed "preferences." Although Californians voted for 209 by an 8 percent margin, one exit poll found that nearly one-third of those who voted *for* 209 supported affirmative action.[66]

Just one day after the vote, the ACLU and other civil rights organizations challenged 209 as denying women and racial minorities federal Equal Protection. They also argued that it conflicted with federal antidiscrimination statutes. In 1996, Judge Thelton Henderson temporarily halted implementation of the law, pending a final judgment on the merits. The judge carefully explained that the plaintiffs' constitutional challenges covered "only the slice of the initiative that now prohibits governmental entities at every level from taking voluntary action to remediate past and present discrimination through the use of constitutionally permissible race and gender conscious affirmative action programs."[67] Thus, it concerned 209's ban on "preferences" but did not reach 209's prohibition of "discrimination." More litigation was envisioned, and challenges might continue for some time as controversies over other portions of 209 ripen into lawsuits.

Judge Henderson did not take lightly the first-order question of whether judicial review was appropriate. In a state where voters had ousted judges in retention votes when they disagreed with their rulings, he was mindful "that any challenge to a duly-enacted law should be met with caution and restraint" by the federal courts. He wrote that "it is not for this or any other court to lightly upset the expectations of the voters." At the same time, however, he recognized that the Constitution sometimes limits temporary majoritarian preferences in our democracy. The judge then provided extensive findings of fact about the implementation of 209 in the areas of public contracting, employment, and education.

With regard to public contracting, the court found that some California affirmative action programs required prime contractors to make a good faith effort to utilize women or minority-owned subcontractors, while other California programs provided an advantage to minority- or women-owned contractors in the evaluation of bids. Initiated under Governor Ronald Reagan in the 1970s, many of these programs sought to remedy the effect of past and present bias against women or minority

contractors. In public employment, California's programs allow employers to consider the ethnicity and/or gender of an applicant as a factor in hiring if the applicant is otherwise qualified. As a result of a 1971 executive order establishing voluntary affirmative action in the civil service, state agencies began using hiring goals and timetables, with gender segregation in state agencies declining by 11 percent and race segregation declining by 16 percent between 1979 and 1986. By eliminating such programs, 209 would substantially reduce opportunities for women and minorities in public contracting and employment, the court found.

In education, California's affirmative action programs ranged from voluntary desegregation and magnet schools to financial aid and admissions programs in higher education. The University of California campuses that are in high demand selected between 40 and 60 percent of their students by weighing grades, test scores, and course work. The remaining students were selected by weighing other criteria, including California residence, disabilities, educational disadvantage, family income, ethnicity, leadership ability, public service, special athletic, artistic, or musical ability, a student's family college history, and whether the student is from a one- or two-parent family. The court found that, without existing affirmative action efforts, African American and Native American enrollments might be reduced by as much as 40 percent to 50 percent. Enrollments for Latina/o and some Asian groups would decline, but overall, Asian American enrollments would likely increase by 15 percent to 25 percent. White enrollments would likely stay the same. The court concluded that admission of African American, Latina/o, and Native American students at California's public medical schools would significantly decrease, negatively impacting delivery of medical services to those minority communities based on the higher percentages of minority patients served by minority doctors.

The district court determined that 209's wide ban on preferences discriminated against minorities and women. By singling out race and gender from other preferences such as disability or veteran's preferences, the law placed special political burdens on women and minorities. To change 209 and retain consideration of race and gender in some government programs, women and minorities would need to seek redress through the expensive, arduous process of amending the state constitution. The court found it likely that plaintiffs would prevail on their Equal Protection claim and their Supremacy Clause argument that Title VII preempts 209's ban on preferences.

After this ruling, national politicians targeted Judge Henderson, despite his careful fact finding. House of Representatives Whip Tom DeLay called for his impeachment: "If judges are going to make political decisions, it is within the precedent of this country and . . . Congress to impeach them."[68] Some critics assumed that Henderson was biased because he is a relatively liberal black judge. By that reasoning, it would be equally fair to assume that the three relatively conservative white judges on the panel that overturned his ruling were equally biased. Henderson's ruling was no more political, of course, than any other court's, including the courts outlawing racial preferences in Texas and Maryland. The politicians who attacked Henderson primarily did not like his constitutional interpretation, but he was likely more vulnerable to political attack because of his skin color.

Henderson's ruling was in line with the Court's precedent in two ways. The Court had not fully resolved the acceptable scope of state affirmative action programs, despite the broad color-blind language. Instead, the Court focused on the quotas in *Croson,* the high percentage of the set-aside, the politics of the Richmond City Council, and so on. Justice O'-Connor continued to cite cases like *Paradise* and *Bakke* approvingly, but the Court declined to address *educational* affirmative action efforts explicitly. Because of the Court's measured steps in affirmative action, a trial judge facing a constitutional challenge to 209 could have reasonably come out either way. Additionally, as the Court of Appeals acknowledged in considering 209, the Court's precedents on impermissible political structural burdens imposed on minority groups are not crystal clear, as *Romer v. Evans* demonstrates (chapter 5). In this novel area of constitutional law, it was reasonable for Judge Henderson to find impermissible political restructuring.

The defendants promptly appealed the preliminary injunction. The Ninth Circuit expedited the review process to consider the merits of plaintiffs' claims. But first the panel discussed whether it should avoid the constitutional question because no California state court had construed 209's effect. The panel emphasized the timing of the litigation (before the government had many opportunities to apply 209) and the drastic remedy requested (enjoining a constitutional amendment passed by a majority of the voters). The U.S. Supreme Court has focused on the timing issue in some cases, urging delay until concrete harm from implementation arises and discouraging facial challenges to laws, preferring narrow decisions affecting specific situations. In *Yniguez,* the Supreme Court ex-

pressed "grave doubts" about whether it was appropriate for the federal courts to decide the constitutionality of an English-Only law because of the federalism concerns present and reminded federal judges to consider whether the constitutional conflict is necessary before undertaking constitutional review (chapter 1).

The Ninth Circuit, which upheld 209, reached its constitutional merits without certifying the question of 209's meaning to a California court. While it recognized that "we must have more than a vague inkling of what the law actually does," the panel distinguished *Yniguez* because the state defendants agreed that 209 operates to eliminate some preference programs. The state, the district court, and the appellate court all accepted a broad reading of the ban on preferences, despite the ambiguities in the text of 209 and confusion among voters. No legislative history accompanies initiatives to help courts construe their meaning. Because 209 treats affirmative action across three very different categories, spanning a wide variety of programs and discrimination concerns, voter intent is more difficult to determine. Some voters believe that courts or other governmental actors are supposed to match new laws to existing legal frameworks, so that they are not voting for something that would be unconstitutional. Heeding the Court's warning in *Yniguez,* this seemed a perfect opportunity to let the California Supreme Court determine the effect of an ambiguous law.

The Ninth Circuit also noted that if the trial court's premise that 209 affronts the Constitution is correct, then the court was merely doing its duty. But if its constitutional analysis was erroneous, it "tests the integrity of our constitutional democracy" because one judge would "block with the stroke of a pen what 4,736,180" voters enacted. Thus, the panel justified proceeding to the merits in part because it believed the district court had erred in interpreting the Constitution. The panel appeared to "peek ahead" and use its view of the merits to justify judicial review. But if the panel was wrong in its constitutional interpretation, its decision would have the same potential for undermining constitutional democracy. Here, the panel did not thwart the will of voters in that it ultimately approved of 209's constitutionality, and federalism tensions were arguably limited. But encouraging judges to "peek ahead" to the merits to see if a court can agree or disagree with the voters—to gauge their level of offense—before they determine whether to engage in substantive constitutional analysis undermines a neutral, evenhanded judicial role. This litigation presented important constitutional concerns in a difficult area of law, and both the

trial and appellate judges should be applauded for setting out their constitutional reasoning. But the Ninth Circuit's approach underscores the malleability in judges' use and application of the avoidance doctrine, despite the Court's warning in *Yniguez*.

The Ninth Circuit proceeded to the merits and found that 209's ban on preferences was consistent with the Equal Protection Clause. Accepting all the trial court's factual findings, it relied on the Court's general color-blind theory in affirmative action cases, without accounting for the narrowness of those opinions or the cautiousness of some justices about the treatment of different preferential programs and different contexts such as education. Thus, the panel did not discuss the existence of discrimination or evaluate the need for some remedial programs to achieve equality. A broad, facial approach to 209's impact is disturbing because it bundles together a broad range of affirmative action programs without concern for their independent application to specific factual situations. At about the same time, the Oregon Supreme Court struck down an initiative that bundled together many measures designed to reform the criminal justice system by offering fewer protections to defendants and more rights to crime victims. The court relied on the single-subject rule for initiatives in the Oregon constitution, which was designed to prevent proponents from packaging obviously popular measures with controversial issues that might not pass if voted on separately.[69] Shortly thereafter, the public voted on the seven measures separately. Not surprisingly, four passed, and the three which posed the most constitutional problems failed.[70]

In reviewing 209, the Ninth Circuit also construed the political burden cases differently than did the trial judge. The panel read the precedent as inapplicable to 209 and saw a difficulty in reconciling the Equal Protection political structure cases, in which the Court expresses concern about harms to a *group's* participation in the political process, with the Equal Protection affirmative action cases, which focus on *individualized* harm to nonminorities. Finally, the panel disagreed with the trial judge on plaintiffs' Supremacy Clause challenge, finding that 209 did not "actually conflict" with federal antidiscrimination laws. Again, the Court construed the effect of 209 prior to its specific implementation, so it is difficult to evaluate the potential for actual conflict. The panel rather easily dismissed the Supremacy Clause arguments, despite important differences in the preemption language in Title VII and Title IX.

In 1997, the U.S. Supreme Court denied certiorari. Perhaps the Court was waiting for the conflict to deepen or awaiting a constitutional chal-

lenge to a specific application of 209 rather than a facial challenge. Although many justices would likely insist that the denial means nothing about the Court's stance on the merits, other interpretations abounded. Some journalists portrayed the denial as extremely significant. A *New York Times* editorial began, "The Supreme Court's most momentous decision of the current term may turn out to be its refusal this week to hear a challenge to [209]."[71] Some expressed concern that the Court was sending a message about the continued viability of all affirmative action programs, perhaps a message to Congress that a ban on affirmative action programs would not pose federal constitutional problems. A lawyer supporting 209 said he was "gratified but not surprised that the court has rejected the other side's bizarre argument that ending racial discrimination is somehow discriminatory."

Others read the action as a federalism message to states—that it is up to state and local government to determine how and whether to eliminate affirmative action programs through state legislation or voter initiatives. Such interpretation will yield many different approaches, even within California. Nearly six thousand California government entities were affected by 209, differing interpretations of 209 abound, and its interaction with federal consent decrees—which govern much hiring in Los Angeles—is unclear. The Ninth Circuit's interpretation of federal Equal Protection binds only federal courts under *Yniguez,* and its interpretation of 209 as a state law matter is subject to California courts' revision.

Conclusion

With no further substantive guidance from the Supreme Court as the 1990s close, "the nation is now embarking on a far-reaching legal and social experiment that holds as much potential to exacerbate racial differences as to minimize them."[72] At the state level, direct democracy measures similar to 209 are pending, but not all politicians and voters have supported a retreat on affirmative action. The Texas legislature responded to *Hopwood* by providing automatic admission to the UT system for the top 10 percent of graduates from all Texas high schools. This is likely to advance integration, particularly for Latinas/os. Houston voters kept alive the city's affirmative action programs through ballot initiatives. Florida governor Jeb Bush rejected a proposal similar to 209, but did propose to eliminate consideration of race in public decisions, and the

Florida system of higher education enacted rules designed to restrict affirmative action in higher education.

As Californians debated 209, Senator Bob Dole and Representative Charles Canady introduced the "Equal Opportunity Act of 1995" in Congress, which prohibited affirmative action in federal contracts and employment. Representative Frank Riggs, a Republican from California, proposed a bill prohibiting all colleges and universities that participate in any programs under the Higher Education Act of 1965 from using affirmative action programs based upon race, gender, color, ethnicity, or national origin. Although proposals to limit or abolish affirmative action were regularly raised in Congress during the 1990s, none passed both Houses.

The Clinton White House and administration struggled with affirmative action, particularly with the presidential election looming in 1996. Mindful of the political anxiety and intellectual uncertainty surrounding this difficult topic, centrist Clinton sought to focus his political capital on issues that engaged more voters. Some Democrats also wanted to avoid a potential minefield within their diverse party. Clinton ordered an internal review of federal affirmative action programs and appointed a task force to study affirmative action, but avoided taking a firm stand. In some speeches, he urged support for existing affirmative action efforts; in others, he talked of basing affirmative action on economic need rather than race or gender. When the Supreme Court agreed to hear *Adarand,* some politicians thought they had a good excuse for delay. Adviser George Stephanopoulos recalled: "[The] ruling in the *Adarand* case would trump Clinton's decision anyway, so why take the political heat now? Being principled was one thing, but there was no need to be reckless. [Two Clinton task force members] joked that the president's new task force on affirmative action was now 'nine guys in black robes.'" When the *Adarand* decision was not "definitive," Stephanopoulos complained, "it was the worst of all worlds: The Court had cast doubt on affirmative action without finding it unconstitutional, and it was throwing the problem back to the other branches."[73]

The Supreme Court is deferring and letting the appropriate scope and constitutionality of educational affirmative action be settled by the political process or lower courts. Avoidance may promote deference, but it does not account for the difficulties lower courts or politicians face in taking firm stands on controversial issues that touch on constitutional rights. The political pressure on state and federal judges, like the call for Judge Henderson's impeachment after he found 209 unconstitutional,

add to the concern expressed by the district judge in *Adarand* that appellate courts are best equipped to set legal standards. As to the difficulties facing politicians, Governor Wilson issued three executive orders dismantling minority outreach programs after 209 passed. Some of these orders may have been broader than 209, depending on how it is interpreted. Democratic governor Gray Davis subsequently appointed a high-profile panel to "seek ways of reaching out to diverse populations . . . without violating Proposition 209." When the panel recommended recruitment of minorities and women for state contracts and jobs, Davis delayed releasing their report, hoping that the issue of appropriate outreach would soon be resolved by litigation then pending in the California state courts.[74] Similarly, after prolonged court battles, Davis worked out a settlement that eliminated some portions of Proposition 187, which targeted Latina/o immigrants. Although he originally opposed the divisive measure and campaigned against the "wedge politics" it epitomized, he kept 187 alive as governor by defending it on appeal so as not to offend voters.[75] The intensity surrounding direct democracy measures like 187 and 209 make it particularly difficult for politicians to act against local, current, majority sentiment.

More importantly, using avoidance to promote deference relegates the courts to an outsider role that may minimize consideration of constitutional equality concerns. Cass Sunstein praises the Court's "minimalist" affirmative action decisions, which he says "keep the nation's eye on the affirmative action issue" without "preempt[ing] processes of public discussion."[76] He urges deference to others because he views the Supreme Court as essentially undemocratic. Although he says the Court has not clearly justified its skepticism of affirmative action programs on constitutional grounds, he generally praises the minimalist approach because it encourages broad debate and delegates authority. He argues that programs are varied, we need more data about the programs' operations to make a considered judgment, the issues are difficult, and the Constitution's equality guarantee does not speak clearly to affirmative action. Sunstein concedes that minimalism may be too "optimistic" in the context of affirmative action if the debate is unlikely to occur or if public deliberation operates as a "forum for sloganeering, mutual suspicion, and racial prejudice." He concludes that the Court has spurred productive debate and that it is too soon to tell whether the public debate is operating badly.

But the public debate on affirmative action has not been complete, open, detailed, or devoid of prejudice. Affirmative action embodies complex

issues, including hard choices about how to measure merit, how to redress past discrimination, and how to assess continuing discrimination. Proposition 209 is one of many direct democracy measures targeting minorities, in which voters can exercise prejudice anonymously in the voting booth. Direct democracy measures overwhelmingly target, rather than protect, racial and other minorities. As described in chapter 1, initiatives, accompanied by sloganeering, brief ads, and conflicting ballot pamphlet descriptions, are not conducive to dialogue. Proposition 209 exemplifies the potential for voter confusion with initiatives on complex constitutional issues, as voters leave difficult questions of interpretation for courts and others to clear up later. The Supreme Court's minimalist decisions have contributed to the poor quality of the discussion and encouraged narrowing of an issue that needs more than a modest, simplistic approach. The Court's contribution to the dialogue has fixated on "racial preferences" and the innocence of the current generation of whites, requiring stringent proof of discrimination by a particular entity before allowing any race-conscious remedial efforts. The Court often does not explore the racial and cultural tensions underlying the legal challenges at more than a surface level, although it did emphasize the racial makeup of Richmond's primarily minority City Council in striking down its affirmative action program. The Court generally speaks with a high level of generality in these cases, with a color-blind theory addressing a future ideal, but failing to take seriously today's competing claims of widespread past discrimination and lingering inequities.

Who should decide what type of affirmative action is permissible and appropriate? The dialogue must be one in which many decision makers engage, including university administrators, legislators, executive officials, and courts. But it is a constitutional issue concerning race and gender equality in which the personal stakes are high for all persons, and it cannot be left completely to temporary voting majorities. The Supreme Court is a necessary voice in a long-term constitutional dialogue about equality. The Center for Individual Rights has sued the University of Michigan and University of Washington law schools, alleging that their admissions policies violate Equal Protection. We are thus back full circle to *Bakke* and *DeFunis*. The Court has waited long enough for the conflict to deepen. It has plenty of conflicting case law from the lower courts that develops theories and approaches in different factual settings. Whether the Court's strategy is to retain some part of *Bakke* or diverge from Powell's approach, we would benefit from the Court airing its views on how public education differs, if at all, from contracting and employment for

Equal Protection purposes. There may be dissension among the justices. They may need to revise their approach later, but we would benefit more from explication than evasion. The seeds for the development of constitutional law would be sown during the interchange as majority and dissenting justices tackle the difficulties and subtleties of the issue.

In contrast, the Court seems to have employed avoidance in an outcome-driven way during the 1990s while denying the effect of its avoidance on outcomes. David Strauss argues that there is some coherence to the Court's activity in the affirmative action area, although its theory is not fully articulated. The Court advances a general principle that courts should try to "ensure that affirmative action measures genuinely promote a public interest and do not simply award benefits to powerful interest groups." But Strauss concedes that the "Court's selectivity, in dealing only with affirmative action laws (and perhaps a few others) in this way, is hard to defend." Interest-group problems are pervasive in a democracy, he asserts, and the Court fails to justify why affirmative action should be singled out. Indeed, he concludes that because affirmative action reflects an important democratic problem and is such an unusually salient issue, the danger of interest group domination should be mitigated.[77]

Why is the Court raising affirmative action above the level of ordinary politics? As noted earlier, the traditional, individual harm focus of the Court's Article III interpretations make reverse discrimination claims palatable. The Court has extensive discretion in characterizing harms and readily views racial grouping as dangerous. The Court is less receptive to claims of remaining barriers to equality. The injury of a denial of opportunity resonates with the justices, who are achievement oriented and mostly white. When President Bush nominated Clarence Thomas to fill Thurgood Marshall's seat, Bush denied that race was a factor in the nomination and Thomas as a justice employs a color-blind approach. The Court has tackled racial preferences, issuing a narrow color-blind consensus, but avoided gender preferences. Justice O'Connor's ambivalence even as to race-based affirmative action may be attributable to the fact that her gender was a factor in her selection as the Court's first female justice. Moreover, despite great academic success, she suffered discrimination in employment opportunities when she graduated from law school and credits government offices with giving her a real chance to excel as a lawyer. She was employed by the U.S. military overseas and subsequently as an assistant attorney general in Arizona when she and other women were excluded from many private firms.

Admittedly, the social and legal questions raised by affirmative action are difficult. As the district court judge said in the Maryland scholarship ruling, "Few issues are more philosophically divisive than the question of affirmative action. It strikes at our very souls as individuals and as a nation. It lays bare the conflict between our ideals and our history. The answers that we give to it today cannot be cast in stone, but must stand exposed, in all of their frailty, to the tests of time and experience."[78] Any constitutional approach to discrimination claims requires flexibility over time, but we also need the Court's voice as part of a robust process of democratic debate. The Supreme Court should weigh the difficult issues surrounding educational affirmative action and trust that, over time in our democratic society, change will not be foreclosed by its contribution.

5

Coming Out of the Constitutional Closet

At the close of the twentieth century, gay Americans—homosexuals, lesbians, and bisexuals—had made significant gains in freedom, privacy, and acceptance. Since the 1960s, more than half the states have repealed their laws criminalizing consensual sodomy. Some states and many cities have prohibited public and private discrimination against gays.[1] Nevertheless, gay people are still singled out by law. The armed forces criminalize sodomy and exclude gays who are open about their sexual orientation. Gays have difficulty obtaining custody of their children or adopting in some states. Same-sex marriage is banned in most states and same-sex sodomy in some states. Other laws are facially neutral but affect gays disproportionately: for example, antidiscrimination laws that do not prohibit sexual orientation discrimination, general sodomy laws that criminalize consensual intimacy, and euthanasia bans.[2]

During the last quarter of the twentieth century, more anti-gay laws were passed, both at the national and local level. In states with direct democracy, gays have been heavily targeted. A study of civil rights initiatives and referenda from 1959 to 1993 found that voters approved more than three-fourths of measures restricting civil rights, while passing only about one-third of all initiatives and referenda in the same period. The study, covering proposed laws about housing and public accommodations for racial minorities, school desegregation, gay rights, English language laws, and AIDS policies, shows that nearly 60 percent of *all* such civil rights measures dealt with gay rights. Nearly 90 percent of these measures were designed to restrict gay rights. Those restrictive measures passed nearly 80 percent of the time.[3] Legislative and executive decisions have also targeted gays. Between 1993 and 2000, at least thirty states banned gay marriage.[4] In Alabama and Mississippi, where legislatures refused to ban gay marriage, governors issued executive orders aiming to thwart recognition of gay marriages from other states.

Under President Clinton, every federal agency, including the FBI and CIA, has extended its nondiscrimination policy to include sexual orientation. But Clinton also capitulated to anti-gay political pressure. During the 1990s, Congress and the president enacted the "Don't Ask, Don't Tell" military policy, making the United States and Turkey the final two NATO countries with restrictions on gay service members as of 2000. The Senate narrowly rejected an amendment to Title VII that would have included sexual orientation as a forbidden basis for workplace discrimination. Many gays hide their sexual orientation out of concern for job security.[5] Congress and the president rejected same-sex marriage in the "Defense of Marriage Act," making the definition of marriage partners a federal issue for the first time in order to thwart state movements to authorize nontraditional marriages. Nor are courts a safe haven for gays. Federal courts have not announced a clear and uniform vision of equality or privacy for gays under the federal Constitution. State courts have found many sodomy laws unconstitutional under state constitutions, and a few state appellate courts have recognized equality rights in the receipt of work-related or other state benefits for gay partners based on state constitutions.[6]

This mix of discriminatory laws and antidiscrimination provisions reflects divided public attitudes. Intense cultural and moral disagreement rages over the propriety of nonheterosexual conduct, whether sexual orientation is an immutable characteristic, and whether a person's sexual orientation should be treated differently from his or her sexual conduct. People disagree about the state's role in policing sexual orientation and behavior and about the appropriate sphere of privacy. Politicians debate whether gays are a favored group receiving "special rights" or a disfavored minority subjected to special stigma and denied "equal rights." Some argue that claims for rights of gays clash with the religious or associational rights of others who condemn or discourage gay relationships. The Supreme Court and other courts have not addressed sufficiently the clashing views and the important principles underlying this debate. Instead, the majority and dissenting opinions are like many campaign commercials, with each side framing the issues quite differently, employing superficial "sound bites" and not directly countering the other's charges.

The bigotry and social disdain reflected in the political debate often spill over into violence. Gays have long been subject to private harassment and official targeting, but several high-profile incidents demonstrate that, as the century closed, shocking violence against gays continued. Gay college student Matthew Shepard was beaten severely and left

strung up on a fence to die for allegedly propositioning a straight man in Wyoming in October 1998. Barry Winchell, a gay soldier, was killed by a fellow soldier with a baseball bat at an army base in Kentucky in the late 1990s. The assailant attacked Winchell as he slept and beat him until he was unrecognizable. Winchell had defeated his attacker in an earlier fist-fight. For months, fellow soldiers had regularly and viciously taunted Winchell, calling him a "faggot," "queer," and "homo."[7] In 1992, Allen Schindler was brutally murdered by a fellow service member after he revealed to his commander that he was gay and requested an administrative discharge. Terry Helvey and a friend followed Schindler into a bathroom to harass him. Helvey admitted that he punched Schindler in the face, kneed him in the groin, and stomped on his head and chest until Schindler was dead. This attack left Schindler so disfigured that only the tattoos on his arms enabled his mother to recognize him. Subsequent to the autopsy, the physician said, "If you took a tomato and slushed it all up without damaging its skin, that's what it would be like."[8] In Oregon, lesbian partners in a property management business were attacked. Roxanne Ellis and Michelle Abdill were found in the back of a pickup truck. They had been bound, gagged, and shot in the head. Robert James Acremant said he decided to kill the women after he deduced that Ellis was a lesbian while she showed him an apartment. He added that he hates homosexuals and bisexuals.[9]

These violent acts of hatred aimed at gays are not isolated incidents. Research shows that gays (or persons suspected of being gay) are frequent targets of violence, although gay rights organizations and law enforcement officials cite markedly different levels of violence. The FBI began collecting statistics after the Hate Crimes Statistics Act of 1990. In 1997, the FBI reported that 1,090 bias-motivated incidents based upon sexual orientation occurred, whereas the National Coalition of Anti-Violence Programs reported 2,529 incidents of sexual-orientation-motivated violence that same year. At that time, anti-gay hate crimes accounted for nearly 14 percent of all hate crimes, a 5 percent increase from 1991.[10] Some of the disparity can be traced to hostility toward gays by some law enforcement officers.[11] Some disparity results from differing interpretations of what constitutes a hate crime motivated by sexual-orientation discrimination. In 1988, after the murder of a gay Asian American man, a Florida judge "jokingly asked the prosecuting attorney, 'That's a crime now, to beat up a homosexual?' The prosecutor answered, 'Yes, sir. And it's also a crime to kill them.' The judge replied, 'Times have really

changed.'"[12] Juries and judges bring societal prejudices to the justice system. In 1988, a Texas judge declined the prosecutor's request for life imprisonment for a man convicted of viciously murdering two gay men. Instead, he imposed a thirty-year sentence for the double murder. In a subsequent interview, the judge explained, "These two guys that got killed wouldn't have been killed if they hadn't been cruising the streets picking up teenage boys."[13] Thus, while statisticians disagree about the frequency and severity of hate crimes against gays, it seems clear that prejudice is still present in the system that enforces hate-crime legislation. Moreover, less than half the states apply hate-crime legislation to protect gays. Federal law only protects gays injured on federal property due to their sexual orientation. Students are regularly subject to harassment, ranging from teasing to violence, on the basis of sexual orientation. In sum, too many gays (or people perceived to be gay) suffer incidents of hatred routinely, ranging from extreme violence to less severe incidents, and legal safeguards are often inadequate.

This chapter focuses on the U.S. Supreme Court's role in addressing and avoiding constitutional issues in the gay rights controversy. It does not cover all aspects of law touching on gay life, such as the Court's denial of many AIDS cases[14] or the Court's refusal to recognize a privacy right to assisted suicide in a challenge brought by people dying of AIDS,[15] but focuses on the challenges directly addressing sexual orientation and behavior. The Court addressed one Equal Protection problem but dodged other important constitutional issues arising out of anti-gay laws. The Court has taken significant and contradictory steps. In 1986, the Court found no constitutional protection for sodomy between consenting adults in *Bowers,* validating Georgia's moral condemnation of homosexuality. Ten years later, the Court struck down Colorado's anti-gay law as a violation of Equal Protection. The Court in *Evans* found the law motivated only by animus toward gays and did not distinguish, or even mention, *Bowers*. A few years later, the Court denied certiorari in an important case from Cincinnati in which a federal court of appeals limited the application of *Evans*. Despite the Supreme Court's step toward protecting gays in *Evans,* "many scholars and judges believe that courts dare not press the implications of [gay] equality, out of fear of an antigay backlash that could undermine courts' legitimacy."[16] In my estimation, the Court needs to make clear that the Constitution's equality guarantees apply to all people, regardless of their sexual orientation. If the Court does not agree with that view, it should at least address more fully the conflicting constitutional

principles and difficult moral, social, and political issues involved in gay rights issues.

This chapter will explore the Court's stance on gays by examining the trilogy of *Bowers, Evans,* and the Cincinnati challenge. Next, it covers two rulings privileging speech and associational rights of private groups that seek to limit speech approving of gays or excluding gays completely. Heterosexual discomfort with gays or moral approbation allows private organizations to discriminate against gays, although the Court required other private organizations to include women when governments moved to protect their civil rights. Then the chapter examines the challenges by gays to the military's series of exclusionary policies. The Court has refused to hear such challenges, leaving in place some narrow rulings by the lower courts protecting individual service members and broad rulings upholding the policies. Those cases reveal the damage inflicted on incredibly accomplished individual service members by continued discrimination, and by the expense, delay, and frustration of piecemeal litigation. Finally, the chapter will contrast the Supreme Court's approach with that of the Vermont Supreme Court, which issued a strong declaration of equality in the receipt of marriage-related benefits as a matter of state constitutional law in 1999. Although it let the legislative and executive branches decide how to implement its vision of equality, the Vermont court condemned squarely some of the inequalities gays face.

Bowers: *Moral Disapproval of Gays Sufficient to Sustain Sodomy Ban*

The Court first faced the issue of homosexuality in *Bowers v. Hardwick*.[17] In 1982, police arrested Michael Hardwick in the bedroom of his home and charged him with engaging in consensual homosexual sodomy in violation of Georgia's criminal sodomy statute. Although the state declined to prosecute, Hardwick subsequently filed suit, arguing that Georgia's law was an unconstitutional infringement of privacy rights. The U.S. Court of Appeals for the Eleventh Circuit found Georgia's antisodomy law unconstitutional on the basis of several U.S. Supreme Court decisions that had recognized an implied right of privacy for intimate decisions such as procreative choice under the Due Process Clause.

In a 5-4 ruling, the Court reversed the Eleventh Circuit. The Court framed the issue in *Bowers* as whether the Constitution conferred a

fundamental right upon homosexuals to engage in sodomy. Justice White's plurality opinion drew on tradition, emphasizing that substantive Due Process protects only those things "implicit in the concept of ordered liberty" or "deeply rooted in this Nation's history and tradition." As of 1986, nearly half the states criminalized sodomy. It was thus easy to conclude that, instead of a right, tradition revealed a long-standing and continued prohibition against homosexual sodomy.

The dissent argued that the sodomy law violated privacy rights by allowing the state to regulate private sexual activity between consenting adults. Georgia *criminalized all sodomy*, including sodomy between married persons. The dissent relied on the earlier privacy precedents, arguing that it would be intrusive and repugnant to the Constitution to permit the types of police searches necessary to enforce the law. But the plurality conspicuously referred only to "homosexual sodomy" in rejecting Hardwick's privacy claim. If privacy protected homosexual conduct, the plurality argued, it would disable the state from prosecuting adultery, incest, and "other sexual crimes" committed in the privacy of the home. Four justices thus linked adult, consensual sodomy among gay men with sexual crimes and vice, tracking the state's argument that recognizing a privacy right would open up a Pandora's box of licentiousness.[18]

The dissent also concluded that Georgia's law raised an unacceptable risk of selective enforcement. Although sodomy prosecutions were rare by the 1980s, police officers could use such laws to harass gays in clubs or private homes. Indeed, Hardwick argued that the sodomy ban placed him in imminent danger of further arrest. The officer who arrested Hardwick regularly pursued gays. K. R. Torrick had visited Hardwick's home several times regarding minor infractions (throwing a beer bottle into a trash can outside a gay bar after work and failing to appear in court on the proper day because of a discrepancy on the ticket for drinking in public). Torrick, armed with an invalid warrant, returned to Hardwick's house a month after Hardwick had appeared in court and paid the $50 fine. He saw Hardwick engaged in consensual sex in his bedroom. The officer dragged Hardwick and his male partner to jail, where they remained for most of a day until friends posted bail. "Hardwick recalls that the arresting officer 'made sure everyone in the holding cells and guards and people who were processing us knew I was in there for "cocksucking" and that I should be able to get what I was looking for. The guards were having a real good time with that.' . . . [J]ail officers made it clear to the other inmates that the men were gay, remarking 'Wait until we put [him] into

the bullpen. Well, fags shouldn't mind—after all, that's why they are here.'"[19] Hardwick thus had a powerful basis to argue that selective enforcement problems accompanied Georgia's general ban on sodomy. Unfortunately, the plurality ignored the harassment gays face as well as the privacy concern the law posed for all Georgians.

Justice Powell cast the decisive fifth vote to uphold the law. Powell thought the law might pose Eighth Amendment problems because it authorized harsh punishment of up to 20 years in prison for a single private, consensual act. But Powell emphasized that Hardwick had not even been tried and that prosecutions under the law had stopped in the last several decades. Viewing the selective prosecution and Eighth Amendment issues as not ripe, Powell narrowed the challenge to one issue: whether to declare homosexual sodomy a fundamental Due Process right. As John Jeffries explains, Powell was unable to comprehend homosexuality despite numerous conversations about the subject with one of his law clerks, who Powell did not know was gay. "Powell had never known a homosexual because he did not want to. In his world of accomplishment and merit, homosexuality did not fit, and Powell therefore did not see it." After he retired, Powell called his concurrence in *Bowers* "a mistake . . . I do think it was inconsistent in a general way with *Roe*. When I had the opportunity to reread the opinions a few months later, I thought the dissent had the better of the arguments."[20]

The Court's 5-4 decision had a devastating impact on gay rights in legal circles, which went beyond its immediate facts. *Bowers* contained a broad holding that traditional moral disapproval of conduct alone could provide a rational, constitutional justification for a law. Hardwick had argued that the mere popular belief that "homosexual sodomy is immoral and unacceptable" was inadequate to support the statute, but Justice White for a plurality responded that the "law . . . is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed." Chief Justice Burger's separate opinion explicitly relied on a millennia of (selected) Judeo-Christian moral teachings condemning homosexual conduct. Thus, *Bowers* foreclosed Due Process privacy protection arguments for homosexual conduct. Several subsequent circuit courts cited *Bowers* for the corollary principle that gays are not entitled to heightened scrutiny under the Equal Protection Clause because the conduct (homosexual sodomy) that placed them in the class (of gay persons) was not constitutionally protected.[21] These courts reasoned that

if the government could *criminalize* homosexual sodomy, the government surely could impose lesser penalties and civil disabilities on gays. After *Bowers,* it was logical to conclude that various types of discrimination against homosexuals based on moral approbation presented no constitutional difficulties.

On the other hand, *Bowers* fueled the growth of gay rights organizations. The ACLU developed a gay rights section. Money flowed into gay public interest law firms. Other incidents, like the Stonewall riots and Anita Bryant's campaign against gays in Florida, also contributed to a larger, more visible gay rights movement from the 1970s to 2000, but a backlash accompanied the gains, as gays were targeted in direct democracy measures and suffered other setbacks.

Evans: *Animus toward Gays Violates Equal Protection*

Only ten years after *Bowers,* the Supreme Court invalidated on Equal Protection grounds a Colorado law signaling out gays in *Romer v. Evans.*[22] Amendment 2 barred Colorado or any of its subdivisions from granting homosexuals "any minority status, quota preferences, protected status or claim of discrimination." Although the Court's decision was celebrated by gay activists and was certainly a critical shift away from the moral disapproval of gays countenanced in *Bowers,* the Court's opaque decision and new Equal Protection theory in *Evans* left significant confusion about application of the rational basis test, the validity of *Bowers*, and *Evans*'s import for other laws affecting gays.

Prior to the passage of Amendment 2, the cities of Aspen, Denver, and Boulder passed ordinances banning discrimination against gays.[23] The crux of the local ordinances was to prohibit discrimination by state actors such as police officers and government officials. These ordinances also prohibited some forms of private discrimination in employment, housing, and insurance practices. In response, a conservative group based in Colorado Springs—Colorado for Family Values ("CFV")—placed a measure on the 1992 ballot to abolish the antidiscrimination laws. In November 1992, Coloradans approved the measure by a vote of 53.4 percent to 46.6 percent.

Amendment 2 provided:

> No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation. Neither the State of Colorado, through any of its branches or depart-

> ments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian, or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any persons to have or claim any minority status quota preferences, protected status or claim of discrimination.

The campaign for Amendment 2 included some false arguments aimed at fueling hatred and fear of gays. For example, just before the voting, CFV distributed 800,000 flyers asserting that sexual molestation was a large part of the "lifestyle" of "many" gays and alleging that "homosexuals commit between 1/3 and 1/2 of all recorded child molestations."[24] Proponents argued that Amendment 2 would merely deny gays "special rights," including the "protected right to commit pedophilia."[25] In fact, a study of 269 perpetrators of sexual assaults on children in Denver during the two years before Amendment 2's passage found that all but two were committed by heterosexuals. The study revealed that in 222 cases, "the alleged offender was a heterosexual partner of a close relative of the child."[26] Other studies similarly establish that nearly all child molesters are heterosexual or bisexual—not homosexual—in their adult sexual orientation, or are sexually "fixated" exclusively on children and have no adult sexual orientation.[27] Proponents raised other arguments to inflame fear and prejudice. "Gay people were defined as AIDS-diseased because of their 'voracious,' 'high-risk' (anal sex), and promiscuous sexual lives, and as a wealthy group seeking 'special rights' so they could be free to 'attack' the family and the church and to 'indoctrinate' and recruit the [s]tate's young people."[28]

Shortly after voters enacted the law, nine people (including tennis star Martina Navratilova) and half a dozen local governmental units sued the state and several officials. Relying on federal Equal Protection theory, plaintiffs claimed that Amendment 2 unconstitutionally placed gays in jeopardy of discrimination. Governor Roy Romer, defending the amendment, asserted that it merely prevented gays from reaping "special rights." The trial court first enjoined Amendment 2 and later invalidated it. The court applied strict scrutiny, the highest level articulated by the U.S. Supreme Court and only applied by the Court to laws that facially classify people according to race, ethnicity, or alienage. The Colorado court found that Amendment 2 burdened fundamental rights of an identifiable group, specifically, the right to not have the state endorse and give effect to private biases. It distinguished *Bowers* as dealing with sexual conduct rather than status.[29]

Colorado, with CFV as amicus curiae, appealed to the Colorado Supreme Court. That court also used strict scrutiny and found that Amendment 2 violated federal Equal Protection guarantees, but it rejected the trial court's rationale. Instead, the Colorado Supreme Court reasoned that the law denied to gays "the fundamental right to participate equally in the political process." Amendment 2 denied gays and bisexuals an "effective voice in the governmental affairs which substantially affect their lives" because gays as a class are prevented from seeking favorable legislation. Gays could only obtain protection through the more difficult course of amending Colorado's constitution, while other groups could resort to all state and local political processes. The Colorado Supreme Court then remanded the case to the trial court for application of the strict scrutiny test.

Governor Romer appealed to the U.S. Supreme Court. The Court denied review, perhaps because the litigation at the state level had not concluded. At trial, defendants argued that six state interests were sufficiently compelling to justify the law: (1) deterring factionalism; (2) preserving the integrity of the state's political functions; (3) preserving the ability of the state to remedy discrimination against suspect classes; (4) preventing the government from interfering with personal, familial, and religious privacy; (5) preventing the government from subsidizing the political objectives of a special interest group; and (6) promoting the physical and psychological well-being of Colorado's children. The trial court concluded that Amendment 2 was not necessary to support a compelling interest and was not sufficiently narrow. The Colorado Supreme Court affirmed that ruling, and the U.S. Supreme Court then granted the state's request for review.

The Court's Ruling in Evans

In a 6-3 opinion, the Court in *Evans* declined to endorse heightened scrutiny for legislation facially classifying people on the grounds of sexual orientation. Instead, the Court applied the rational basis test and grounded its decision on a novel Equal Protection political process argument: Amendment 2 impermissibly imposed second-class legal status on a disfavored group to target that group rather than to further any legitimate governmental interest. Justice Kennedy's majority opinion first addressed the state's argument that Amendment 2 merely equalized gays

and non-gays by denying gays special rights. The Court noted that Amendment 2 repealed and prohibited laws barring both official and private discrimination on the basis of sexual orientation. Thus, common carriers, hotels, restaurants, hospitals, banks, theaters, travel agencies, insurance agencies, and shops and stores of every kind were free to refuse service to gays; state colleges could deny admission to gay students; every state agency could deny employment to gay applicants. Moreover, Amendment 2 might fairly be construed to deny to gays even *general* nondiscrimination laws such as those forbidding racial or religious discrimination. The Court concluded, "A state cannot so deem a class of persons a stranger to its laws."

But even if a narrower reading of Amendment 2 were plausible, the Court found the law problematic because it imposed a special disability upon gays alone. Agreeing at least in part with the Colorado high court, six justices reasoned that to obtain relief from discrimination after Amendment 2, gays must amend the Colorado constitution. By contrast, other citizens could readily obtain protection from discrimination at other governmental levels. By "imposing a broad and undifferentiated disability on a single named group," Amendment 2 violates "the principle that government . . . [must] remain open on impartial terms to all who seek its assistance." Because the law's "sheer breadth" did not comport with the state's professed interests, the law was only supported by "animosity"—enmity, malice, hatred—toward gays. And animus cannot be a rational or constitutionally permissible purpose.

Justice Scalia's Dissent in Evans

The majority and dissenting opinions in *Evans* sound very different notes. They interpret Amendment 2 in radically different ways, evaluate the state interests divergently, and reach opposing conclusions. Whatever the reader's stance on the merits of the dispute, neither opinion satisfies completely because neither engages the opposing contentions seriously and directly.

Justice Scalia's dissent read Amendment 2 narrowly. He characterized the Colorado laws protecting individuals from discrimination in employment or public accommodations as "special" or "preferential treatment," apparently because they depart from the common law presumption of freedom of contract. In Scalia's view, the anti-gay animus identified by

the majority was no more than a rational response by Coloradans to the concentration of political power held by gays in three cities. Amendment 2 countered both the "geographic concentration and the disproportionate political power of [gays] by (1) resolving the controversy at the statewide level, and (2) making the election a single-issue contest for both sides." Neither the majority nor dissent address the context from which the disproportionate gay presence in urban centers like Denver, Boulder, and Aspen arise. Samuel Marcosson explains that many gays experience alienation, fear, and violence in their hometowns, whether they be suburban, rural, or small town. "Gay flight" to the cities affords refuges where gays can find other gays, tolerance, and greater safety.[30] People gain freedom and strength from expressing themselves in association—public or anonymous—with other like-minded persons, as the Court said in defining associational rights under the First Amendment in 1960s cases involving state attempts to thwart the NAACP. These associational benefits may be particularly important for those in a minority group and those espousing unpopular opinions.

Justice Scalia also found Amendment 2 a rational expression of moral disapproval for gay sexual conduct. The law was a "modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores." He declared, "*Bowers* alone suffices to answer all constitutional objections." If the state can criminalize homosexual conduct, it is constitutionally permissible for the state to disfavor that conduct and disfavor those with a "self-avowed tendency or desire to engage in the conduct." Sexual orientation is a reasonable substitute for conduct, he argued, and the state needs to be able to regulate conduct it deems immoral, like bigamy. The dissent also rejected the majority's Equal Protection theory, arguing that condemning immoral conduct is not the equivalent of condemning a person or group in an unconstitutional manner.

The Impact of Evans*: An Important Shift Leaving Significant Questions*

The Court drew praise from gay rights groups, civil libertarians, and many legal scholars for protecting gays in *Evans*. Others criticized the Court for granting protection to gays and overturning a state's majoritarian decision to preference one moral viewpoint over another. I applauded the outcome because the Court protected a sexual minority group that

has long been, and continues to be, subject to discrimination in the majoritarian political process. Nevertheless, the Court's silence about important elements of the gay rights controversy and the reasoning the Court employed generated substantial confusion over the constitutionality of other anti-gay measures, as demonstrated by litigation over Cincinnati's version of Amendment 2, discussed next.

Evans was surprising for several reasons. One of the first things to note in evaluating *Evans* is that most laws easily pass rational basis review, but this one failed because it was supported only by irrational animus toward gays. It is unclear what *Evans* connotes for future applications of the rationality test. *Evans* might signal that the Court is going to be (and other constitutional actors should be) less deferential to state interests masking moral determinations. Or did Amendment 2 really flunk the rational basis test *because* it signaled out gays? If so, perhaps most state moral determinations, such as laws precluding bigamy, will still be acceptable, but laws targeting gays will be unconstitutional. Or was the Court concerned more broadly that one religious viewpoint was preferenced by the state, signaling trouble for other morality-based governmental decisions?

The *Evans* Court also avoided discussing how classifications involving gays fit within the tiers of Equal Protection scrutiny. The Court proclaimed that it did not need to do so because the law failed even the lowest-level analysis. Thus, the Court opted for avoiding some difficult constitutional issues and taking a measured step. But in choosing rationality review and not discussing the tiers, the Court declined to deal with critical issues in the gay rights debate. The Court has made resonating symbolic choices when it invoked heightened scrutiny for race and gender discrimination and rejected it for other groups who suffer discrimination (e.g., the elderly and mentally disabled). In *Evans*, the Court did not compare discrimination against sexual minorities to race or gender discrimination. It did not discuss the history of official and private intolerance against gays in the United States. It did not explore the nature or extent of modern prejudice against gays. Are gays a discreet and insular minority, not well represented in the political process, or, as Scalia charged, a wealthy, politically powerful group? Is sexual orientation an immutable characteristic deserving of heightened constitutional protection? Gay rights advocates are divided on this question, with some advancing a distinction between sexual orientation (status) and sexual activity (conduct), while others regard the distinction as bogus or even dangerous to gay rights recognition. By not responding to the claims of Amendment

2's defenders, the Court weakened its ruling. Although it did not *preclude* future invocation of heightened scrutiny, the Court certainly did not hint that laws facially classifying people on the basis of sexual orientation deserve anything more than rational basis review.

Perhaps the justices, like many of us, are not comfortable discussing differences between gays and heterosexuals. Discussing minority sexual orientation is likely difficult for traditional, law-trained, heterosexual jurists. Perhaps they could not garner the votes for any standard other than rationality review, but some justices did not want to foreclose the use of heightened scrutiny in the future. Perhaps they reasoned that avoiding the political context of the gay rights debate would make the decision appear more legal than political, and arguably more legitimate. Perhaps they were concerned about the impact of a classification ruling for the challenges to the military's policy excluding gays then pending in lower courts. But raising the issues could stimulate broader societal discussion, increasing understanding of discrimination against gays as well as taking seriously the views of anti-gay groups. Justice Scalia concluded that Coloradans were "seemingly tolerant"; the majority concluded that Coloradans voted for Amendment 2 solely because of "animus" toward gays. Neither conclusion was supported with details of the campaign arguments or other evidence of voter intent. Thus, the conclusions shed little light on application of the rational basis test or how to classify other measures affecting gays.

Second, the victory for gays in *Evans* was significantly weakened because the majority did not deal with *Bowers*. The *Evans* dissenters argued that the Court's deference in *Bowers* to a state's moral disapproval of gay sexual conduct was sufficient to save Amendment 2. Despite this argument and despite the fact that *Bowers* was the only Court ruling involving a claim of gay rights and was merely a decade old, the *Evans* majority completely ignored the precedent. "In a remarkable act of intellectual evasion," it didn't even mention *Bowers*.[31] Particularly because the Court concluded that Amendment 2 was supported only by animosity toward gays, it needed to distinguish *Bowers*'s reliance on moral disapproval as a rational basis for banning homosexual sodomy. Perhaps there were not sufficient votes both to overrule *Bowers* and to invalidate Amendment 2. Perhaps retaining a six-person majority was more important than dealing with *Bowers*. But the majority could have distinguished *Bowers* in many ways, with varying impact. *Bowers* was a substantive Due Process

ruling, an area in which the Court focuses primarily on tradition and is cautious about recognizing fundamental rights. Alternatively, it could have distinguished a condemnation of conduct (the Georgia law) from orientation discrimination (Amendment 2). The Court could have emphasized the close division among the justices in *Bowers*.

The majority's silence in the face of the dissent's reliance on *Bowers* results in significant confusion and wide discretion for lower courts. Scholars disagree about the status of *Bowers*: some suggest *Evans* implicitly overturned *Bowers* or seriously diminished its validity; others argue *Bowers* is good precedent. As Bill Eskridge aptly summarized: "*Evans* leaves [*Bowers*] in equal protection purgatory." If only animus against gays supports the Georgia statute (which was not enacted until 1969), it may be invalid under *Evans*'s new Equal Protection theory. On the other hand, *Evans* can be read more narrowly. The Court in future cases might insist that *Evans* was a measured, fact-specific ruling and that anti-gay laws are only constitutionally problematic when similar factors are present, such as an extremely broad disability (Amendment 2's "sheer breadth"), a facial categorization of gays, and a severe impediment to participation in the political process (e.g., one requiring redress through future constitutional amendments).

Finally, *Evans* is an enigmatic precedent because it employs a novel Equal Protection political process theory similar to the theory developed by plaintiffs and used by the Colorado Supreme Court. Amicus briefs from other states, scholars, and a variety of liberal and conservative interest groups also proffered grounds of decision. The Court drew on several arguments, and its Equal Protection theory left a lot of room for interpretation.[32] Discussion of analogous precedents would have helped shape the theory and future applications. Discussion of the different characterizations of gay political strength (ranging from a politically repressed and oppressed minority to a politically powerful, wealthy special interest group) could have provided detailed support for the Court's Equal Protection political process theory, making it more accessible and useful as a guide for lawmakers and lower courts. The vague contours of the Court's new Equal Protection theory, the silence about the morality holding in *Bowers* contrasted to *Evans*'s animosity finding, and *Evans*'s import for applying traditional Equal Protection analysis to future laws categorizing gays and gay conduct remain unclear, generating significant confusion and discretion for other constitutional interpreters.

Limiting Evans*: Cincinnati's "Amendment 2"*

Shortly after *Evans,* the Supreme Court remanded a case in which the U.S. Court of Appeals for the Sixth Circuit had upheld a Cincinnati law very similar to Colorado's Amendment 2. The Court sent the case back for reconsideration in light of *Evans*. The Sixth Circuit responded by again validating the law, offering a limited construction of the Cincinnati law and narrowly interpreting *Evans*.[33] When a gay rights group appealed again, the Supreme Court declined to review the Cincinnati measure. Given the similarities in the Colorado and Cincinnati laws, the Supreme Court's failure to examine the case on its merits dismayed those who held high hopes for *Evans*'s import.

In 1991 and 1992, the Cincinnati City Council passed two ordinances prohibiting discrimination based upon sexual orientation in city employment, city board and commission appointments, private employment, public accommodations, and housing. In response, a citizens group placed an amendment to the city charter on the ballot. The law closely tracked the language of Amendment 2.[34] The campaign was bitter and often inflammatory, with proponents claiming that the measure merely denied "special rights" for gays, characterizing gays as pedophiles and terming homosexuality as simply a matter of "who one chooses to have sex with."[35] About two-thirds of the voters approved the measure.

When the Equality Foundation of Greater Cincinnati, Inc., challenged the law, a federal trial court permanently enjoined the law, finding that the new law distorted the political process to make it more difficult for an "independently identifiable group of people" (gays) to obtain favorable legislation. Applying strict scrutiny, the court found that the law was not narrowly tailored to serve a compelling state interest. On appeal, the Sixth Circuit rejected the district court's use of strict scrutiny. Even if sexual orientation is an immutable characteristic, gays are not an identifiable group, the appellate panel reasoned. Because many homosexuals successfully conceal their orientation and "homosexuals generally are not identifiable 'on sight' unless they elect to be so identifiable by conduct . . . they cannot constitute a suspect class," the court asserted. No law can burden an unidentifiable group "whose identity is defined by subjective and unapparent characteristics such as innate desires, drives, and thoughts." Additionally, the Sixth Circuit did not agree with the trial judge that the law violated gays' constitutional right to participate fully in the political process. The court interpreted the charter amendment nar-

rowly. The law "deprived no one the right to vote, nor did it reduce the relative weight of any person's vote." It merely proscribed the City Council from enacting preferential legislation for gays, and it did not impair gays from seeking to replace the law with another charter amendment. The Sixth Circuit also opined that local gays could seek relief through other political avenues, from Ohio state processes to Congress.

Soon after the Sixth Circuit decided *Equality Foundation I*, the Supreme Court issued *Evans*. The Supreme Court then vacated and remanded the Sixth Circuit's ruling for reconsideration in light of *Evans*. Justice Scalia's dissent from the remand order provided detailed suggestions for limiting the *Evans* Equal Protection political process theory. The Sixth Circuit closely tracked this reasoning, finding that *Evans* involved a state constitutional amendment that prohibited protection for gays and denied the local democratic choices made by governments like Aspen, Boulder, and Denver, which decided to accord gays protection. Under Amendment 2, gays would have to amend the state constitution to receive the benefit of that democratic preference. In contrast, the Cincinnati litigation involved a democratic determination by the lowest electoral subunit—the "level of government closest to the people"—that it did not wish to protect gays. If the Cincinnati law were found unconstitutional, the court continued, no local group of persons could "decide, in democratic fashion, not to accord special protection to homosexuals."

But if the law was motivated by animus, the law might be unconstitutional under *Evans*, whether voters passed it on the local level or statewide. The Sixth Circuit sidestepped this problem by employing a limited construction of the Cincinnati measure similar to Scalia's interpretation of Amendment 2—the law merely took away "special" protections that gays had gained. Because of this limited construction, the court concluded that the law was not motivated solely by animus. The Sixth Circuit held that *Equality Foundation* and *Evans* "involved substantially different enactments of entirely distinct scope and impact." The court noted that where Amendment 2's broad language could be reasonably construed to exclude homosexuals from the protection of *every* Colorado state law, Cincinnati's law had no such "sweeping and conscience-shocking effect." Although the measure used almost identical language incorporating broad prohibitions on protections for gays, it applied only locally. Thus, it did not deprive gays of any rights derived from the state of Ohio. It eliminated only "special class status" and "preferential treatment" for gays in city law, leaving untouched the application of general legal rights, according to the court.

The Sixth Circuit noted that the law did not impinge on a class of persons entitled to heightened review, following *Evans*'s lead of using the rational basis test to analyze laws impacting gays. Thus, courts owed the law a "formidable presumption of legitimacy" and the most deferential review. Here, the Sixth Circuit concluded that voters acted with the rational basis of actualizing their individual and collective preferences. Of course, the same is true of every enactment. The court also said that the law was not *facially* motivated solely by animus. The court's requirement of another indicia of facial motive establishes an impossible barrier. It is highly unlikely that lawmakers would admit hatred as their sole intent on the face of a law, and the Cincinnati law clearly signaled out gays. Moreover, the *Evans* Court didn't require facial proof of enmity to strike down Amendment 2. The *Evans* Court, maintained the Sixth Circuit, never rejected the proffered justifications for Amendment 2 of community moral disapproval and associational liberty; the Court simply found those justifications not credible on the facts. The Sixth Circuit did not rely on those grounds, either. Instead, it found the law justified by the electorate's rational interest in conserving financial resources, both public and private. It would be more expensive to accord "special protection" to gays, the voters apparently reasoned. This exercise demonstrates how easy it is to find a rational basis for a law and underscores the novelty of the Court's animus/rational basis approach in *Evans*.

The Sixth Circuit's deferential inquiry into the motive of the voters—ignoring the anti-gay campaign materials—is critical to understanding the confusion surrounding *Evans*. The *Equality Foundation* court also recognized that the law was "designed in part to preserve local community values and character." The political debate in Cincinnati and Colorado was apparently similar. Both campaigns were inflammatory, with alarms about pedophilia and predatory activity by gays. The Court's silence about the Colorado political battle as an indicator of animus in *Evans* makes it easier for other courts to ignore animus in the political context surrounding similar enactments. Courts sometimes infer discriminatory intent from surrounding circumstances for statutory discrimination claims. Invocation of the rational basis test, in contrast, means courts can ignore such indicators.

The scope of the Supreme Court's novel political process theory and its application to local measures was certainly a question left unanswered by *Evans*. The Sixth Circuit embraced Scalia's limited view of that theory,

preferencing local decision making. As noted earlier, direct democracy measures are overwhelmingly anti-gay, and voters pass them overwhelmingly. If courts must be exceedingly deferential when voters make choices concerning local character and values, Equal Protection of the law will not be guaranteed to targeted minority groups in some locales. In theory, gays can always move to a gay ghetto where they can collectively exercise their own preferences. But Equal Protection promises equality across the country, not segregated communities and places where discrimination is acceptable because of majority vote. Courts, applying Equal Protection theory, have a duty to protect minority interests from majoritarian processes, including local political processes. The democratic role of courts in interpreting Equal Protection principles is missing from Scalia's local preference theory. The Sixth Circuit's restriction of the *Evans* theory to the "unique" situation of a statewide constitutional amendment conflicting with local voter preferences is an important constitutional development the Court should address.

The Supreme Court, however, denied certiorari to gays challenging the Sixth Circuit's decision in 1998. Justice Stevens issued a rare comment on the denial of certiorari in which he emphasized that "the denial of a petition of certiorari is not a ruling on the merits. Sometimes such an order reflects nothing more than a conclusion that a particular case may not constitute an appropriate forum in which to decide a significant issue."[36] justices Souter and Ginsburg joined him in arguing that the narrow interpretation of state law by the lower federal court constrained the justices, since the justices are sometimes reluctant to interpret a novel state law without prior state court interpretation. If the Ohio court interpreted the law narrowly, the Supreme Court might avoid some constitutional questions. While gay rights groups interpreted the law broadly as barring antidiscrimination protection only for gays, the Sixth Circuit found that the law "merely removed municipally enacted special protection" from gays. This "confusion" over the interpretation of the law "counsels against granting [review]," noted the three justices. That confusion was actually an important reason the Court should have granted review. Justices Stevens and Ginsburg often urge avoidance techniques. In *Arizonans for Official English* (Chapter 1), Justice Ginsburg castigated the lower federal courts for not using the avoidance canon to construe a new state direct democracy measure narrowly in order to avoid a potential constitutional problem.

In *Equality Foundation*, the Sixth Circuit construed the measure narrowly, perhaps to avoid the constitutional problem identified in *Evans*. But the narrow interpretation seems to contradict the broad language of the Cincinnati measure (nearly identical to the Colorado measure), the political controversy surrounding the vote, and the Supreme Court's interpretation of Amendment 2 in *Evans*. In *Evans*, the Supreme Court was aided by the fact that the Colorado courts had first interpreted Amendment 2 broadly. In contrast, the Cincinnati law had never been construed by a state court, so the Court was faced with a possibly erroneous construction offered by a federal court (the Sixth Circuit or Supreme Court) if it granted certiorari. State courts could later disagree, construe the measure broadly, and then the need to face the Equal Protection challenge might be more clear for these three justices. However, the canon of construing laws so as to avoid constitutional problems has a limit: only reasonable narrowing constructions are valid. Because the Sixth Circuit's narrow interpretation is difficult to reconcile with the text of the measure and likely voter intent, the Supreme Court would not have been bound by the narrowing construction. Moreover, because the Sixth Circuit's local preference theory significantly limits *Evans,* the Supreme Court should have addressed the Equal Protection political process argument.

The full Court's view of the Cincinnati challenge is unclear; we only have the brief glimpse of a procedural problem identified by three justices. Do some justices from the *Evans* majority endorse the Sixth Circuit's logic in advocating limited judicial review for measures affecting gays in the municipal lawmaking context? Or are they simply awaiting a "better" case in which a state court has found animus? Or are they simply waiting? Some gay rights supporters, who viewed *Evans* as an enormous act of courage, caution that the Court needs to stay away from the topic of gay rights for a while because it is too controversial. The Sixth Circuit's decision demonstrates the significant questions concerning the extent of constitutional protection for gays in the wake of *Evans*. The measured and opaque step toward recognizing anti-gay discrimination taken by the Court in *Evans* would be more defensible if it had been followed by other rulings clarifying that opinion and signaling the direction of Equal Protection law. Instead, when the Court denied certiorari in *Equality Foundation,* it passed on its first chance to explicate the holding in *Evans,* perhaps deferring to lawmakers, courts, and other constitutional actors across the country to first interpret the scope of *Evans*.

Public versus Private Discrimination

The Supreme Court rejected claims of gays in several First Amendment cases involving the clash between laws protecting gays and freedom of association. The Court allowed the organizers of Boston's St. Patrick's Day Parade to exclude a gay group that wanted to express a gay pride message inimical to the message of the organizers in 1995. Five years later, the Court permitted the Boy Scouts to exclude gay scout leaders because approval of homosexuality did not comport with the group's mission. The Court did so by developing new First Amendment associational protections for private discrimination. The rulings conflict with the Court's earlier denials of protection to private organizations when associational freedom conflicted with laws protecting against gender discrimination. In the cases involving the exclusion of gays, the Court protected associational rights without weighing that freedom against the discrimination gays face or distinguishing the equality concern it voiced in *Evans*.

In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, a group founded by gays, lesbians, and bisexuals of Irish-American heritage ("GLIB"), applied for permission to march in Boston's St. Patrick's Day Parade.[37] The South Boston Allied War Veterans Council, a private entity that annually organizes the parade, denied GLIB's request. GLIB sued the Council, alleging violations of the state and federal constitutions as well as the state public accommodations law, which prohibited discrimination on the basis of sexual orientation in any public place. The Massachusetts high court affirmed a victory for GLIB.

The Supreme Court did not display its frequent deference to state courts, relying on its need to closely examine facts when a First Amendment objection is raised. The Court overturned the state court's decision, holding that this application of Massachusetts's public accommodations law infringed the free speech rights of the Council. In a unanimous opinion, the Court created new First Amendment law, finding that the parades are inherently expressive and that participation in a parade is protected speech. The Court found that GLIB's speech would likely be perceived as the parade organizers' speech, and by compelling the organizers to accommodate GLIB, the state would change the message of the parade. Requiring the speaker to include a message inimical to its own would infringe the Council's free speech rights. It concluded: "While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free

to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government."

The Court did not overtly balance the parade organizers' speech interests against the state's and GLIB's interest in promoting equality. The Court did, however, attempt to narrow its ruling by emphasizing that it was not completely condemning public accommodations laws or countenancing exclusion of gays from the parade because of their sexual orientation. It concentrated on GLIB's desire to march as a group with its own banner in the specific situation presented. Since 1947, Boston had allowed private organizers to sponsor the parade, which draws more than one million viewers. Many people might assume that such a large, traditional parade through city streets is an official, public event and miss the confining aspects of the Court's decision. The larger message many draw from *Hurley* is that discrimination against gays is acceptable if the organization is private and has a discriminatory message like moral disapproval of, or prejudice against, gays. This principle is hard to reconcile with the equality aspect of *Evans,* which appeared to condemn animosity toward gays even if it were based on moral approbation. But *Hurley* was issued before *Evans*. Would its message be diluted after *Evans*?

In *Dale v. Boy Scouts of America,* the Court reversed another state high court decision upholding a state's nondiscrimination law.[38] The Court, in a 5-4 ruling that avoided *Evans,* found that the Boy Scouts could exclude gay scout leaders. Because the scouts are widespread and well-known, the decision is particularly significant. Scouting influences many boys. Although the Scouts are a private group and 65 percent of its troops are sponsored by religious organizations, public entities like schools and fire departments also sponsor troops.[39]

Plaintiff James Dale joined Boy Scouts of America in 1978, when he was eight years old. Over the next decade, Dale successfully rose through the youth membership ranks and ultimately reached the prestigious rank of Eagle Scout. When Dale turned eighteen he applied for, and was granted, adult membership in the Boy Scouts, which allowed him to remain active in his local council as an assistant scoutmaster. While at college, Dale came out as a homosexual. When a New Jersey newspaper identified him as co-president of the Lesbian/Gay Alliance at Rutgers University, the Boy Scouts informed Dale that his membership was revoked because his homosexuality conflicted with the organization's established moral standards for leadership.

The New Jersey Supreme Court eventually ruled that the Boy Scouts of America is a "place of public accommodation" subject to New Jersey's antidiscrimination law, and thus prohibited from excluding persons on the basis of sexual orientation. The court concluded that Dale's reinstatement did not run afoul of Boy Scouts' associational rights. *Hurley* was distinguishable because, while admission of GLIB to the parade forced the organizers to alter their overall message, Dale's readmission would leave Boy Scouts' moral message unaffected. The court emphasized that Dale did not intend to use the Boy Scouts as a platform from which to espouse his views on gay rights. Moreover, the court reasoned that scout leadership, unlike participation in a parade, is not a form of pure speech.

On appeal, the Boy Scouts argued that inclusion of a gay scoutmaster would conflict with the Boy Scout's moral message to impressionable boys. Private groups must be allowed to limit their membership to protect their own values and messages. Dale asserted that his inclusion would not undermine the Scout's core function or message. The Scouts say they are "open to all boys." No formal policy statement against gays exists. Members and leaders are not required to agree with the Scout's view on homosexuality. The Scouts do not inquire about sexual orientation, but if a leader is discovered to be homosexual, he is expelled. Thus, supporters of Dale argued, the Scouts are more interested in excluding gays than expressing speech rights central to the organization.[40] Nevertheless, the Court was extremely deferential to the Scouts, particularly its view that inclusion of gay leaders would impair its expression. As the dissenters noted, the majority accepts these allegations of impaired expression without any skepticism or solid proof. The Court seems to allow redress for a potential First Amendment harm, contrary to much of its recent standing analysis.

Dale also argued that an unlimited right to refuse association would lead to extensive discrimination, undermining desegregation law and prohibitions on sex and race discrimination in employment. He relied on cases in which women successfully challenged male-only policies of the Rotary Club and the U.S. Jaycees. In those cases, the Court upheld state antidiscrimination laws as advancing compelling government interests that trumped the organizations' associational choices. The Court emphasized that these groups were not highly selective, intimate social clubs; they were large groups with a primarily commercial purpose. But that emphasis is missing in *Dale,* where the Court shifts its focus from a group's civic purpose to a group's moral message. The Court reasoned

that the gender precedents did not apply because lifting the bans on gender discrimination did not materially interfere with the ideas those organizations sought to express. In contrast, it found scouting to be about conveying a moral message to boys that discouraged homosexuality by teaching boys to be "morally straight" and "clean," despite the lack of clarity on sexual or moral teaching in the Scouts' materials. Dissenters pointed to the rules given to troop leaders when boys ask about sexual matters:

> You do not undertake to instruct Scouts, in any formalized manner, in the subject of sex and family life. The reasons are that it is not construed to be Scouting's proper area, and that you are probably not well qualified to do this.

Scouting's message is confusing. Although its core function is not teaching about sexuality, its exclusionary stance was important enough for it to wage a very public, expensive legal battle in the Supreme Court on the issue. The Canadian Scouts, on the other hand, have integrated gay members without diluting their mission. For many Americans, the import of *Dale* will be that private discrimination, at least against gays, is constitutional. The ruling qualifies the gender "state action" cases because even a large, sectarian group like the Scouts can discriminate as long as its message is a moral rather than commercial one. And it extends *Hurley* because the Scouts, as part of their message, purposefully exclude members due to their sexual orientation, while the parade organizers were purportedly not excluding GLIB because of its members' orientation.

The *Dale* majority proclaimed that it must be morally agnostic as to the discrimination so that the government (including the Court) is not regulating the content of speech. "We are not, as we must not be, guided by our views of whether the Boy Scouts' teachings with respect to homosexual conduct are right or wrong." In contrast, a New Jersey concurring justice, in ruling against the Scouts, wrote, "One particular stereotype that we renounce today is that homosexuals are inherently immoral." The *Dale* dissenters said that it was the first time a claimed right to association prevailed over a state's nondiscrimination law. They warned that the Court's approach fails "to mark the proper boundary between genuine exercises of the right to associate . . . and sham claims that are simply attempts to insulate nonexpressive private discrimination." The majority venerated speech and associational rights without clarifying the continuing validity of equality protections for gays and other minorities. The Court failed to reconcile the distinct and conflicting constitutional prin-

ciples of *Evans,* the gender state action cases, and *Hurley,* but *Dale*'s privileging of *Hurley* does not bode well for gay civil rights.

"Don't Ask, Don't Tell": What Evans *Means for Gays in the Military*

In 1942, in the midst of World War II, the U.S. military issued its first regulations concerning "homosexuals" and "homosexual conduct." The preliminary regulations, instructing military psychiatrists to discriminate between the "homosexual" and the "normal" person, were promulgated with the notation that persons who "habitually or occasionally engaged in homosexual or other perverse sexual practices were unsuitable for military service."[41] (The military still bans all sodomy—gay and heterosexual—under its criminal justice code.) In 1943, final regulations completely barred gays from all branches of the military. After World War II, gays were considered "sexual psychopaths" who were precluded from federal civil service jobs and from becoming U.S. citizens. In the 1950s, military lecturers warned female recruits not to become involved in lesbian relationships. The lecturers invoked the noble, Creator-sanctioned role of a woman as childbearer, cautioning that a lesbian risked dishonorable discharge, social degradation, being "cut off from acceptable relationships with men and the companionship of normal women," and "destroy[ing] the purpose for which God created her."[42]

These exclusionary regulations remained fundamentally unchanged for half a century. In spite of exclusion, gays have served in the military throughout its history, many with distinction. Some of their compelling stories are found in the lower court opinions reviewing their legal challenges to the military's policies. Their commanding officers usually knew about their sexual orientation, but the plaintiffs were investigated and discharged after years of stellar service. Sometimes the disciplinary action followed plaintiffs' public statements about their sexual orientation as part of their efforts to draw critical attention to the military's exclusionary policy. The retaliation for the national media exposure underscored the military's selective enforcement of its general sodomy policy and brought to light basic fairness and privacy concerns.

During the 1992 presidential campaign, Bill Clinton promised to end the ban on gays in the military. Once he took office, however, the strength of the resistance to change from military leaders and some members of

Congress became clear. Public debate over the military's policy increased significantly as a result of the campaign, the Clinton administration's maneuvering after the election, and a highly publicized court case finding the old policy unconstitutional. The administration faced decreasing public support for lifting the ban. It also faced pressure from gay rights groups like the "Campaign for Military Service," which urged the administration to construct a new policy that targeted sexual misconduct, not private homosexual behavior. Instead of eradicating the ban, Clinton spearheaded a compromise in which new service members would not be asked about their sexual orientation, and gays would not be excluded from military service as long as they kept their sexual orientation secret and did not engage in homosexual conduct. Courts, Congress, and the president are often deferential to the military, not wanting to interfere with the effectiveness of its operations and not having as much expertise on security matters. They often recognize it is a special enclave with the unique mission of being prepared constantly to defend U.S. interests. However, the military's exclusion of gays, and the compromise of silencing gays, present significant constitutional questions about equal treatment and free speech. Military leaders testified that the "Don't Ask, Don't Tell" policy was necessary to maintain morale and unit cohesion because many straight soldiers are uncomfortable serving with openly gay soldiers. As the following case summaries reveal, most American judges are extremely deferential to the military, and only a few are willing to scrutinize closely its justifications. In contrast, the European Court of Justice rejected all arguments in favor of the British exclusion of gays.[43] A few U.S. judges have noted the animus motivating straight soldiers' discomfort and likened the policies to earlier military rules providing for racial segregation and the exclusion of women from combat positions.

This section first describes cases attacking the older policy of complete exclusion and then reviews court challenges to "Don't Ask, Don't Tell." Gay service members claimed that both policies violated their constitutional rights. Before *Evans,* courts largely rejected these claims, arguing that the policy punished gay conduct rather than expression, and that it was rationally related to promoting cohesion within the military or deterring sodomy. Some lower federal courts issued measured opinions, narrowly construing the policies, or reinstating targeted service members on contractual fairness theories, without denouncing the military's exclusion of gays. A few judges found the policies unconstitutional, relying in part on *Evans*. Other courts found that *Evans* did not preclude their

conclusions that the policy is constitutional. The Supreme Court has repeatedly refused to hear the appeals in these cases.

Service Members Challenge the Ban

Perry Watkins

In 1982, the U.S. Army refused to reenlist Sgt. Perry J. Watkins, a fifteen-year veteran, solely because of his homosexuality.[44] The army undertook this action despite Watkins's exemplary record, which included a perfect rating on his army performance evaluation and the unanimous recommendation from his superiors that he be promoted ahead of his peers. Watkins never hid his sexual orientation. Instead, in November 1968 he stated to an army investigator that he "had been a homosexual since the age of 13 and had engaged in homosexual relations with two servicemen." The army did not discharge Watkins, and in 1971 he reenlisted for another three years. During his reenlistment period, and with the approval of his commanding officers, Watkins performed as a female impersonator in highly publicized military venues on several occasions. In 1972, he was denied a security clearance based on his 1968 admission of his homosexual status and activity. Nonetheless, Watkins finished his second tour of duty, reenlisted for an additional period of six years, and was assigned as a company clerk to a post in South Korea.

While in South Korea, his new commander initiated elimination proceedings because Watkins was gay. In 1975, this commander testified that he had discovered Watkins's sexual orientation through a background records check, but that Watkins was "the best clerk I have known." Others in Watkins's company testified that "everyone in the company knew that plaintiff was a homosexual and that it had not caused any problems or elicited any complaints." His superiors retained Watkins, but his duties were limited to clerical or administrative positions. The army subsequently gave Watkins several new assignments. In 1977, he received a security clearance from his commanding officer for information classified as "Secret," which qualified him for new positions. When Watkins applied for a new position, he was rejected because of his homosexual tendencies. With support from his new commander, Watkins appealed this rejection. The commander requested the requalification because of Watkins's "outstanding professional attitude, integrity, and suitability for assignment."

The officer testified that Watkins was "one of our most respected and trusted soldiers, both by his superiors and his subordinates." When an examining physician concluded that Watkins's sexuality "appeared to cause no problems" and that earlier proceedings and investigations had concluded with "positive results," the army relented and in 1978 approved his eligibility for the Nuclear Surety Program.

Watkins's repose, however, was short-lived. In 1979, his security clearance was revoked because he had acknowledged his homosexuality at yet another interview earlier that year. At this point, army officials became concerned that Watkins's absolution during the earlier proceedings might violate its internal "double jeopardy" regulations. However, the Judge Advocate General's Office rendered an opinion that new proceedings would not violate the regulations if the army could show subsequent homosexual conduct. The army therefore initiated another discharge action and convened a new hearing to investigate Watkins's conduct. In 1981, the army promulgated a new regulation that mandated discharge of all gays, regardless of merit. The board discharged him based solely on his admission of homosexuality; it rejected any charge that he engaged in homosexual conduct after 1968.

Watkins appealed initially through army channels and then filed suit to halt his discharge. In 1982, the U.S. District Court for the Western District of Washington held in his favor, finding that Watkins's statement did not constitute "subsequent conduct" because the statement merely repeated a fact that had been considered during the 1975 proceedings. The court also concluded it was unfair to allow the army to rely on its policy to discharge Watkins because it had allowed him to remain in the service after his 1967 admission and 1975 confirmation of his homosexuality.

On appeal, the Ninth Circuit overturned the district court's estoppel analysis and remanded the case for consideration of whether the army regulations violated the Constitution.[45] The district court then reversed itself and upheld the discharge on constitutional grounds. When Watkins appealed, the Ninth Circuit declared homosexuals a suspect class entitled to heightened review, and held that the army's regulations encroached upon Equal Protection rights and were not necessary to further compelling military interests.[46] The army had conceded that "homosexuals have historically been the object of pernicious and sustained hostility." The court found this invidious discrimination embodied a gross unfairness inconsistent with the ideals of Equal Protection, that sexual orientation does not impair a person's ability to perform well in the army, and

that classifications based on sexual orientation reflect prejudice and inaccurate stereotypes. The army argued that most homosexuals are "sodomists," and sodomy is a major military crime not constitutionally protected under *Bowers*. But the court avoided *Bowers* by focusing on orientation rather than conduct and reasoned that sexual orientation, whether clearly immutable or not, rests outside the conscious control or choice of the individual.

More than a year later, the full court granted review. While it did not alter the result, it rejected the panel's Equal Protection rationale. The full Ninth Circuit held that the army could not deny Watkins's reenlistment because of his homosexuality. His stellar military service could only serve to benefit the public interest. In reviewing the long trail of discharge proceedings, reenlistment applications, and security clearance investigations, the court concluded that it was unfathomable for the army not to have known of Watkins's homosexuality and averred that any claim to the contrary would denote bad faith. Finally, the Ninth Circuit ruled that because Watkins had invested his energies for fourteen years on a military career, refraining from honing skills commensurate with civilian jobs, he had detrimentally relied on the army's prior endorsements. The Ninth Circuit's final, fractured determination was thus directed at Watkins's individual factual situation. The final ruling did not, like some of the earlier opinions in the litigation, condemn the army's policy or emphasize constitutional concerns about Watkins's treatment. Instead, the court focused on contractual theories of reliance and estoppel and specifically stated "it is unnecessary to reach the constitutional issues raised." The relief given was very narrow, applying only to Sergeant Watkins.

Keith Meinhold

In April of 1980, at age seventeen, Volker Keith Meinhold enlisted in the U.S. Navy and began an exemplary career. During his twelve years of service, Meinhold rose through the ranks to become, by the navy's own admission, one of its best airborne sonar analysts and instructors. In recognition of his achievements, the navy appointed Meinhold to selective positions so that he might serve as an example to others. By 1992, Meinhold was rated in the top 10 percent of all navy instructors and was just six years away from being eligible for retirement.[47] At no time during Meinhold's naval career did the navy ever ask him to identify his sexual orientation or formally notify him that he could be discharged solely

on the basis of his homosexual orientation. On numerous occasions throughout his naval career, Meinhold publicly acknowledged his sexual orientation to navy representatives, including senior officers. Meinhold was sufficiently open about his sexual orientation that his status became common knowledge within his unit.

On May 19, 1992, Meinhold again acknowledged his gay status, this time on *ABC Nightly News*. After this nationally televised interview, the navy immediately initiated discharge proceedings against him on the basis of his homosexual status. “I’m really saddened by the fact that I could potentially never serve again in the U.S. Navy,” Meinhold said. “But I don’t regret bringing to light a policy that makes the Navy look really bad.” “Primarily, the reason was my own personal integrity,” Meinhold said. “I am an honest person, and not saying anything didn’t make me feel good.”[48] He was also motivated to discuss the policy because of an alleged witch hunt for gay sailors serving in Japan. The navy had allegedly investigated many soldiers for homosexual conduct. Within three months, Meinhold was discharged from the navy, not because he engaged in homosexual conduct, but because he labeled himself as gay.

After exhausting administrative remedies, Meinhold filed a lawsuit alleging that the military’s policy violated Equal Protection. The U.S. District Court for the Central District of California agreed. African American jurist Terry Hatter powerfully condemned the policy, finding that the military’s justifications were based on cultural myths and false stereotypes, similar to the reasons offered to keep the military racially segregated in the 1940s. Eventually, the judge issued an injunction forbidding the Department of Defense from taking any action against a gay service member based on sexual orientation, effectively nullifying the policy nationwide. Meinhold was reinstated pending resolution of the case.

The government appealed the judge’s ruling immediately, complaining about the breadth of the injunction. The Supreme Court granted an emergency stay of the injunction as it pertained to anyone other than Meinhold, thus reinstating the policy for other service members. Following the Supreme Court’s lead, when the Ninth Circuit considered the merits of Meinhold’s challenge, it significantly narrowed the trial court’s ruling and held that the injunction was proper only to the extent it enjoined the navy from discharging Meinhold, reasoning that the relief should be no more burdensome than necessary for the military. Since Meinhold secured relief and this was not a class action, the court used a minimalist approach to determine the scope of injunctive relief.

The Ninth Circuit used several other avoidance techniques as it considered the merits of the dispute. First, it held that the district court should not have reached the Equal Protection ruling without first considering Meinhold's nonconstitutional estoppel claim, urging other courts to consider constitutional claims only as a last resort. After the court rejected Meinhold's estoppel claim on its facts, it was positioned to proceed to the Equal Protection claim. The court then used the avoidance canon to construe the policy to get around the "serious" Equal Protection question it presented. The court emphasized that barring gays for sexual conduct was permissible under its precedents, but conflating status and conduct was problematic. Indeed, the court said that the question was only a "close" one because of the extraordinary deference owed military judgments. The Ninth Circuit then proclaimed that it could avoid these constitutional tensions by narrowly construing the policy to apply only when a service member's statement of sexual orientation "indicates more than the inchoate 'desire' or 'propensity' that inheres in status." The court found that Meinhold's statement manifested no concrete, expressed desire to commit sexual acts. This interpretation, while purporting to avoid an Equal Protection decision, certainly narrowed the scope of the policy and implicitly rejected some of the military's arguments supporting the policy. The government never appealed the ruling to the Supreme Court.

Margarethe Cammermeyer

Significant media attention focused on the travails of Colonel Margarethe Cammermeyer, who had served in the army for twenty-six years. She earned a Bronze Star in Vietnam and was "Nurse of the Year" in 1985. She had risen to the rank of colonel and a promotion to national chief nurse and general at the Army War College was pending. The job hinged on a security clearance, and she told the truth. She admitted she was a lesbian when questioned during the security clearance interview about her sexual orientation.

Investigations and hearings continued until she was discharged in 1992—the highest-ranking officer ever to be dismissed due to sexual status. Prior to her discharge, Governor Booth Gardner, commander-in-chief of the Washington State National Guard, stated: "If Colonel Cammermeyer's discharge becomes final, this would be both a significant loss to the State of Washington and a senseless end to the career of a distinguished, long-time member of the armed services." The trial judge,

applying the rational basis standard and noting the deference given to the military, found that the policy violated the Constitution, and there is no military exception to the Constitution. The court found that the only motivation for excluding those who acknowledged their homosexuality was the prejudice of other service members. As in *Meinhold*, the Ninth Circuit did not vacate Cammermeyer's reinstatement. However, because she was reinstated and the regulation had been rescinded, it found the controversy moot.[49]

Joseph Steffan

In the District of Columbia Circuit, another case challenging the exclusion policy wound its way up and down the system for six years. Joseph Steffan enrolled in the Naval Academy in 1983 and was consistently ranked close to the top of his class. During the fall of his senior year, a confidential conversation with a friend prompted the Naval Investigative Service to start an investigation regarding Steffan's homosexuality. Subsequently, Steffan confirmed that he was gay. As a result, the Naval Academy recommended that he be discharged "due to insufficient aptitude for commissioned service." Since it was likely that if Steffan attempted to litigate he might be discharged and have it noted on his transcript, Steffan reached an agreement with the navy and submitted a "qualified resignation." A year and a half later, Steffan sought to withdraw his resignation. After the navy denied this request, Steffan brought suit in federal court.

The trial court ruled in favor of the government, but the court of appeals ordered that Steffan be reinstated with his diploma and commission. Then a fragmented court, sitting en banc, affirmed the trial court decision, holding that Steffan's discharge and denial of his academic degree for admitting his homosexuality did not violate the Constitution. Nearly seven years after Steffan's discharge, the D.C. Circuit found reasonable the military's inference that a service member who identifies himself as homosexual is likely to engage in homosexual conduct. The policy thus did not violate Equal Protection because the conduct could rationally be prohibited. Although the court did not explicitly rely on *Bowers*, it used similar reasoning. The majority addressed the Academy's policy but said Steffan had no standing to challenge the Department of Defense regulations. Ruth Bader Ginsburg, then on the D.C. Circuit,

thought that the court should have avoided the constitutional questions entirely. She found that Steffan did not pursue his challenge to the Academy policy on appeal and that he had no standing to challenge the DOD regulations. The dissenters charged that the majority twisted the complicated case, in an "ingenious but totally unjustified" manner, to transform the case into one about homosexual conduct. They emphasized that his challenge focused on whether the military could discharge members solely for statements about their orientation with no evidence of sexual misconduct. They stressed that the navy had never alleged that Steffan engaged or intended to engage in homosexual conduct. The dissenters concluded that the policy violated Equal Protection, and despite the deference given military professional judgments, courts can determine whether a military policy is based on rational grounds or prejudice.[50]

Steffan clearly diverged from *Meinhold*. Although the Ninth Circuit used the avoidance canon to construe narrowly the military's status regulation, rather than expressly basing its decision on constitutional grounds, the court had held that a service member's statement of orientation, absent any expressed desire or intent to engage in homosexual conduct, was insufficient to warrant separation from the military. Its analysis of the military's policy equating status and conduct sharply differed from the *Steffan* majority. In contrast, the Fourth Circuit, sitting en banc, agreed with the *Steffan* court that discharging people on the basis of orientation does not offend the Constitution.[51] The Clinton administration initially said it would not contest cases brought under the old rule while waiting for a challenge to the new "Don't Ask, Don't Tell" policy. However, the administration continued to defend the old policy in court, apparently fearing that its ability to implement the new policy would be impeded by judicial findings that the old policy was unconstitutional.

Thus, the appellate courts were closely and deeply divided in these difficult cases, and the differences continued after *Evans*. Courts frequently used avoidance techniques in these high-profile, controversial challenges. Numerous other individual challenges to the military's policies were pending in federal courts by the early 1990s. The Supreme Court needed to provide some guidance on this national issue. Instead, the Court encouraged piecemeal resolution of these controversies and avoided taking any appeals about the military's policies. It denied certiorari repeatedly, in challenges to both the old and new policies when those policies had been upheld against constitutional attack by lower courts.

Challenges to the "Don't Ask, Don't Tell" Policy

A new policy on gays in the military was announced by President Clinton on July 19, 1993, popularly known as "Don't Ask, Don't Tell, Don't Pursue." Congress subsequently codified this policy into law with President Clinton's approval.[52] Under the "Don't Ask" provision of the new policy, the military will no longer question applicants for military service about their sexual orientation. This prohibition, however, applies *solely to future applicants* and not to those already serving in the military. Further, regulations provide that the military will continue to discharge any service member who has "engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts." The discharge policy contains an odd exemption. It is limited to service members who cannot demonstrate that their homosexual conduct is an aberration. It thus rewards a straight soldier who can show he just "went astray" once or twice or a gay soldier willing to renounce his orientation and refrain from homosexual acts to remain in the military.

Initially, gay service members focused on the First Amendment. Courts easily rejected most of these claims, arguing that the policy was directed toward restricting *conduct* rather than *expression*. The policy was also rationally related to the legitimate government concern of promoting cohesion within the military, most judges found. Shortly after the Court handed down *Evans,* lower courts faced new constitutional challenges to the "Don't Ask, Don't Tell" policy on Equal Protection grounds. But *Evans* did little to alter lower court analysis of the policy. For example, a naval reserve officer argued that the policy failed rational basis review because it was grounded in nothing more than prejudice of heterosexual service members. The district court held that the policy survived rationality review, with little independent analysis and relying on pre-*Evans* cases. The court only cited *Evans* for the general proposition "that no person shall be denied the equal protection of the law co-exists with the realization that most legislation classifies for one reason or another, resulting in disadvantage to various groups or persons."[53]

Soon, circuit courts addressed the "Don't Ask, Don't Tell" policy. The Eighth Circuit upheld the policy. The court distinguished *Evans* because the Supreme Court grounded its holdings in the Equal Protection Clause. In contrast, the Eighth Circuit relied largely on First Amendment and Due Process arguments. The court followed what six other circuits had decided prior to *Evans,* regarding those decisions as unchanged.[54]

In 1997, the Ninth Circuit upheld the policy, finding that the military might reasonably believe that open homosexuality would disrupt normal military operations, and that the policy furthered the military's objective of ensuring uniformity and orderly operations. Judge Noonan noted in his concurrence that the court must be careful not to usurp presidential power to supervise the military. "The Constitution does not exempt the military services from its own commands, but by virtue of its special treatment of this federal activity the Constitution creates a domain full of inequalities uncharacteristic of civilian life." In dissent, Judge Betty Fletcher argued that the policy should be invalidated under *Evans*. She argued that the policy was based on prejudice and was not rationally related to any legitimate interest. Since sodomy and sexual misconduct are grounds to punish any service member, and because the government agreed that gay service members are no more likely to engage in sexual misconduct than heterosexual service members, the policy could not rationally be justified as deterring sexual misconduct. The *Evans* Court, said Judge Fletcher, "implicitly but necessarily rejected the argument that discrimination on the basis of homosexuality does not violate equal protection simply because *Bowers v. Hardwick* has held that the criminalization of homosexual sodomy does not offend due process." She argued that the Court had protected gays without distinguishing between status and conduct in *Evans* and had implicitly rejected moral disapproval of homosexuality as a legitimate state interest.[55]

The Ninth Circuit soon had another occasion to review the policy. Two National Guard soldiers challenged their discharge. Both had outstanding military records and there were no disciplinary charges against them as a result of any homosexual behavior.[56] In fact, one of the discharged officers specifically wrote that he had never engaged in homosexual conduct with another military person and had no desire to do so. The Ninth Circuit rejected their Equal Protection and First Amendment claims. In dissent, Judge Stephen Reinhardt condemned the analysis as "rooted in *Bowers*," arguing that the policy severely burdens and chills protected speech, speech "that goes to [plaintiffs'] right to communicate the core of their emotions and identity to others."

In addition to these dissenters, only one court found the policy constitutionally suspect. In *Able*, six plaintiffs challenged the new policy. The court analyzed the new rule and found it similar in application to the old one and therefore an unconstitutional violation of plaintiffs' Fifth and First Amendment rights. The United States argued that the policy promoted cohesion by

giving heterosexuals a greater feeling of privacy when living in close quarters with homosexuals. The court found this privacy claim fundamentally flawed because it assumed that simply because no one was out of the closet, members of a unit would conclude there were no homosexuals in the unit. The government also contended the policy helped reduce "sexual tension" among soldiers. But the court noted that all sexual relationships were subject to disciplinary action when they were "prejudicial to good order and discipline." The policy was thus unnecessary to further the goal of reducing sexual tension. The court concluded that the articulated reasons for the policy were pretexts for overt discrimination against homosexuals, similar to the fear and prejudice faced by interracial couples raising children, previously condemned by the Supreme Court. Under *Evans,* this amounted to unconstitutional animus. The district court also went beyond *Evans,* holding that homosexuals were a suspect class deserving heightened scrutiny, emphasizing the historic and continuing discrimination gays faced. Indeed, the court noted that discrimination against gays was present during the congressional hearings over the new policy. Both Generals Colin Powell and Norman Schwartzkopf acknowledged that homosexuals were capable of performing all the duties of other soldiers, but each believed open homosexuality would be disruptive in the military.[57]

On appeal, the Second Circuit reversed the district court opinion. Using rational basis review, a unanimous court had little trouble upholding the policy. Again, the court relied primarily on decisions in other circuits and added a general discussion of the great deference owed the military. The panel subsequently ruled that prohibiting homosexual activity in the military did not violate Equal Protection. Plaintiffs relied on precedents, including *Evans,* but the Second Circuit explained that these cases did not arise in the military setting, where "constitutionally-mandated deference to military assessments and judgments gives the judiciary far less scope to scrutinize the reasons, legitimate on their face, that the military has advanced to justify its actions." The court could not find irrational Congress's reliance on military experts about unit cohesion, reduced sexual tension, and privacy.

In sum, most judges conclude that *Evans* bears little import for the military's policies and are still following the Court's lead in *Bowers*. A few judges read *Evans* more broadly, finding the policies supported only by the prejudice of heterosexual service members and thus motivated by animus. The problem is that these divergent interpretations are both plausible readings of *Evans.* The Court may view the latest military policy as a

constitutional classification on the basis of sexual orientation, reasoning that it owes the military extreme deference or that more than prejudice motivates the policy. Arguably, the policy does not impose as broad a disability on unwilling gay citizens as did Amendment 2. On the other hand, the effects of "Don't Ask, Don't Tell" are broad and important. The government benefit regulated by the policy is significant, although military service is voluntary. In addition, while the policy would appear to exclude only those homosexuals who have come out of the closet, it has been used against closeted homosexuals as well. Reports of gays targeted for publicly acknowledging their orientation continue. As of early 2000, an army investigator recommended that a reserve lieutenant be discharged because he revealed his sexual orientation during a legislative hearing while he served as an Arizona lawmaker. President Clinton has said that the compromise was not supposed to allow for harassment or targeting of gay soldiers and has repeatedly expressed concern over the beating death of Barry Winchell.[58] Pentagon reports show that under the policy, gay troops are being discharged at a far higher rate than prior to the policy. In response to those figures and other abuses, the Pentagon issued new guidelines for implementing the policy, requiring sensitivity training and limiting investigations.[59] The Court could readily use *Evans,* with its generalized conclusion of animus, to closely examine the military's justifications for the policy and its operation.

The disruption to individual lives and outstanding military careers presents a compelling argument that it is inefficient and potentially harmful for the Supreme Court not to consider the constitutionality of the policy and make a uniform federal determination. The litigation in the various courts across the country consumes the resources of the courts, the government defendants, and plaintiffs. With the piecemeal approach, each service person subjected to potential expulsion must take the government to court, resulting in delay for adjudication and enforcement of rights and significant expense. And significant speech rights are potentially chilled during the waiting process, skewing the political debate. The Court may well agree with the lower federal courts upholding the policy, and then no deprivation of rights occurs during the wait. The political branches have had time for response and dialogue. A definitive response from the Court is appropriate. The Court should evaluate the compromise and face the serious constitutional issues presented, as the Vermont Supreme Court recently did with the contentious issue of gay marriage.

The Vermont Victory for Gays

In December 1999, the Vermont Supreme Court ruled that the state violated the Vermont constitution by denying marriage-related benefits to same-sex couples.[60] Three same-sex couples sued because state officials had refused to issue them marriage licenses. Two of the couples had raised children together and one couple had been partners for twenty-five years. The couples showed that they were denied a broad range of legal benefits and protections flowing from marriage, including spousal privileges, spousal support, intestate succession, and many other items. The state defended its law limiting marriage to couples comprised of one man and one woman because it "send[s] a public message that procreation and child rearing are intertwined." The court agreed that the state has an interest in promoting permanent commitments between couples to provide more security for children. But the law was underinclusive because it did not provide that security to children of same-sex unions and those being reared by same-sex couples. The marriage law was also over-inclusive because it provided benefits to heterosexual couples who cannot or do not procreate. Historical exclusion of a group, based on animus, cannot legitimate continued exclusion, the court added. It concluded that the state's interests did not justify the inequalities resulting from denying significant marriage benefits and protections to gays.

The court based its decision solely on the "Common Benefits Clause" of the state constitution, not the federal Equal Protection Clause. Thus, the U.S. Supreme Court has no authority to review the decision. The development of state constitutional law as an independent avenue of constitutional decision making grew markedly in last few decades of the twentieth century, with some states protecting rights more generously than federal law.[61] This is one method by which litigants and state courts can sometimes insulate their constitutional decisions from the federal system. Of course, such a decision only binds people subject to that state's law.

All the Vermont justices agreed that denying marriage benefits to same-sex couples violated the state constitution. Two justices wrote separately to express concerns over the court's approach. One justice focused on the court's vague legal standard, which veered away from the court's earlier framework of fundamental rights and suspect classifications, like that employed in federal Equal Protection case law. Instead, the court instituted a test with several factors and a balancing of competing interests.

This "backtracks" from the established test, argued the concurring justice, and "fails to provide any guidelines whatsoever for the Legislature, the trial courts, or Vermonters in general to predict the outcome of future cases." The concurring justice concluded that the court would have acted on accepted legal grounds—and less like a legislature—if it had employed the traditional legal framework. The majority recognized that the case was fraught with deep controversy based on religious, moral, and political grounds. The court maintained, however, that its ruling turned on legal grounds rather than the private values and sensitivities of the individual judges.

Another justice expressed dismay over the court's remedy. Plaintiffs wanted to marry, and the justice argued that the court should have simply ordered the state to grant marriage licenses to gays on the same basis as it did to non-gays. But the court did not require Vermont to allow gay marriage. Instead, it asked the legislature, within a "reasonable period of time," to either allow gay marriage or establish an equivalent alternative like a domestic partnership system. It issued a constitutional ruling that the same benefits and protections must be extended to all couples, but did not say that gays were entitled to marry under Vermont law. This justice alludes to desegregation rulings that were not implemented fully and quickly by other constitutional actors. The majority, however, distinguished the situations. "Plaintiffs have not demonstrated that the exclusion of same-sex couples from the definition of marriage was intended to discriminate against women or lesbians and gay men, as racial segregation was designed to maintain the pernicious doctrine of white supremacy." The present case did not involve years of official foot dragging and resistance. The majority rejected a more direct and immediate remedy in order to show deference to other constitutional actors, noting that the judiciary is "not the only repository of wisdom." Judicial answers may be wrong when a democracy is in "moral flux" or counterproductive even if right. The Vermont court cited the state constitutional amendments precluding gay marriage in Hawaii and Alaska after courts there recognized gay rights. The court saw itself as one participant in a system of democratic dialogue, hoping to share the responsibility of achieving equality with the legislature and executive officers who would implement the legislature's remedy.

Those who oppose equating benefits for gay and straight couples might criticize the court, noting that this deference offers only a limited range of choices to the legislature. Additionally, if gay couples do not

receive benefits equivalent to those of married couples within a "reasonable time" from the state, they presumably will have recourse in the Vermont courts. Vermonters disagreeing with the court can attempt to change the constitution, but that would be a long and difficult process. Vermont does not have direct democracy, and amendments must be proposed by the legislature in two consecutive sessions.[62] Some legislators might not appreciate the court's attempt at deference. Some might prefer a direct court decree rather than being saddled with working out a remedy under pressure from divided constituents and colleagues. Even for legislators who appreciate the deference, devising a remedy will consume significant legislative time and effort, at the expense of other issues.

The court's ruling certainly spurred debate, with national interests and many local people presenting their views to Vermont legislators, with significant national media coverage.[63] Within three months of the ruling, the state House of Representatives passed a bill authorizing "Civil Unions."[64] "Parties to a civil union shall have all the same benefits, protection and responsibilities under law . . . as are granted to spouses in a marriage." The bill deems a same-sex partner a parent for children born to a partner during the union. It appears to allow the equivalent of marriage except for the use of the word. The legislators who voted for the law faced heavy pressure from conservatives in the 2000 elections.

Conclusion

Contrasting the Supreme Court's approach in *Evans* to the Vermont ruling highlights the failings of the Court thus far on this civil rights controversy. The highest appellate court in a system has an important symbolic function in discrimination challenges. In *Baker,* the Vermont court concluded with a sentence that was quoted extensively in the national press:

> The challenge for future generations will be to define what is most essentially human. The extension of the Common Benefits Clause to acknowledge plaintiffs as Vermonters who seek nothing more, nor less, than legal protection and security for their avowed commitment to an intimate and lasting human relationship is simply, when all is said and done, a recognition of our common humanity.[65]

The court clearly named a problem, although it didn't completely resolve the controversy. The plaintiffs had to await legislative relief. The ruling

was grounded in state, not federal, equality concerns. But the court took its duty of construing the constitutional equality guarantee seriously, even in the midst of political, cultural, and moral controversy. In *Evans,* the Court issued a conclusory finding of "animus," using the rational basis test. It did not clearly take on the clashing arguments of the two camps or discuss the anti-gay context facing the gay workers, individuals, and families in Colorado as the Vermont court discussed the history of discrimination against gays and the significant inequalities imposed by the marriage law.

Avoidance advocates might say that this divergence in the two courts' approaches is appropriate. They believe it is better for such socially divisive controversies to be worked out by the state courts, which are more responsive to local opinion. They can resolve the issue by focusing on state law, one state at a time. The states can serve as laboratories for democracy, either reaching consensus or illuminating a split view. They voice a process concern: the fear that early intervention by the federal courts, particularly a definitive ruling by the Supreme Court, could preempt this dialogue. Moreover, some are motivated by a substantive, federalism concern: a federal resolution is not sufficiently deferential to localities, legislatures, and other constitutional interpreters. This type of decision is best left to local democratic preferences, as the Sixth Circuit urged in upholding the Cincinnati version of Amendment 2.

Laws that distinguish between gays and non-gays, however, raise federal constitutional concerns. Uniformity is necessary to ensure evenhanded treatment for sexual minorities nationally. A federal ruling protecting minorities, particularly a controversial decision, does not preclude further political and social debate, as the resistance to *Brown v. Board of Education* and continuing school desegregation litigation demonstrate. Even the Court's approval of the status quo in *Bowers* produced significant reaction. If providing time for dialogue motivated the Court's avoidance of gay rights cases and measured steps like *Evans,* sufficient time has passed. Other constitutional actors have struggled with gay marriage and other gay civil rights challenges like Amendment 2. Military, executive, and legislative leaders have had time to review and justify national and local discriminatory policies. It is now more important for the Court to exercise its lawsaying role, with a view to its responsibility to construe Equal Protection and First Amendment speech and associational guarantees to protect sexual minorities who have been unfairly treated and silenced by majoritarian forces.

6

Avoiding Gender Equality

Women have made great strides from the 1970s through the 1990s, entering previously segregated fields, attaining more economic security, and gaining greater autonomy, including more choice of whether to pursue careers, families, or both. In an era of significant, often dramatic, social changes for women, high-profile challenges to the status quo assumed symbolic importance not lost on the American public. Billy Jean King outplayed retired tennis star Bobby Riggs before a packed crowd and a huge television audience. A quarter of a century later, the U.S. women's soccer team defeated China to win the World Cup. President Clinton commented at halftime that people watching the outstanding play should appreciate the gains achieved under Title IX. Constitutionally, women have also made great strides, from the Court's initial Equal Protection rulings in the 1970s through its castigation of Virginia Military Institute for excluding women in the 1990s. The Court has made it more difficult for large commercial groups like Rotary Clubs and the Jaycees to discriminate against women when states or local governments forbid discrimination.

But women are still excluded from certain kinds of employment, are sexually harassed, subject to gender-based violence, or denied leadership opportunities in male-dominated fields, including law and the justice system. Women are underpaid and undervalued in the workforce. In 1999, women still were paid only 74 cents for every dollar paid to men. As women move up the corporate ladder, their salaries relative to men are often driven lower. As of the late 1990s, among the Fortune 500 companies, there were only a handful of female CEOs, among the next 500, there were only five. Jobs traditionally held by women remain clustered at the lower end of the pay scale, and even for traditional women's work, women earn less than men. In 1995, the median income for registered nurses for women was $35,360 and for men $36,868. A 1994–95 survey found that male elementary school teachers had a mean base salary of

$33,800 as compared to $32,292 for women. Women computer operators made almost $7,000 less annually than their male counterparts.[1] Women face sex discrimination when applying for jobs. Many employers worry about women taking pregnancy leaves or extended family leaves. Some employers worry about sexual harassment issues in a coed workforce, or those with hiring power simply tend to prefer people like themselves, which frequently means males. People disagree about whether unequal opportunities for men and women is due to discrimination or choice. For example, some women do not pursue jobs with long hours, travel, and extensive responsibility due to family obligations. Other women are never given such opportunities due to employer perceptions of appropriate gender roles.

Sex discrimination contributes significantly to the economic plight of older women. Nearly 75 percent of the nation's four million elderly poor are women. Older women have just over half the income of older men, and women of color have significantly less income than older white women. The disproportionate poverty of older women is created by a lifetime of low wages intensified by sex discrimination in pensions, retirement insurance, having child custody and not receiving adequate or any child support, and social security.[2] Additionally, many poor children live in single-parent, female households. Women are frequently required to pay more than men for equal insurance coverage, and while many insurance plans cover Viagra, birth control for women is often not covered.

To analyze issues of gender-related discrimination that have reached the U.S. Supreme Court in this era could fill a book. Congress and the executive have moved to protect women by enacting laws such as Title VII, Title IX, and the Family and Medical Leave Act. States and local governments have passed antidiscrimination measures. This chapter does not canvass many important precedents in which the Court outlawed gender discrimination—including protection against sexual harassment—through statutory rulings. Consistent with the avoidance doctrine's exhortation to use constitutional grounds as a last resort, the Court prefers to follow the lead of Congress rather than ruling on Equal Protection.[3] In so doing, however, the Court sometimes fails to advance congressional intent in eradicating discrimination. For example, after the Court issued a restrictive reading of Title IX, Congress had to enact corrective legislation to ensure gender equity in sports and education.[4] The Court's repudiation of the civil remedy in the Violence Against Women Act is profiled in the next chapter, and the Court's reluctance to

rule on the constitutionality of gender-based affirmative action was discussed in chapter 4. Although the Court has not transformed its "colorblind" approach to race-based affirmative action into a "gender-blind" approach, affirmative action for women has been called into question because programs often remedy race and gender-based discrimination together. As the Supreme Court avoids the question, lower federal courts split on how to apply the Court's race precedents to women.

This chapter concentrates on how the Court has employed avoidance extensively and failed to develop strong constitutional equality principles in the areas of contraception, gender discrimination in the workforce related to reproductive capacity, and abortion. The first section details the Court's attempts to duck the birth control controversy in the 1960s. Although the Court eventually established a fundamental privacy right protecting contraception choices and recognized gender equality claims in the 1970s, both the undue burden standard in abortion law and the intermediate scrutiny test in Equal Protection gender analysis use a balancing approach toward the clash of female and state interests. Particularly in abortion cases, justices like O'Connor rely on the avoidance canon and measured rulings to steer a middle-of-the-road course politically, recoiling from attacks on the Court for *Roe v. Wade*. The Court's avoidance technicalities can disguise the degree to which the Court has backtracked from *Roe* in the face of political resistance. Similarly, the gender Equal Protection cases are full of important symbolism, with broad language about equal opportunity, but the Court minimizes the equality problems women encounter on the job when they become pregnant or start a family. Laws that harm women but do not segregate on their face by gender are subject only to the deferential rational basis test. As seen in the cases explored below, the Court's avoidance tendencies toward delaying judgment, crafting narrow rulings, or minimizing gender discrimination has skewed constitutional gender equality law, consigning it thus far to "little sister status."

Birth Control Battles

It is ironic that a discussion generally confined to our bedrooms and private lives ensnared the state legislature of Connecticut and the Supreme Court of the United States in a constitutional firestorm in the 1960s. The challenges to Connecticut's laws restricting contraceptives, in addition to

raising sexual privacy concerns, were likewise a challenge to the Court to abandon its strategy of avoidance and examine laws affecting women and their reproductive capacities within a constitutional framework. The chronicle of court opinions below examines some of the doctrines used by the Court to avoid deciding the ultimate question of whether the U.S. Constitution permitted Connecticut to deny its residents access to contraceptives. While the actual opinions are important to the study of constitutional law, the years in between opinions are important in weighing the social and political costs of avoidance. The birth control cases demonstrate that while the Court deflected successive challenges to Connecticut's law, some individuals—particularly women— suffered appreciable harm.

With the ink of the *Brown* decision still fresh on the books, the Court found itself on the horns of a familiar but slightly different dilemma. State laws mandating "separate but equal" schools had been enforced vigorously prior to *Brown,* through legal and extralegal channels. In contrast, Connecticut's laws against the sale and use of contraceptive devices were rarely enforced by the state against individual users. Yet, both laws, as written, implicated constitutional rights and the Court's role as a counterweight to the democratic process. As the opening of Connecticut's birth control clinics transformed harmless, private infractions of the ban into public civil disobedience, the Court's avoidance tactics faltered.

In the summer of 1961, the Supreme Court heard *Poe v. Ullman* and sidestepped a constitutional challenge to Connecticut's birth control laws, which were the most restrictive in the country, banning the medical prescription and private use of contraceptives even in cases where pregnancy posed the threat of serious injury or death to the pregnant woman. It was the second time that the Court had heard arguments that Connecticut's nineteenth-century birth control statutes violated the Due Process clause of the Fourteenth Amendment, which protects against deprivation of life, liberty, or property without Due Process. Once again, the Court turned to doctrines of justiciability designed to weed out "feigned or hypothetical" suits.[5] The *Poe* majority issued a terse opinion explaining that Connecticut prosecutors rarely enforced birth control laws. The group of doctors and married persons who brought the case had not been prosecuted, nor did the Court believe that they faced an appreciable risk of being prosecuted in the future. In the Court's estimation, the controversy over birth control in Connecticut had not reached the "ripeness" required for a judgment on its merits.

In reality, modern trends were "ripening" across the country, making the link between reproductive freedom and self-determination apparent to growing numbers of women. Although the postwar years saw women's roles in the workforce diminish, the increasing availability of birth control created room in the lives of women for more than successive pregnancies and the care of growing families. A woman capable of planning pregnancy had the potential to map out an adulthood that included higher levels of education, better employment opportunities, and sexual intimacy independent of childbearing.

Although the *Poe* Court sought to avoid a pronouncement on the growing use of birth control by both married and unmarried individuals, Justice Brennan's concurrence aptly described the unstated issues at stake: "The true controversy in this case is over the opening of birth-control clinics on a large scale; it is that which the state has prevented in the past, not the use of contraceptives by isolated individual married couples. It will be time enough to decide the constitutional questions urged upon us, when, if ever, that real controversy flares up again." Sanctioning the institutionalization of birth control was precisely the role that the Court sought to avoid, or at least delay, through the doctrines of standing and mootness, all of which served to preserve the status quo and mute a necessary dialogue among the Court, state legislatures, prosecutors, etc.

The Statute

In 1879, the Connecticut legislature passed its birth control law as part of "An Act to Amend an Act Concerning Offenses against Decency, Morality, and Humanity." Whereas most states with birth control statutes regulated sales and advertising, Connecticut actually forbade the use of contraceptives. Standing alone, a statute restricting the use of birth control would obviously be difficult to enforce. But Connecticut had another statute that would prove to be crucial in its effort to restrict birth control usage: a general criminal accessory statute. Under the Connecticut law, "[a]ny person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender."[6]

The legislation came to be known as the "Little Comstock Law" after its champion, Anthony Comstock, a career religious reformer who had successfully lobbied for federal laws against "obscene reading materials

and articles." Early support for the Comstock Law included diverse Christian groups. But within a few decades, the Catholic Church was somewhat isolated in its staunch opposition to "family spacing techniques," viewing sex primarily as an instrument of procreation.

The first of twenty-three efforts to repeal and amend the law—at least to require a medical exception for women with serious health problems associated with pregnancy—began after Margaret Sanger brought public attention to the need for family planning and women's reproductive health in the early 1920s. While such measures routinely passed in Connecticut's house of representatives, they languished in the senate, whose constituents lived in cities that were 46 percent Catholic by 1960. Physicians were among the earliest citizen groups to lobby against birth control bans, and by 1947, 94 percent of the Connecticut state medical society opposed the law. The wholesale rejection of any political compromise on the birth control issue was in direct conflict with social trends among Connecticut's citizens. A steady decline in the region's population during the first forty years of the twentieth century, coupled with open and heavy sales of contraceptives in drugstores, underscored the tension between the law on the books, the public pronouncements of politicians, and private impulses toward personal freedom.

The Contraception Cases

The Supreme Court considered its first constitutional attack on the Connecticut statute criminalizing birth control in 1943, well before the *Poe* decision and the Court's subsequent recognition of modern privacy protection under Due Process. In *Tileston v. Ullman,* a doctor argued that the statute prevented him from providing birth control advice to women whose health would be jeopardized by pregnancy. In doing so, the statute effectively denied his patients their substantive Due Process rights. A similar argument had been raised successfully a few years earlier by a convicted felon seeking to repeal a state law mandating the forced sterilization of habitual criminals. However, the Supreme Court had not been confronted with a substantive Due Process challenge or any constitutional challenge to birth control laws before. The Court avoided Dr. Tileston's request for a ruling on the constitutional validity of the statute. It unanimously determined that the doctor did not have standing since he had not alleged an injury to himself, but asserted intrusions upon the

constitutional rights of his patients instead.[7] Standing law in the 1940s was not as well developed as now. Generally, courts merely inquired whether the plaintiff could state a claim. But here, the Court's more rigid application of the standing requirement had a decisive effect. The *Tileston* decision delayed the Court's consideration of the Connecticut law for another two decades.

The Court faced a renewed challenge to Connecticut's law in *Poe v. Ullman.* This time, parties orchestrated their attack more carefully to overcome the Court's reluctance to address the constitutional claim, using plaintiffs directly injured by the Connecticut law. Doctors and married couples seeking medical advice related the tragic circumstances they faced when pregnancies had resulted in permanent disability to one woman and fatal abnormalities for infants. The married people involved were at least twenty-five years old; they were not young, single people or others wanting birth control to facilitate sexual promiscuity. Paul and Pauline Poe wanted to have a child but needed birth control to preserve their lives and health. Mrs. Poe had endured three consecutive pregnancies that had resulted in infants with multiple congenital abnormalities. Each child died shortly after birth. Jane Doe was also childless. During a pregnancy, she suffered a serious physical illness. She was unconscious for two weeks and acutely ill for another nine weeks. As a result, Mrs. Doe was left partially paralyzed, with a marked speech impediment, and she was emotionally unstable.

As at the time of *Tileston,* birth control advocates had difficulty finding people willing to participate in the legal challenge underway in *Poe.* The couples used fictitious names and made anonymity a condition for their participation in the action. One *Poe* plaintiff feared that her husband would lose his job if her participation in the case became public. Their concern underscores the intimate and difficult nature of conversations about birth control at the time. Entering a public debate on the issue a generation ago imposed burdens on couples, doctors, lawyers, and supporters of the legal challenge. Even today, within some families and religious communities, the discourse on birth control is not settled or safe. Throughout the birth control and abortion case law, the Supreme Court's emphasis on the role of doctors has tended to eclipse the role of women in the legal challenges. Historically, judges have given a degree of deference to the professional concerns articulated by the medical community, while distancing themselves from autonomy and equality concerns expressed by the plaintiffs. This litigation, however, demonstrates

the pivotal role of doctors and lawyers in collaborating with individuals to lend professional expertise to support novel and socially sensitive constitutional claims.

Both Mrs. Poe and Mrs. Doe consulted with Dr. C. Lee Buxton, chair of Yale Medical School's Department of Obstetrics and Gynecology, the only medical school in Connecticut. He felt the law prevented doctors from providing information to people who desperately needed help. Buxton described the medical and human hardships imposed by the statute and criticized what he viewed as the political cowardice and legal procrastination surrounding the issue. "Within a few months in 1955, several of our obstetrical patients suffering from severe medical complications of pregnancy either died or suffered vascular accidents which were permanently incapacitating. These patients should never have become pregnant in the first place but they had never been able to obtain contraceptive advice." One case involved a twenty-eight-year-old woman with severe mitral stenosis, a form of heart disease. "She had sought contraceptive advice in our clinic in vain at the time of her marriage. She died in the sixth month of pregnancy as a result of the added heart strain imposed by this condition, and in spite of several months of heroic efforts on the part of the medical and nursing staff to save her." "The irony of this situation . . . [was] that following cardiac surgery she would have been able in all probability to have several children."[8] Buxton held the Connecticut ban largely responsible for the death of this woman and the fetus.

Buxton, along with others involved in Planned Parenthood, filed a series of lawsuits in Connecticut courts in 1958. At trial, Buxton testified that the cause of death for the Poes' children was genetic. He believed that another pregnancy would very likely strain the Poes' physical and mental health to a disturbing degree. He believed that prescribing contraceptives was the best option for the Poes and Mrs. Doe. The patients asserted their right to use birth control, relying on Due Process. Buxton asserted his own constitutional right to practice medicine without unreasonable restraint. The independent injuries and constitutional rights asserted by both the doctors and their patients served as important distinctions in legal terms from the unsuccessful attempt at extracting a judgment from the Court in *Tileston*.

Abraham Ullman, the state's attorney, argued that the declaratory judgment actions were improper because the issues in the cases had already been conclusively determined by the Connecticut courts. The trial court agreed with the state, and the plaintiffs appealed. The Connecticut

Supreme Court equated the rights of the patients and doctors, reasoning that the ban on birth control curtailed the activities of both potential birth control providers and the users. The court deferred to the state legislature's authority to enact such restrictions unless "it clearly appeared that the legislative measures do not serve the public health, safety, morals, or welfare or that they deny or interfere with the private rights unreasonably." Here, the court opined, no such interference occurred because married couples facing the risk of a life-threatening pregnancy retained the option of abstinence.

The U.S. Supreme Court ducked the constitutional issue, concluding that the lawsuit was not ripe. In other words, the plaintiffs did not yet have standing because they were not actually experiencing any hardship in the form of arrest or prosecution under the statute. A plurality of the Court emphasized that since the adoption of the birth control statute in 1879, there had been only one prosecution for violation of the statute, and the prosecutor had eventually refused to proceed. Moreover, contraceptives were readily available in Connecticut drugstores.

Justice William Douglas asked pointed questions of the majority, challenging the prudence and fairness of delaying review of Connecticut's statutes.

> What are these people—doctor and patients—to do? Flout the law and go to prison? Violate the law surreptitiously and hope they will not get caught? By today's decision, we leave them no other alternatives. It is not the choice they need have under the regime of the declaratory judgment and our constitutional system. It is not the choice worthy of a civilized society. A sick wife, a concerned husband, a conscientious doctor seek a dignified, discrete, orderly answer to the critical problem confronting them. We should not turn them away and make them flout the law and get arrested to have their constitutional rights determined. They are entitled to an answer to their predicament here and now.

Although individuals were not likely to be prosecuted, the law was still on the books, and doctors, particularly those who wanted to openly provide birth control advice, were more likely to be targeted. Indeed, in *State v. Nelson,* a raid on a women's clinic in 1940 resulted in criminal proceedings brought against three of the clinic's staff members. Although prosecutors offered to discontinue the proceedings, their leniency came at the price of immediate and permanent closure of the clinic. The majority characterized *Nelson* as a minor irregularity in the state's passive disre-

gard for the statute. Justice Douglas in dissent argued that the law was not a "dead letter" because Connecticut's legislature had acted twice to resuscitate the law and had rejected bills to repeal it during the previous twenty years. Douglas indicated that such actions provided notice and saved the statute "from being the accidental left-over of another era." He found that the law did bind those who chose to obey and thus posed at least a moral dilemma. Citing transcripts of the *Nelson* prosecution, Justice Harlan insisted that it had sent a clear message to both doctors and laypeople that violation of the statutes would result in prosecution and punishment.

But Justice Felix Frankfurter wrote for a plurality: "Deeply embedded traditional ways of carrying out state policy . . ."—or not carrying it out—"are often tougher and truer law than the dead words of the written text." Justice Brennan, who provided the fifth vote to deny reaching the merits, only concurred in the judgment, not the reasoning of the plurality. He issued a terse opinion, framing the dispute between the parties as revolving around the institutionalization of birth control rather than its private use. He concluded, "It will be time enough to decide the constitutional questions urged upon us, when, if ever, that real controversy flares up again."

Justice Douglas criticized the Court's implicit acceptance of desuetude, the notion that if a law were left unenforced by the state for an extended period of time, it would be given no legal effect by the courts. Desuetude allows courts to thwart the development of constitutional law by refusing to condemn antiquated old laws. Judge Guido Calabresi argued in the 1990s that New York's rarely enforced, nineteenth-century ban on assisted suicide should not be viewed as a "prescription for silence" by courts. Although he conceded that courts often uphold dead-letter laws, Calabresi urged judges to overcome the "strong, inertial force that the framers of our constitutions gave to the status quo" to review legislation that remains on the books in apparent contradiction to the fundamental rights protected by the Constitution. In such instances, "there is a long tradition of constitutional holdings that inertia will not do."[9]

In his classic book on the Supreme Court, Alexander Bickel applauded the Court for steering clear of the quagmire created by Connecticut's birth control ban. Bickel conceded that denying judicial relief would impose "intermediate costs" upon Dr. Buxton and his patients, but concluded that if Connecticut was to come of age democratically, it could expect growing pains in the process.

> If Catholic opinion in Connecticut and officials who are responsive to it can not decide whether it is wise or self-defeating to forbid the use of contraceptives by authority of the state, it is quite wrong for the Court to relieve them of this burden of self-government . . . One day, the people of Connecticut may enjoy freedom from birth control regulation without it being guaranteed by judges, and it is much better that way.[10]

The dissenting justices were less comfortable with abstention, even if it might spur more robust democratic action. Justice John Harlan contended that Due Process protects those liberties rooted in the traditions of the country, including the right of a married couple to use birth control. Laying the groundwork for later pivotal privacy decisions on contraception and abortion, he argued that the intrusion into the privacy of "the most intimate details of the marital relation with the full force of the criminal law" was a constitutional violation. He relied on the privacy of the home, expressly protected against certain governmental intrusions by the Third and Fourth amendments, and more generally protected by the principle of liberty "against all unreasonable intrusion of whatever character."

The legacy of *Poe* is mixed. Justice Harlan's dissent has been reproduced for generations of law students as the imprimatur for the modern right to privacy and the breadth of substantive Due Process. Frankfurter's plurality opinion endures in its own right as a major ripeness precedent. The Court had, since its inception, expressed concern about rendering advisory opinions, reasoning that adjudication within an adversary system functions best in the presence of "a lively conflict" between actively pressed, antagonistic demands, making resolution of the controverted issue a practical necessity. Citing the "historically defined, limited nature and function of the courts," separation of powers, and avoidance case law, Frankfurter in *Poe* recast this prudential tradition into a constitutional barrier. Since the 1980s' development of standing requirements, ripeness concerns are dealt with primarily in the "imminence" aspect of standing.

After *Poe,* Planned Parenthood activists considered their next step. If Frankfurter was right that the state laws were "harmless, empty shadows," then they could open and run birth control clinics. Approximately five months after *Poe* was decided, the Planned Parenthood League of Connecticut opened a clinic in New Haven. Dr. Buxton was its medical director and Estelle Griswold served as executive director. Buxton said that Frankfurter's opinion led him to believe that "all doctors in Connecticut may now prescribe child spacing techniques to married women when it is medically

indicated." Fowler Harper, the Yale Law School professor involved from the beginning in challenging the birth control ban, believed that "it would be a state and community service if a criminal action were brought . . . . I think citizens and doctors alike are entitled to know if they are violating the law." Meanwhile, the state's attorney in New Haven assumed that if there was a violation of the law, the local police would take action.[11]

The clinic served a heavy load of clients and prescribed a variety of contraceptives, including the new birth control pills. In addition to its regular patients, the clinic was visited by two detectives. The police acted after receiving a complaint by a West Haven car salesman who believed that "a Planned Parenthood Center is like a house of prostitution. It is against the natural law which says marital relations are for procreation and not entertainment." The clinic was open three times a week. Within a week, police returned to arrest Griswold and Buxton for violating the law. The clinic was closed. Although it was open only ten days, it had served seventy-five women in four sessions and was solidly booked for another month.

Griswold and Buxton, in their defense to the criminal prosecution, raised a Due Process objection to the law. They were found guilty and fined $100 each. After four legal challenges to the statute over the last quarter century, little had changed in the Connecticut Supreme Court's analysis. In *State v. Griswold,* it held that, so long as the law bore a "real and substantial relation" to the accomplishment of the state's police power to conserve the "public safety and welfare, including health and morals," the court would not repeal an act of the legislature.[12] If the people of Connecticut wished to use contraceptives, they would have to do so in violation of the law.

The dispute reached the Supreme Court in 1965. This time around—even without plaintiffs who wanted to use birth control—the Court held that the doctors had standing to raise the constitutional rights of the married people with whom they had a professional relationship. The Court distinguished the doctors' claims from those in *Tileston* because *Griswold* involved a criminal conviction for serving married couples. Notably, the Court did not tackle the *Poe* opinion in its justiciability discussion. The Court's primary justification for avoiding the merits of *Poe* had been that "eighty years of Connecticut history" had solidified a "tacit agreement" by state prosecutors not to pursue violations of the birth control statutes. Perhaps, in the face of its misplaced confidence in Connecticut's gentlemanly discretion, the Court preferred to omit any reference to *Poe* in *Griswold.*

Justice Douglas, writing for the 6-3 majority, delineated a right to privacy with regard to married couples. Douglas acknowledged that the right to privacy does not appear explicitly in the Constitution and he refused to rely on Due Process. He found in favor of the plaintiffs, however, concluding that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy." He also cited the First Amendment right of association, the Third Amendment's prohibition on quartering of soldiers in private homes, the Fourth Amendment's ban on unreasonable search and seizure, the Fifth Amendment's protection against self-incrimination, and the Ninth Amendment, which provides that "the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The claim of a right for married couples to use birth control was thus based in "the zone of privacy created by several fundamental constitutional guarantees."

The majority justices disagreed as to the source of the privacy right. Justice Arthur Goldberg found the concept of privacy in the Ninth Amendment, which he read as demonstrating the framers' belief that fundamental rights exist outside of the text of the Constitution. Justice White embraced the substantive Due Process analysis, relying upon cases from the 1920s for a fundamental right of privacy in familial matters. Justice Harlan found the right of marital privacy "implicit in the concept of ordered liberty." The narrow focus on the sanctity of marriage and the need for privacy in childbearing decisions might appease birth control opponents in part, addressing fears of doctors providing easy access to contraceptives for minors or for those interested in fornication or adultery more than planned procreation within marriage. With its measured focus, the Court was not completely denying some legitimate state interest in deterring unlawful sexual conduct under traditional police powers, even if that incorporated a majoritarian religious principle. Doctors working at some Catholic hospitals were forced to sign a pledge that they would not inform patients about birth control. Some of the doctors also claimed that the ban violated the Establishment Clause. No justice, however, tackled the religious nature of the opposition in Connecticut or viewed the birth control restriction as an unlawful attempt by a state to establish a particular religion in violation of the First Amendment.

The Court is usually reluctant to announce new substantive Due Process rights. It uses two primary tests to see if laws unduly infringe in-

dividual rights to life, liberty, or property, employing the strict scrutiny test—very helpful for plaintiffs—if the right is deemed fundamental. To establish a new Due Process right, plaintiff must show the right is so fundamental that it is "essential to ordered liberty." For nonfundamental rights, the Court uses the rational basis test, which is very deferential to government. The hesitancy among some justices in the *Griswold* majority to use substantive Due Process weakened the ruling. As Erwin Chemerinsky says, "The best illustration of the avoidance of substantive Due Process is Justice Douglas's majority opinion in *Griswold* . . . Justice Douglas used substantive Due Process even though at the time he denied that was what he was doing."[13]

Despite the Court's cautious approach in *Griswold,* contraceptive privacy has become rooted in our culture and notions of fundamental rights. Thirty years later, the contraceptive privacy right was so well established that Robert Bork's criticism of *Griswold* as an "unprincipled opinion" further complicated his ill-fated nomination to the Supreme Court. Obviously, the Court has moved beyond its reluctance to address the birth control struggle evident in *Tileston* and *Poe*. *Griswold*'s narrow focus on the necessity of privacy to protect the "sacred precincts of the marital bedroom" soon evaporated, leaving an individualistic privacy focus that protected more people. Shortly after *Griswold,* the Court extended the right of choice about contraceptive use to single people, minors, and commercial sellers of contraceptives in a series of challenges to laws restricting birth control. But the widespread acceptance of individual contraceptive rights stands in stark contrast to the continuing controversy over privacy rights for procreative choices when abortion is involved.

The *Griswold* Court's narrow focus on marital privacy did not provide as strong a foundation for other procreative choice rights as an explicit theory of equality or of autonomy in making important life-altering decisions. Although the Court did not view the woman's privacy interest as absolute in *Roe v. Wade,* it deemed it fundamental and subjected abortion restrictions to strict scrutiny in *Roe* and subsequent cases. Two decades later, however, the Court replaced that analysis with the "undue burden" test, a less rigorous protection of the woman's liberty interest allowing state regulation even prior to viability. This is a unique, midlevel Due Process standard created solely for abortion laws. The standard attempts to balance competing interests and steer a middle-of-the-road course. Thus, while contraceptive privacy rights are well accepted and accorded status as a fundamental right, abortion is a second-class privacy right.

This chapter explores the Court's abortion jurisprudence after examining how the Court dealt with other pregnancy-related issues like maternity leave and insurance coverage exclusions.

Measured Steps in the Pregnant Employees Cases

The feminist movement gained strength during the 1960s. Feminist groups and lawyers, including Ruth Bader Ginsburg, pursued legal challenges on behalf of male and female plaintiffs seeking to overturn gendered classifications based on stereotypes. But courts—overwhelmingly filled with older, white male judges—were slow to develop constitutional protections for gender equity. The Supreme Court, as late as 1961, upheld a Florida law that made men presumptively eligible for jury service but automatically exempted women unless they requested to serve. Although it acknowledged that women had been freed in recent years from restrictions on their participation in community life formerly reserved for men, the Court proclaimed that "woman is still regarded as the center of the home and family life." The Court ignored the potential juror's parental status, the age of her children, or ability to get child-care assistance from the father or others. A state could thus classify potential jurors based on gender due to a "woman's own special responsibilities," perpetuating the role of men in applying law through the jury system. This exclusion was particularly troubling in light of women's historic exclusion from jury service and the legal profession because they were thought to be too "fragile and virginal to withstand the polluted courtroom atmosphere" and the demands of civic responsibility.[14]

By the early 1970s, however, the Court approached gender classifications with greater skepticism, especially when the classifications rested on underlying arguments of administrative ease or efficiency. The Court did not avoid these claims in the manner of the early birth control cases. Indeed, it was exercising its authority under the Equal Protection Clause to strike down military pension systems and state property tax laws that provided benefits for widows but not widowers. State "tie-breaker" laws preferencing male over female relatives in the absence of a preappointed estate administrator also failed to meet constitutional muster, as did laws requiring parents to support males until age twenty-one but females only until eighteen. The Court said, "No longer is the female destined solely

for the home and the rearing of the family and only the male for the marketplace and the world of ideas."[15]

For the most part, the overt avoidance barriers that had proved nearly insurmountable to litigants in the birth control struggle were not at issue in later challenges to laws with explicit gender classifications. A cursory review of gender law in the 1970s yields an early flurry of promising decisions with strong language criticizing state and local entities for ignoring women's changing roles in society. However, the Court's reasoning and doctrinal basis for a decision can be just as significant as the result of a decision. In many gender challenges, the Court seems to limit its role to narrow dispute resolution, frequently relying on avoidance strategies. In the pregnant-employee and abortion cases discussed below, the Court declined to apply an Equal Protection analysis altogether, choosing to grant more limited, fact-specific relief, as opposed to a broader constitutional ruling on the challenged laws. The Court has considerable discretion to avoid frank dialogue with other constitutional actors even when it rules in favor of litigants suing the government. This approach comports with avoidance rules urging narrow rulings or delay, particularly in socially divisive cases.

As with substantive Due Process, the Court uses two levels of scrutiny in Equal Protection analysis. The test that best protects the individual or group claiming disfavored treatment is the strict scrutiny test, requiring government to show that the challenged law is necessary to advance a compelling government interest. The judiciary is particularly watchful in protecting suspect classes who have "immutable traits" like race and have been historically subject to discrimination from the majoritarian political process. The test most deferential to government is the rational basis test, allowing laws rationally related to advancing a legitimate government interest. Rational basis allows many discriminatory gender-based laws to survive, as long as they are reasonable. The Court struggled over the appropriate level of scrutiny for gender classifications for about five years. In the early 1970s, it employed the rational basis test, but applied it to invalidate a gender classification as having no reasonable basis in some cases and to uphold gendered exclusions in other instances. In 1973 a plurality of the Court urged strict scrutiny, which is used for facial racial and ethnic classifications. Three justices argued that the Court should await the outcome of the vote on the pending Equal Rights Amendment before announcing a level of scrutiny more rigorous than rational basis.[16]

The ERA may have been interpreted to require strict scrutiny for laws classifying people by sex, but only thirty-five of the thirty-eight states needed to ratify the ERA approved it.

The justices' attempts to use trends in the democratic process as a litmus test for their Equal Protection jurisprudence is problematic in light of the overall purpose of Equal Protection. Historically, the Court has applied the guarantee independently as a device to safeguard the rights of individuals who are underrepresented in the legislative process and have faced a legacy of discrimination. The Court's apparent willingness to defer to others to identify the level of scrutiny to apply to women under the equal protection analysis is a type of avoidance that undermines the Court's role as an important interpreter of the Constitution generally and equality principles specifically.

In 1976, the Court created a midlevel standard for laws that are gender based on their face (e.g., a law allowing only males or females to attend a state school or serve as jurors), requiring the challenged law to be substantially related to an important government interest. *Craig v. Boren* involved the equal right to drink beer: an Oklahoma law allowed women to buy low-alcohol beer at age eighteen while men had to wait until twenty-one. The Court found that the law violated Equal Protection because, despite the state's important interest in improving traffic safety by reducing the number of drunk drivers, the gender classification was not substantially related to that goal.[17] The intermediate scrutiny test is more of a *balancing or accommodating* of the government's interest and the individual's rights than the other Equal Protection tests. There is no thumb on the scales presuming deference to the law (as with rational basis) or weighty skepticism of the law (as with strict scrutiny). At first blush, a midlevel approach seems sensible because women are not a discrete and insular minority, and most white women experience discrimination differently from racial minorities. But women did face official discrimination barring them from voting, excluding them from professions, an so on. Further, despite legal and social gains, women are still excluded from much political and economic power, and the law countenances continuing discrimination.

Some scholars convincingly argue that the midlevel standard denies women equal rights.[18] Unlike the broader, more substantive rules produced by the strict scrutiny analysis, the Court's results-oriented decisions reached under intermediate scrutiny have yet to provide clear guidance on gender discrimination issues to lawmakers or other constitu-

tional interpreters. The mixed results cannot be fully canvassed in this brief chapter, but a few examples are illustrative. The Court upheld a statutory rape law criminally punishing men who sleep with young women, but not punishing women, in 1981. The Court overlooked its perpetuation of sexual stereotypes because of biological differences: because they could become pregnant, teenage girls had a built-in deterrent to underage sex.[19] The Court upheld the government's male-only draft-registration policy, deftly avoiding a reconsideration of the 1948 statutes excluding women from combat roles in the military. The Court offered a matter-of-fact yet circular explanation: the purpose of the draft was to amass a pool of combat-ready troops. Because women were precluded from combat, excluding women from the registration process was constitutional, in light of the important government interest in preparing for large-scale, emergency combat. The litigants opposing the all-male registration policy had refused to concede to the merits of the 1948 female combat exclusion, thus preserving a future Equal Protection challenge not only to military decorum, but to society's fundamental conceptions of gender. In a seemingly neutral endorsement of Congress's power to pass the draft law, the Court deflected further consideration of women's evolving capacity for combat, leadership, and physical prowess.[20]

Consigning gender concerns to the category of intermediate scrutiny further muddies the Court's constitutional analysis in cases of pregnancy and reproductive rights. Gender is an immutable, highly visible trait that has formed the basis of historic and ongoing discrimination against women. Taken together, an immutable trait and a legacy of discrimination normally will secure the highest level of judicial scrutiny. Within the strict scrutiny analysis, the Court does not isolate the component parts of an immutable trait (hair texture, genetic composition, etc.) for purposes of its analysis. Yet, the Court has severed pregnancy, reproductive rights, and even the capacity to become pregnant from its gender-based analysis. The result is the removal of pregnancy from the Court's heightened Equal Protection scrutiny. This is not so much a complete avoidance of a common-law issue as it is a measured, ambivalent approach to the substance of the common-law claim.

Removing abortion rights from the Equal Protection context has had a similar stagnating effect. Taking away a woman's right to choose when and whether to bear children essentially sends the message that a woman's primary function is to bear and rear children. This, of course, perpetuates gendered roles in the workplace and other aspects of public life. Women have

been excluded from the workforce because of their very capacity to become pregnant and concern for their health and the health of their potential offspring, regardless of whether an individual woman intends to become pregnant. Thus, in the early twentieth century, the Court upheld a law restricting the number of hours that women could work in bakeries, in direct conflict with other decisions of that era invalidating government restrictions protecting employees' health, safety, and welfare.[21] As late as the 1970s, many women were forced to quit jobs when they visibly "showed." In job interviews, women were frequently asked if they were married or if they had children. Today, the questions are often unspoken, but reproductive and child-rearing concerns still influence many employers and supervisors, precluding women from some employment and leadership opportunities. The possibility of becoming unexpectedly pregnant undermines their capacity to enjoy sexuality and threatens their health and ability to participate equally in all aspects of life.[22] The Court's inconsistent and circumscribed decisions based on midlevel scrutiny have been particularly problematic for women pursuing the dual goals of family and career success. Negotiating the sometimes conflicting demands of societal expectations, personal ambition, workplace policies, family, and financial needs leaves women susceptible to insidious forms of discrimination that require better redress than the occasional, individualistic relief the Court routinely offers via midlevel scrutiny.

Maternity Leave in the Military

Captain Susan R. Struck was a nurse in the United States Air Force.[23] Captain Struck entered the air force in 1967 as a commissioned officer and served continuously on active duty. While serving on active duty in Vietnam, Captain Struck became pregnant. During this time, an air force regulation provided that female officers must be discharged when pregnant. Additionally, any woman who gave birth to a living child while a commissioned officer would be terminated. If a woman terminated the pregnancy, discharge proceedings would halt. Struck was a Catholic who would not consider abortion. She planned to give birth and place the child up for adoption.

In October 1970, she appeared before air force officials, who found that she was pregnant and recommended her separation with an honorable discharge. For the next several months, Struck challenged the regula-

tion as a violation of Due Process in federal court. She also argued that her Equal Protection rights were violated because only female officers lost their careers under the regulation. In February 1970, the trial judge found the air force rules reasonable and constitutional.

The Ninth Circuit also held that Struck's discharge did not violate the Constitution. Struck advanced a privacy argument, "Without a substantial showing of necessity, the military should not be constitutionally allowed to invade this most personal and private right of its women officers." The court responded summarily: "We think the necessity for, or at least the high degree of rationality of Air Force Regulation 36-12 shows plainly through the fabric of this case. We find no merit in the appellant's claim of violation of her privacy." The Supreme Court's historic deference to the military encourages other courts to use a weighty presumption in favor of disputed military regulations and policies. The Ninth Circuit buttressed its refusal to "displace the military authorities in cases of pregnancy" with a reference to precedent reinforcing the military's unique status within the three-branch system. "The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be . . . scrupulous not to interfere with legitimate army matters."[24] The Ninth Circuit concluded that Captain Struck's Free Exercise claim under the First Amendment gave way to "a compelling public interest in not having pregnant female soldiers in the Military establishment." Such a soldier, opined the court, "is equally vulnerable, whether she has no religion, or a religion which forbids abortions, and that perfect and universal Free Exercise of Religion must give way to the slight extent necessary to conserve the compelling public interest, there being no practicable way to conserve both interests."

Captain Struck also emphasized that pregnancy was singled out as the only temporary physical condition mandating discharge. Moreover, a provision in the Air Force Manual provided that if an officer's wife is pregnant, "port call orders will not fall during the period six weeks before or six weeks after expected delivery." Expecting a child was apparently beneficial for a father in the air force, deserving of special treatment. Yet pregnancy for a female officer created the unique danger of disabling an entire medical facility as part of a hypothetical chain of events.

> If . . . the hospital of which she was in charge . . . had been damaged and patients and personnel had been injured or had been frightened and confused,

> a not improbable consequence might have been that the Captain, as a result of injury or shock might have suffered a miscarriage, and become a patient instead of a nurse. As such, instead of being a useful soldier, she would have been a liability and a burden to the Air Force. The fact that other personnel, males and females, might have been disabled in the attack is irrelevant. Those would have been the fortunes of war. But as to the pregnant officer-nurse, the Air Corps, when it had become aware of her pregnancy, would have acted imprudently if it had allowed her to remain in the zone of active fighting.

This scheme differentiated invidiously by allowing males who became fathers, but not females who became mothers, to remain in service and by allowing women who had undergone abortions, but not women who delivered infants, to continue their military careers. As Ruth Bader Ginsburg described, "[The Regulations] declared, effectively, that responsibility for children disabled female parents, but not male parents, for other work—not for biological reasons, but because society had ordered things that way."[25]

The dissent focused on the fact that pregnancy alone, of all temporary physical conditions, required discharge. The dissent relied on a recent Supreme Court ruling, *Reed v. Reed,* which unanimously held that a statute giving preference to males as executors of estates violated Equal Protection.[26] The *Reed* Court found that tie-breaker preferences for males as executors of estates had no rational relationship to a legitimate state objective. The Ninth Circuit *Struck* dissenter queried:

> Is there any evidence that pregnancy has some effect on ability to function as an officer that is different from any other temporary physical condition? For example, is there any reason to believe that a female officer who has suffered a fractured leg is better able to perform her job than a female officer who is eight days pregnant? The former gets medical leave and retains her commission; the latter is discharged. Why? If this be rational, nothing is irrational!

Struck pointed out that during her pregnancy she did not miss one day of duty. At all times she was ready, willing, and able to perform her duties as a nurse.

When the Supreme Court granted certiorari, the air force waived the regulation for Struck and permitted her to remain an officer. But since it did not revise, vacate, or repeal the regulation, there was no reason to think that the air force would not use it against Struck or other pregnant women in the future. Nonetheless, shortly after the regulation was

waived, the Court reversed its course, denied certiorari without an opinion, and remanded the case for consideration of mootness.

Donna Matthews argues that *Struck* demonstrates how the Court used mootness to avoid dealing with constitutional issues involving pregnancy discrimination.[27] The justices could have reviewed the constitutionality of the air force scheme by applying the "voluntary cessation" exception to mootness. As discussed in other chapters, the Court selectively invokes mootness and its multiple exceptions. Ruth Bader Ginsburg later said that *Struck* "would have proved extraordinarily educational for the court and had a large potential for advancing public understanding." If the Court had reviewed *Struck*, it could have linked reproductive rights to Equal Protection.

Teacher Maternity Leave Cases

In addition to standing, mootness, and ripeness barriers, development of constitutional gender discrimination law is hindered by the avoidance rule of "measured steps," cautioning that federal courts should "never . . . formulate a rule of constitutional law broader than is required by the precise facts for which it is to be applied."[28] The Court frequently uses this strategy in cases involving equality between the sexes and reproductive rights. The Court has used avoidance to exclude pregnancy and abortion from rigorous equality scrutiny. When a woman faces classifications that discriminate against women on the basis of their reproductive capacity, their status as equal citizens is not implicated. Although the Court's gender analysis has opened the doors for women to previously all-male military academies, universities, and government offices, it has often ignored the biological and social reality of their lives once inside those institutions.

Several teacher cases challenging mandatory maternity leave policies in Cleveland, Ohio, and Chesterfield County, Virginia, illustrate this problem.[29] Carol LaFleur and Ann Elizabeth Nelson were junior high school teachers for Cleveland public schools. When they became pregnant, a school board rule required them to take unpaid maternity leave. The Cleveland rule, governing only married females, provided that maternity leave must begin "not less than five months before the expected [due] date." A leave of absence without pay for two years was allowed. Further, a teacher could not return to her job until the start of the semester after her child was three months old. Then, she did not have a claim to

resume work in her former position, only priority in reassignment to a vacancy. If a teacher did not follow these maternity rules, her contract could be terminated.

Neither Mrs. LaFleur nor Mrs. Nelson wished to take an unpaid maternity leave; each wanted to continue teaching until the end of the school year. Because of the mandatory maternity leave rule, however, each left her job in March 1971. Their children were born that summer. The two women then filed suits in federal court, arguing that the maternity rules discriminated against them on the basis of gender. The District Court tried the cases together and rejected the plaintiffs' arguments. A divided panel of the Sixth Circuit reversed, concluding that the Cleveland rule violated Equal Protection.

The school boards offered two explanations for mandatory maternity leave rules. Firm cutoff dates were necessary to maintain continuity of classroom instruction, since advance knowledge of when a pregnant teacher must leave facilitates the finding and hiring of a qualified substitute. Second, some teachers become physically incapable of adequately performing some of their duties during the latter part of pregnancy. By keeping the pregnant teacher out of the classroom during these final months, the maternity leave rules were designed to protect the health of the teacher and her unborn child, while at the same time assuring that students have a physically capable instructor in the classroom at all times. The court responded, "[A]ny actual disability imposed on any teacher, male or female, poses the same administrative problems and many (including flu and the common cold) can't be anticipated or planned for at all. This rule may arguably make some administrative burdens lighter. But these are not the only values concerned." Citing a recent Supreme Court ruling (which did not involve gender), the Sixth Circuit cautioned:

> The Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights . . . that [its protections] were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy which may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones. . . . Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand.[30]

The Sixth Circuit also relied on the Court's pathbreaking gender ruling in the probate setting to condemn forced maternity leave as classifying people by sex without a rational basis. "Male teachers are not subject to pregnancy, but they are subject to many types of illnesses and disabilities. This record indicates clearly that pregnant women teachers have been singled out for unconstitutionally unequal restrictions upon their employment. . . . The rule is clearly arbitrary and unreasonable in its overbreadth."

Susan Cohen, a public school teacher in Chesterfield County, Virginia, sued over her school board's maternity leave regulation. It required that a pregnant teacher leave work at least four months prior to the expected birth. A teacher on maternity leave was declared reeligible for employment when she submitted written notice from a physician that she was physically fit to return to work. Moreover, the teacher had to give assurance that child-care responsibilities would cause only minimal interference with her job responsibilities. As with the air force regulations in *Struck,* the policy went beyond biological differences between the sexes and incorporated societal presumptions about child-rearing responsibilities. Mrs. Cohen, as required, informed officials in November 1970 that she was pregnant and expected a child in late April. The school board refused Cohen's request to continue teaching until April 1, and then refused her reasonable suggestion that she be allowed to teach until the end of the semester in January, providing continuity for her class. Instead, she was required to leave her teaching job on December 18, 1970. Her child was born on May 2.

Mrs. Cohen filed suit in the United States District Court for the Eastern District of Virginia, which held that the regulation violated Equal Protection. A divided panel of the Fourth Circuit affirmed, but the court of appeals upheld the constitutionality of the challenged regulation in a 4-3 decision on rehearing en banc.[31]

The Supreme Court granted certiorari in both cases in order to resolve the conflict between the courts of appeals. Despite the fact that both the Fourth and Sixth Circuits had decided the maternity leave cases on Equal Protection grounds, the Supreme Court refused to determine whether such gender discrimination violated Equal Protection. Although it was briefed, the Court ignored the question. Instead, the Court created a new context-specific doctrine made especially for maternity leave. The Court said it had "long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause." It found that "administrative convenience alone is insufficient" and that

both policies were too broad, holding that the arbitrary cut-off dates for mandatory leave bore no rational relation to the state's interest in maintaining continuity in classroom instruction. The policies "employ irrebuttable presumptions that unduly penalize a female teacher for deciding to bear a child." This holding is broad in its elucidation of a privacy right for marriage and family decisions, but measured in suppressing the Equal Protection component. Its holding, like *Griswold* and *Roe,* focused solely on the individual's Due Process right, limiting the impact of the decision. As Matthews notes, the Due Process rationale did not even acknowledge that classifications based on pregnancy are gender based. The Court's measured step made clear that it was not ready to tackle as a matter of Equal Protection law the overt discrimination many working women still faced as a matter of official government policy, even within a traditionally female occupation like teaching.

Pregnancy Discrimination and Constitutional Equality

The measured step chosen by the Court in *LaFleur* and *Cohen* paved the way for *Geduldig v. Aiello,* in which the Court declared that California's refusal to cover pregnancy as a temporary disability in a workers' insurance program did not violate Equal Protection. The Court dismissed part of the dispute as moot and then found that the statute did not classify individuals on the basis of sex. Apparently, choosing to blind itself to the reality of the situation, the Court declared that the law merely divided workers into two groups: "pregnant women" and "nonpregnant persons."[32] Justice Stewart expounded: "The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification."

Geduldig is a wonderful example of how the Court precludes many discrimination challenges with its stingy purposeful discrimination doctrine. The doctrine reserves heightened scrutiny for laws that discriminate overtly on the basis of sex. Under the doctrine, pregnancy is not a gender-related characteristic. Laws that do not classify people by gender explicitly—"on their face"—are subject only to the deferential rational basis test. Thus, the Court found a law providing a preference in state jobs for veterans constitutional because the law was enacted with the purpose

of rewarding veterans, not discriminating against women, who comprised between 2 percent and 4 percent of the persons eligible for the veteran's preference.[33] Facially neutral laws only receive heightened scrutiny if the challenger can show both discriminatory intent of the law's enactors and a discriminatory effect. The *Geduldig* Court contorted a law facially referencing the gender-based characteristic of reproductive capacity into a facially neutral law allegedly entailing no gender classification.

In dissent, Justice William Brennan argued that the exclusion was sex based, that elective procedures were covered, and peculiarly male disabilities (e.g., circumcision, gout) were fully covered. He pointed out that the economic effects suffered by workers due to pregnancy-related disabilities are indistinguishable from those of other temporary disabilities. The three dissenters concluded: "Such dissimilar treatment of men and women, on the basis of physical characteristics inextricably linked to one's sex, inevitably constitutes discrimination." The majority did not acknowledge that women's capacity to become pregnant had excluded many from employment opportunities and that the ability to bear children is closely linked to societal expectations that they will be the primary nurturers while men are the primary breadwinners.

These outdated assumptions do not fit many families, including single-parent families, same-sex families, and families in which both parents need or want to work. Nevertheless, they continue to affect perceptions of women and their opportunities in many work environments. One report showed that more than half of all working women have left the workforce at least once for family reasons, while only 1 percent of men have left the workforce for such reasons.[34] While it is important for employers to be flexible and recognize the reality that many women still bear primary child-rearing responsibility, laws that rest on gendered assumptions must give way to higher constitutional ideals of equality. The Court's purposeful discrimination doctrine and its contortion of the law in *Geduldig* are not a promising start.

Abortion Cases

The clash between women's work obligations and family roles, influenced by both their reproductive capacity and societal expectations, comes to a head with the issue of abortion. Abortion is an option chosen by only a small percentage of pregnant women. In 2000, about 1.2 million abortions

were performed per year in the United States. But the option is still critical for women who face unplanned pregnancies. And for many people, the issue signifies the underlying equality and privacy issues: Who controls female bodies? Abortion restrictions particularly harm lower-income women, who are affected by other economic barriers relating to reproduction. For example, effective contraceptives can be expensive and are still not covered by most insurance plans. Further, childbirth leave policies of employers have often been inadequate, although the federal Pregnancy Discrimination Act, passed in 1978, gave time off and wage replacement for a 2–4-week postpartum period. During the 1990s, Congress passed the more generous Family and Medical Leave Act. Moreover, quality day care remains expensive. Other factors also influence women as they make the intimate and difficult abortion choice, including their religious beliefs, financial constraints, job opportunities and flexibility, personal choice about family size and a partner's involvement, or lack thereof. Moreover, some communities continue to stigmatize pregnancies resulting from rape, incest, or intimacy outside of marriage.

In *Roe v. Wade,* the Supreme Court protected some abortions through a right to privacy found in the Due Process Clause, striking down a nineteenth-century Texas statute that criminalized all abortions, except when the woman's life was at stake.[35] The Court announced a right for a woman to choose to terminate her pregnancy prior to viability. The Court treated abortion like a fundamental right, applying the strict scrutiny test, although it made clear that state interests in the health of the woman and in potential life were also important. Its trimester scheme made the right fundamental only for a portion of the pregnancy. Nevertheless, *Roe* is celebrated for extending the contraception rulings and earlier Due Process precedents that acknowledge autonomy in important family matters to the abortion decision, giving a pregnant woman some control and freedom from government regulation in the early stages of a pregnancy.

Scholars criticize *Roe* on numerous grounds, however, and the Court remains quite sensitive to the political controversy surrounding the decision, as the cases described below demonstrate. Some condemned *Roe* for identifying a fundamental right not clear in text of the Constitution or envisioned by the framers. The Court, however, has identified other rights not protected expressly in the Constitution or intended clearly by the framers, including associational rights and contraceptive rights and others. Some critics say *Roe* did not sufficiently protect majoritarian

moral decisions of states seeking to protect potential life. Others respond that the decision belongs to the individual woman who must carry a pregnancy to term and decide whether to raise a child and who should care for a child. Still others say the Court correctly sidestepped the moral and cultural question of when life begins. Although the *Roe* Court tried to evade that issue, it was not particularly successful. Any abortion ruling implicates some choice among competing definitions of when life begins.

Even supporters of reproductive choice sometimes join the critical chorus, arguing that *Roe* gave too much weight to physicians' professional judgments at the expense of the many life factors women must consider when pregnant. Others say it should have been decided on Equal Protection rather than Due Process grounds. Laws restricting abortion "use public power to force women to bear children." "Facts about women's bodies have long served to justify regulation enforcing judgments about women's roles."[36] "If women were permitted to control their own reproductive processes, more in the way of equality would result: neither man nor woman would be subject to the risk of pregnancy from sex. . . . [Abortion regulation] can be understood in terms of social subordination of women, imposing on them a burden nowhere imposed on men; and the burden has significant consequences in the real world."[37] A leading feminist wrote that a right to abortion, under "conditions of gender inequality . . . does not free women, it frees male sexual aggression. The availability of abortion [removes] the one remaining legitimized reason that women have had for refusing sex besides the headache."[38]

A criticism of *Roe* that particularly haunts the Court in other gender-related rulings is the charge that it was an overly broad constitutional ruling that put the Court too far out in front on a political controversy. Justice Ginsburg, a supporter of choice, argues that a more "moderate and restrained" approach in *Roe* would have afforded more deference to other constitutional actors, as did the Court's gender classification rulings of the same period, in her estimation. While the Court's measured but firm invalidation of sex-based classifications in employment benefits, jury selection, and child support instructed legislators to "rethink ancient positions" on gender roles, *Roe* "invited no dialogue with legislators." *Roe*'s divergence into the more philosophical realm of privacy may have stalled the progress gained during a more methodical march toward gender neutrality.

Justice Ginsburg criticizes the *Roe* Court for stepping "boldly in front of the political process," resulting in attacks on the judiciary and exposing

the Court's "precarious position" in constitutional adjudication. She asserts that the Supreme Court should follow rather than lead societal changes, recognizing an exception when political change would be slow or impossible, citing *Brown v. Board of Education* and *Reynolds v. Sims* (a Warren Court legislative reapportionment ruling) as acceptable examples. Ginsburg posits that a narrower ruling might have prevented or lessened the long controversy following *Roe,* citing efforts to liberalize nineteenth century restrictive abortion laws in some states during the early 1970s. But she has also said, "I do not pretend that, if the Court had added a distinct sex discrimination theme to its medically oriented opinion, the storm *Roe* generated would have been less furious."[39] Concerns about Court decisions foreclosing action by other constitutional actors, however, is often overstated, particularly if we take a long-term view of the process of constitutional interpretation. The polity can often respond to the Court's constitutional interpretation and effect change through a majoritarian process, as demonstrated by legislation sympathetic to the pro-life resistance to *Roe.*

Further, the prediction that a narrower ruling could have avoided some controversy is likely just wishful thinking. The pro-life movement was energized by *Roe,* but many individuals and religious lobbies were opposed to abortion prior to *Roe.* As the contraception battle demonstrates, opponents were unlikely to sit on the sidelines as more legislatures liberalized abortion rights. If the Court had proceeded with narrow rulings, it would still have engendered criticism for constitutionalizing this volatile area,[40] and would have deprived more women of personal choice. Besides, the Court did not rush into *Roe*; its reasoning followed naturally from the Court's contraception rulings of the 1960s and early 1970s. And the Court had previously considered abortion restrictions when a doctor was indicted under the District of Columbia statute in 1971.[41] The federal trial judge, relying in part on *Griswold,* found the law was too vague to put the defendant on notice with its ban on abortions except where necessary to save the life or health of the woman. In an unusual move, the Supreme Court, by a narrow vote, found that it had jurisdiction over a direct criminal appeal by the government. The Court refused to abstain, although it could have, and then deemed the law constitutional, allowing the criminal case to proceed. The dissenters charged that the Court contorted a statute to find jurisdiction and then refused to construe the abortion law narrowly to avoid the constitutional challenge. The majority was split in its reasoning on the merits. Three justices be-

lieved the law was not unconstitutionally vague. Another found that a licensed physician exercising his own judgment was immune, reading broadly a health exception for a woman's psychological and physical wellbeing. Justice Douglas, dissenting, argued that the law violated procedural Due Process by failing to put doctors on sufficient notice of criminal violations. He addressed directly the privacy issues, the balancing of individual and state interests, the potential for imposition of religious prejudice by lawmakers or triers of fact in such cases, and the inflammatory nature of the issue for the Court. Thus, prior to *Roe,* the Court had begun to struggle with abortion and the broader privacy issue.

Regardless of the political acrimony the Court's decisions engender, the justices are appointed for life and must take the heat on some controversial constitutional issues. In my view, abortion is a fundamental privacy and equality issue that should not be left to the political process.[42] Although organized lobbies on both sides inundate politicians and the media about the moral, medical, and constitutional issues, abortion is not a simple majoritarian matter in which all participate equally. The decision to terminate a pregnancy is an intimate choice, one fraught with moral difficulty for many people and involving consideration of multiple factors, as referenced above. This difficult, private, spiritual decision carries lifelong ramifications (no matter what choice is made).[43] It may be hard for some supporters to champion the right publicly, due to their under-age status (lack of voting power), control exerted by their family members or religious communities, or their fear of personal exposure, embarrassment, or harassment. In sum, abortion is a personal choice to be made by the woman and, ideally, those close to her, rather than the government. The courts play a critical role in ensuring this through constitutional law.

Finally, abortion regulation should not be solely the province of majoritarian political processes because abortion restrictions are most likely to harm poor and minority women. In the late 1970s, Ruth Bader Ginsburg said, "Poor women are not much better off than before *Roe*." The same is true today. Poor women cannot afford to travel quickly to states or countries with less restrictive abortion laws or face waiting periods and lengthy procedures. Since 1977, the Hyde Amendment has excluded abortion from the federal Medicaid program, which covers other necessary health costs related to pregnancy. The Supreme Court has found public funding bans acceptable. Peace Corps volunteers, military personnel, and women using Medicaid remain subject to prohibitions on abortion coverage. For a time,

federal regulations even barred federal funding for counseling about abortion at federally funded clinics for indigent women.

Lack of funding led an estimated two thousand low-income women to turn to illegal abortions during the first year in which federal coverage for abortion was denied. Low-income women, on average, obtain abortions two to three weeks later than middle- or upper-income women. Laws that deter or delay women from seeking early abortions make it more likely that women will bear unwanted children, continue a potentially health-threatening pregnancy to term, or undergo abortion procedures that would endanger their health.[44] Moreover, prohibitions on public funding disproportionately harm women of color because they are disproportionately poor.[45] Among women who died of reported illegal abortions between 1975 and 1979, the most common reason for seeking an illegal abortion was financial constraints. One source reports that 82 percent of the women who died from illegal abortions were African American or Latina.[46]

The Court definitely has walked a tightrope in the abortion cases. It seems to be still reeling from *Roe v. Wade* and is defensive about its appropriate role. In many areas of law, the Court's opinions are often dry, without dramatic details about the parties or references to the political controversy surrounding cases. But in the abortion cases, justices frequently acknowledge the politics of abortion and the pressure on the Court. *Roe* begins by citing the "sensitive and emotional nature of the abortion controversy," the "vigorous opposing views," and the "deep and seemingly absolute convictions that the subject inspires." Nearly thirty years later, in a 5-4 decision striking down a ban on so-called partial birth abortions in 2000, the majority begins by recognizing the "controversial nature of the problem" and the "virtually irreconcilable" views among Americans, while the dissenters warn that the ruling will elicit a "firestorm of criticism."[47] One abortion opinion even referenced the protestors who surround the Court regularly. With combative sarcasm, Justice Scalia exclaimed, "We can now look forward to at least another term with carts full of mail from the public and streets full of demonstrators." The criticism can get personalized sometimes. Justice Harry Blackmun, as the author of *Roe,* received threats and hate mail from members of the public because of his rulings. Blackmun made the conclusion of his *Webster* dissent unusually personal: "In one sense, the Court's approach is worlds apart from that of the Chief Justice and Justice Scalia. And yet, in another sense, the distance between the two worlds is short—the distance is but a single vote. I am 83 years old. I can not remain on this Court for-

ever, and when I do step down, the confirmation process for my successor may well focus on the issue before us today. That, I regret may be exactly where the choice between the two worlds will be made."[48]

The justices' discomfort with the topic and unusual concern with the political ramifications of their decisions explain the Court's inconsistent use of avoidance techniques in this area of constitutional law. The Court's abortion cases contain contradictory applications of the avoidance doctrine that appear politically motivated and results oriented. The next section explores three important abortion cases to profile the Court's inconsistent use of avoidance strategies: Missouri's attempt to get the Court to overrule *Roe* in the late 1980s, a subsequent challenge to the "gag rules" on federal employees who provide health care for indigent women, and the Court's invalidation of a "partial birth abortion" law in 2000. Briefly, the First Amendment challenges brought by anti-abortion protestors to restrictions on demonstrations at clinics will be explored.

A Direct Challenge to Roe

Webster v. Reproductive Health Services was a critical case because Missouri, supported by President Bush's administration, orchestrated a direct challenge to the validity of *Roe*.[49] The case drew the largest number of amicus briefs ever submitted to the Court.[50] It is also an unusual ruling because the justices battled overtly and at length about the propriety of avoidance strategies, rather than employing their usual oblique or passing references (such as an accusation by dissenters that the majority reached a constitutional question it should have avoided).

In 1986, Missouri toughened its abortion law, adding a preamble that provided that "[t]he life of each human being begins at conception," and that "unborn children have protectable interests in life, health, and well-being." It equated the rights of unborn children with the rights enjoyed by other persons. Prior to performing an abortion on any woman who a physician had reason to believe was twenty or more weeks pregnant, a physician had to ascertain whether the fetus was viable by performing "such medical examinations and tests as are necessary to make a finding of the gestational age, weight, and lung maturity of the unborn child." Since 90 percent of the 1.2 million abortions performed in the U.S. annually take place within the first twelve weeks of pregnancy,[51] the viability testing provision would affect few pregnancies. Approximately half of

women who obtain abortions after sixteen weeks of pregnancy are delayed by the difficulties of financing the procedure.[52] Additionally, the law prohibited the use of public employees and facilities to perform abortions not necessary to save the woman's life, and it prohibited the use of public funds, employees, or facilities for the purpose of "encouraging or counseling" a woman to have an abortion not necessary to save her life.

In *Webster,* five health professionals employed by Missouri and nonprofit organizations providing abortion services challenged the constitutionality of the restrictions in federal court, seeking declaratory and injunctive relief. Plaintiffs sought to raise the claims of pregnant women seeking abortion assistance in Missouri. The three physicians counseled pregnant female patients at the University of Missouri and, where medically indicated, encouraged or advised some to terminate their pregnancies. Two also performed abortions. A registered nurse and social worker from a public hospital who encouraged or counseled certain patients to have abortions also sued.

The District Court found that many of the restrictions violated the Constitution. The Court of Appeals affirmed, ruling that the law contravened *Roe* and subsequent Supreme Court cases. On appeal, the state and the Bush administration urged the Supreme Court to overrule *Roe*. Although five justices voted to uphold the Missouri law, a plurality of the Court refused to reject *Roe* completely. The Court used a host of avoidance techniques in *Webster,* finding no justiciable challenge to the preamble, which provided that life begins at conception. It termed a challenge to part of the law that forbids public employee abortion counseling moot. As to the law's ban on the use of public facilities and public employees in performing abortion, Justice O'Connor relied on the rule discouraging facial challenges to statutes. To sustain a facial challenge, a plaintiff must establish that no set of circumstances exists under which the law would be valid.[53] This principle is closely related to justiciability doctrines and the rule of measured steps, urging courts to rule narrowly on concrete factual disputes. Because she found some applications of the ban constitutional, she could reject plaintiffs' claims, even if some applications might be unconstitutional.

Two other avoidance strategies debated by the Court deserve detailed attention. Justice O'Connor played a pivotal role in *Webster,* concurring in the Court's judgment upholding the law but refusing to join the plurality's reasoning. She used the measured-steps rule, which instructs that when federal courts reach constitutional issues they should rule as nar-

rowly as possible, to argue that the Court should uphold the Missouri statute without dealing with the broader issue of *Roe*'s validity. In a closely related strategy, O'Connor advocated using the avoidance canon to issue a narrow construction of the law. The canon provides that a federal court should construe a statute narrowly if it can to avoid potential constitutional problems. O'Connor argued that the viability provision did not conflict directly with *Roe*. She found a compelling state interest in determining whether a fetus is viable but did not view the viability testing requirement as mandatory. "[I]t does nothing more than delineate means by which the unchallenged twenty-week presumption of viability may be overcome if those means are useful in doing so and can be prudently employed." With that extremely narrow construction, arguably quite different from what Missouri legislators had intended, O'Connor forestalled full reconsideration of *Roe* and allowed for factual development of the viability provision and other restrictions in subsequent litigation. But O'-Connor and the plurality clearly suggested their willingness to modify and narrow *Roe* and succeeding cases.

The dissenters—Justices Blackmun, Brennan, and Marshall— charged that this avoidance tactic eviscerated *Roe* while claiming to preserve it. "[A] plurality of this Court implicitly invites every state legislature to enact more and more restrictive abortion regulations in order to provoke more and more test cases, in the hope that sometime down the line the Court will return the law of procreative freedom to the severe limitations [prior to *Roe*]." They concluded that no Court judgment had ever fermented such disregard for the law and for the Court's own precedents. Justice Scalia, although in agreement with O'Connor in upholding the statute, argued that her reliance on the rule of measured steps was "irresponsible." He believed that the doctrine did not apply since the Court could not avoid deciding whether the Missouri law was constitutional and the only debate should be over "whether, in deciding the constitutional question, we should use *Roe v. Wade* as the benchmark, or something else." He set forth numerous examples of cases where the Court had departed from avoidance and summarized the precedent as supporting a flexible rule of measured steps, containing a "good cause exception." He found good cause not to issue "the most stingy possible holding" in *Webster*, noting that it was particularly inapt to convert the rule into an absolute in order to avoid overruling the broad *Roe* opinion.

The justices also debated the propriety of the avoidance canon. O'Connor, following the state's lead, interpreted the viability testing provision to

be nonmandatory, thus avoiding constitutional difficulties that might be presented by a conflicting interpretation. The avoidance canon is generally applied only when the interpretation that avoids constitutional difficulty is a plausible construction of the law before a court. The dissenters did not view the testing provision as ambiguous or the state's narrow reading as reasonable. They read the provision as a mandate to perform tests to find gestational age, fetal weight, and lung maturity, even if a doctor deemed such testing imprudent.

Since the avoidance canon also surfaces as a focus of disagreement in the other abortion cases profiled below, the measured-steps rule is considered first. Although the rule is often stated as a given by courts, it is actually a serious point of contention. The rule is not neutral and cannot be easily applied, as the Court's inconsistent precedent demonstrates. Choosing which constitutional issues are necessary to address and how broadly to address an issue or precedent are extremely significant. The weight of those preliminary decisions is magnified by the controversy surrounding abortion and the Court's role in those politics. Advocates of measured rulings value their flexibility and how they promote deference to other decision makers. A measured ruling like O'Connor's in *Webster* allows time for gradual development of the law, after a fuller airing of facts with a variety of laws across the country.

Webster also demonstrates, however, some problems flowing from measured rulings. *Webster* revealed the Court's weak support of *Roe* and invited future challenges. It did not overrule *Roe,* but it upheld Missouri's broad law through limiting tactics that are not obvious to most readers. It also announced no clear new constitutional principle to replace *Roe*. It signaled a directional shift in constitutional law without formulating a rigid rule or generating uniform abortion laws. Thus, it could be criticized from the pro-life side for its wishy-washiness and its lack of guidance to the states. From the pro-choice side, its failure to treat women's procreative choice as a secure and fundamental constitutional right was threatening.

The Aftermath of Webster

The Court's opinion generated substantial public response. Individuals and organizations continued to debate the constitutionality of abortion restrictions, and the media was active in reporting on abortion contro-

versies. Pro-life advocates increased their lobbying efforts. A National Right-to-Life Committee spokeswoman said, "*Webster* really did change everything, by saying for the first time that limits would be allowed, so we have been drafting and working for legislation that we feel would be upheld under the *Webster* standards."[54] Provisions of the proposed model legislation included: forbidding abortion as a means of birth control and sex selection, requiring the woman's informed consent and parental consent, establishing a father's right in choosing whether to abort, and preventing public hospitals from performing abortions. Abortion rights advocates also stepped up their efforts. Kate Michelman, the executive director of the National Abortion Rights Action League, stated: "To politicians who oppose choice, we say, 'Read our lips. Take our rights. Lose your jobs.'"[55]

Webster was particularly important to Planned Parenthood and the ACLU, which were involved in the litigation. The public response to their calls for support was unprecedented. Between the time certiorari was granted and the time the final decision was released, Planned Parenthood received $1.2 million in contributions that it attributed to its *Webster* appeals. Similarly, the ACLU enrolled five thousand new members as a result of its direct mail and advertising campaign on the issue.[56] After the Court's decision, the public perception of an increased threat to *Roe* led to a quantum jump in membership donations to pro-choice organizations. Early fundraising appeals after *Webster* had high response rates. Between 1988 and 1989, NOW/LDF more than doubled its annual contributions. Planned Parenthood increased its "direct public support" receipts from $14 million to $24 million dollars during the same one-year period.[57] The increase in donor interest was not one-sided; during the same period, Americans United for Life, a Chicago-based anti-abortion law firm, raised $1.3 million. In *Webster,* Americans United filed several amicus briefs. The additional contributions enabled them to hire an extra lawyer to handle the lobbying and state by state litigation in the aftermath of *Webster*.

Politicians soon felt pressure to take a firm stance on the abortion issue. Interest groups poured funds into campaigns, targeting candidates who were pro-choice or pro-life.[58] David Frohnmayer, Oregon's attorney general at the time of *Webster,* attended a conference of other attorneys general and candidates for elective office shortly after the Court released the decision. He recalled that many politicians who had been reluctant to declare their position on legal access to abortion felt

pressure after *Webster* to take a position. In particular, three Catholic attorneys general who were running for gubernatorial positions in major states issued strong pro-choice statements shortly after *Webster*. In his own gubernatorial race, Frohnmayer, a pro-choice Republican, faced opposition from a third-party, pro-life candidate backed by evangelical groups. Suddenly, abortion became a salient and dominant issue in the campaign, eclipsing other important issues. The Republican vote was split between the pro-choice and pro-life male candidates, and the pro-choice female Democratic candidate won the election.[59]

In the years following *Webster,* many legislators and executive officials accepted the Court's invitation to continue to challenge *Roe*. The Louisiana legislature passed a resolution calling on district attorneys to enforce nineteenth-century criminal abortion statutes that were still on the books "to the fullest extent."[60] But other legislators fought to pass pro-choice bills. Few proposed laws passed, whether restrictive or liberalizing. When they did, litigation ensued, and the issue returned to the Supreme Court within several years. Pro-choice advocates considered thirty-four state legislative bodies more pro-choice than they were before *Webster,* and only three were considered more opposed to choice. In 1989, only sixteen governors were openly pro-choice. Two years later, twenty-six governors supported choice, while the number advocating restrictions on abortion remained constant.[61] Some politicians did not feel compelled to state a position prior to *Webster,* preferring to rely on *Roe* as foreclosing state options. Thus, foreclosure of dialogue is not always the Court's fault. A claim of foreclosure can be a convenient way for others to "blame" the Court and deflect political heat on controversial issues. *Webster* may have helped to force some formerly neutral governors to "get off the fence." At the federal level, the Hyde amendment was modified shortly after *Webster* to allow abortions in cases of rape or incest, although it still contained no exception to protect a woman's health.

The Court Refuses to Avoid Constitutional Questions about the "Gag Rules"

Three years after *Webster* revealed serious fissures in the Court's support for *Roe,* the Court reaffirmed some core of *Roe* in *Casey*. In the interim, however, plaintiffs unsuccessfully challenged federal regulations restricting speech about abortion at federally funded clinics for indigent peo-

ple.[62] By a 5-4 margin, the Court in *Rust v. Sullivan* upheld the regulations after refusing to apply the avoidance canon, which provides that a federal court should construe statutes to eliminate "serious constitutional doubts" perceived by the court. Despite the serious First Amendment questions raised by the regulations, the Court concluded that it could ignore the avoidance canon because five justices determined that the statute was not *clearly* unconstitutional. *Rust* demonstrates that the Supreme Court sometimes manipulates the canon based on its view of the merits. *Rust* also demonstrates how the Court engages in constitutional interpretation even when it decides whether the canon applies.

Congress enacted Title X of the Public Health Services Act to provide funding for family planning clinics serving low-income women, "who frequently face disproportionately high rates of teenage pregnancy, infant mortality, and impaired health."[63] While Congress clearly said that Title X funds could not be used to perform abortions, Congress did not restrict abortion counseling. For almost eighteen years, federal regulators charged with interpreting Title X allowed providers to give "nondirective counseling" about all available alternatives, including prenatal care, adoption, and abortion. Repeated proposals in Congress to amend the act to ban abortion counseling failed. During the last portion of President Reagan's second term, his administration expended tremendous effort to prohibit Title X abortion counseling through administrative action.

The secretary of health and human services ("Secretary"), responsible for issuing regulations interpreting Title X, produced new regulations in 1988. These rules prohibited Title X providers from counseling or referring clients for abortion as a method of family planning; required Title X grantees to separate their projects, physically and financially, from any abortion activities; and prohibited Title X projects from encouraging, promoting, or advocating abortion as a method of family planning. Title X had not changed, but the Secretary reported that the new rules, reflecting a revised interpretation of Title X, responded to the political climate, including changed attitudes toward the "elimination of unborn children by abortion." These regulations—commonly called the "gag rules"—were an extreme departure from almost eighteen years of agency policy, and they placed a heavy burden on Title X providers.[64]

Family planning groups and others challenged the regulations on First Amendment grounds, claiming that the regulations discriminated against the pro-choice viewpoint and censored speech. They also argued the gag rules impaired a woman's right to informed reproductive choice

in violation of Due Process. Appellants included recipients of Title X funds like New York, which distributed nearly $6 million in Title X grants to thirty-seven agencies, a public hospital that provided services to low-income New Yorkers, and doctors. Planned Parenthood of New York City, the single largest provider of family planning services in the city, sued on behalf of itself, its staff, and its patients. Its Bronx Center received a $439,391 Title X grant, amounting to 50 percent of its family planning budget.

The trial court and the U.S. Court of Appeals for the Second Circuit upheld the gag rules, and in *Rust,* the Supreme Court affirmed by a 5-4 margin. Plaintiffs in *Rust* argued that the gag rules conflicted with the plain language of Title X, which forbids projects only from *performing* abortions. As in *Webster,* the Court relied on the doctrine discouraging facial challenges to conclude that plaintiffs' challenge failed. The Court termed the statute ambiguous because it "does not speak directly to the issues of counseling, referral, advocacy, or program integrity," and also found the legislative history of the statute ambiguous on these issues. The Court then relied on a doctrine of administrative deference providing that when Congress does not address a specific issue, or its intent is ambiguous, the court should defer to the agency's interpretation if it is based on a *permissible* construction.[65] The Court found the Secretary's reading of Title X plausible. Even though the regulations reversed long-standing agency policy, the Court accepted as reasonable the Secretary's justification of a changed political attitude toward abortion. The Court was not troubled by the fact that the agency acted upon this perceived change even though Congress had failed to pass numerous bills amending Title X to specifically prohibit abortion counseling.

The Title X doctors argued that the gag rules imposed an unconstitutional condition upon the receipt of Title X funds by silencing them on the topic of abortion. The *Rust* majority concluded that the gag rules did not violate the free speech rights of the providers, their staffs, or Title X patients. The Court reasoned that the gag rules did not discriminate on the basis of viewpoint, favoring pro-life sentiment. "[T]he Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other." In earlier abortion cases, the Court had declared that the government has no constitutional duty to fund activities merely because they are constitutionally protected. The Court found that Title X providers could still engage in abortion counseling, but not on the government's time or at its expense. The Court relied

on the government's ability to refuse to subsidize speech and to impose reasonable time, place, and manner restrictions on speech.

It seems reasonable that the government does not have to pay for every person to exercise his or her constitutional rights. In our free market system, it is understandable that we cannot all exercise our rights equally. It is also sensible to allow some time, place, and manner restrictions on speech. But it defies logic to say that the gag rules were not a form of viewpoint discrimination. The regulations were clearly aimed at limiting speech about abortion as a family planning option. They did not silence federal employees generally; they silenced them on a particular topic and only about one option—advising about abortion versus childbirth or adoption.

As to the Due Process rights of patients to procure abortions or make an informed choice, the Court observed that the women who benefited from Title X were in "no worse position than if Congress had never enacted Title X." The Court did not blame the government's refusal to fund abortions or abortion-related speech for any impairment of a woman's right of choice. The woman's individual economic circumstances created the obstacle; her poverty blocked her ability to procure an abortion, not the gag rules.

The dissenters disagreed with the Court on the merits of the First Amendment and Due Process issues. They also argued forcefully that the Court should have never reached and ruled so broadly on the constitutional issues. The dissenters thought the statute was ambiguous because it barred abortions but did not bar abortion counseling. If Title X was read to prohibit only the actual performance of abortions (as agency regulations had provided for eighteen years), the statute would be constitutional under Supreme Court rulings permitting selective government funding of childbirth over abortion. Once the Secretary read the statute to support suppressing speech about abortion, the dissenters saw serious constitutional questions. The dissenters presumed that the statute would have been explicit if Congress had intended to press the outer limits of constitutionality, and they assumed that the gag rules pressed those limits. Thus, their application of the canon was inextricably linked with their view that the gag rules were constitutionally suspect.

The majority rejected application of the avoidance canon and refused to defer to Congress. The majority found no need to invalidate the regulations to save the statute, reasoning that the regulations did not indicate that Congress intended to preclude the gag rules. On the majority's view

of the merits of the constitutional issues, the rules simply did not raise sufficiently "grave and doubtful constitutional questions." Significantly, the *Rust* majority determined that the plaintiffs' arguments did not "carry the day" before rejecting the more cautious approach. The majority justified not using the avoidance canon by, in essence, peeking ahead to the merits and taking a head count of justices willing to uphold the gag rules. This suggests that ideology was the driving force for reaching the constitutional question in *Rust*. The dissenters accused the majority of sidestepping the avoidance canon in its zeal to resolve important constitutional issues. Justice Blackmun stated, "Whether or not one believes that these regulations are valid, it avoids reality to contend that they do not give rise to serious constitutional questions." Among other issues, he pointed out that "the extent to which the government may attach an otherwise constitutional condition to the receipt of a public benefit . . . implicates a troubled area of our jurisprudence."

Justice O'Connor joined in the dissent's assertion that the regulations presented serious constitutional questions. She refused, however, to join them to the extent they dissented from the majority's substantive outcome on the constitutional issues. She again advocated the use of the avoidance canon as a matter of judicial restraint, arguing that the Court "acts at the limits of its power when it invalidates a law on constitutional grounds." O'Connor relied on traditional justifications for the canon, emphasizing those linked with concerns about the judiciary striking down popular legislation, particularly when popular action concerns controversial political issues. In her view, "In recognition of our place in the constitutional scheme, we must act with 'great gravity and delicacy' when telling a coordinate branch that its actions are absolutely prohibited absent constitutional amendment." O'Connor's use of the canon would thus act as a warning signal to Congress and the Secretary, warning that if they pursue this course, the Court may invalidate the gag rules. "If we rule solely on statutory grounds, Congress retains the power to force the constitutional question by legislating more explicitly. It may instead choose to do nothing. That decision should be left to Congress; we should not tell Congress what it cannot do before it has chosen to do it."

Many courts use the avoidance canon frequently without acknowledging its import for constitutional lawmaking and, like the Supreme Court, are inconsistent in applying it. Further, *Rust* demonstrates that neither the majority nor dissent could escape their views of the ultimate merits when applying the canon. The Court often makes constitutional choices

when it uses this particular avoidance strategy. In *Webster* and *Rust,* the sensitive and controversial nature of abortion propelled Justice O'Connor to urge avoidance consistently. Other justices pointed out that the decision to avoid can have important ramifications like leaving *Roe* partially intact through *Webster* or, as O'Connor recommended, leaving the battle to the majoritarian branches.

After the Court issued *Rust,* the gag rules remained a serious political issue. Congress repudiated the gag rules as a misinterpretation of Title X. The Senate passed the legislation by a margin of 73 to 25 votes and the House by 272 to 156 votes. But President George Bush, Sr., vetoed the legislation, and Congress narrowly failed to muster the two-thirds vote necessary to override his veto. President Clinton rescinded the regulations by executive order shortly after his inauguration in early 1993.

The Court Affirms Roe and Issues a New Standard

Within six months of *Webster,* Pennsylvania passed a statute restricting access to abortion, resulting in a legal challenge that reached the Supreme Court in 1992. In *Planned Parenthood v. Casey,* the Court narrowly preserved some "core" of *Roe*, with the pivotal joint-opinion of justices O'-Connor, Kennedy, and Souter emphasizing a generation's reliance on *Roe* and urging adherence to precedent.[66] Justice Blackmun termed that opinion "an act of personal courage and constitutional principle." Four dissenters castigated the joint opinion authors and argued that states should be allowed full freedom in regulating or prohibiting abortions.

Casey significantly modified *Roe,* doing away with its trimester framework because it did not sufficiently protect states' interests and replacing it with an amorphous "undue burden" standard. Although the government cannot completely ban abortions prior to viability, it can regulate such abortions before viability so long as the regulation does not impose an undue burden on the underlying right by placing a substantial obstacle in the path of a woman seeking an abortion. After viability, the state can prohibit abortions except where necessary to preserve the life or health of the woman. Compared to *Roe,* the new standard is significantly less protective of pregnant women's choice rights.

Presumably, judges will know an undue burden when they see it, and judges are likely to vary significantly in applying the test, depending on their views of how accessible abortions should be and their respect for

the underlying right. In *Casey*, the Court upheld most of Pennsylvania's restrictions on abortion, including a twenty-four-hour waiting period, a parental consent provision with the possibility of judicial bypass, a requirement that physicians inform women of the availability of information about the fetus, and reporting and record-keeping duties. The Court struck down only one portion of the law that required a woman to furnish proof that she had notified her spouse prior to obtaining an abortion or, if the spouse was not the father, she had to provide a statement certifying that her spouse was not the father. The spousal notification was deemed an undue burden because the joint-opinion justices assumed that spouses in well-functioning marriages discuss such intimate, important decisions regardless of the requirement. But for women who are subject to domestic abuse, their need for secrecy is valid, and the requirement might prevent a significant number from obtaining abortions. O'-Connor observed that some pregnant women might not want to inform spouses of their pregnancy when it results from an extramarital affair.

Pro-life supporters were upset that *Casey* preserved some part of *Roe*. States' rights supporters view the rulings as not sufficiently deferential to the majoritarian moral choices of each state. On the other hand, prochoice supporters believed the *Casey* standard allows too many restrictions to be imposed by majoritarian bodies. They lamented that the Court no longer regards abortion as a fundamental right deserving of strict scrutiny. Yet the Court does not employ a rational basis analysis, either. Once again, when gender is implicated, the Court created a unique constitutional standard. The *Casey* standard is a middle-of-the-road Due Process approach, involving a balancing of the woman's interest and the state's interest, much like the balancing approach used with intermediate scrutiny under the Equal Protection gender cases.

Application of the New Test

In the mid- to late 1990s, extensive media attention was devoted to an infrequently used late-term procedure labeled "partial-birth" abortion by its opponents. Congress twice tried to make the procedure a federal crime, but President Clinton vetoed the bills. The National Right-to-Life Committee then sent its proposed bill to the states, and many adopted such bans. The Supreme Court soon faced a constitutional challenge to Nebraska's ban, the Court's first application of the undue burden stan-

dard since *Casey*. Although it was an election year, the Court did not sidestep the challenge in deciding *Stenberg v. Carhart*. In a bitterly disputed 5-4 ruling, the Court found the law unconstitutional. Justice O'Connor joined the more liberal members of the Court to form the majority. Justice Kennedy, who had voted with her in *Casey,* condemned the "partial birth" procedure as "abhorrent." Other dissenters insisted that the basic right to an abortion should be overruled.

The majority held that the Nebraska law violated Due Process because it lacked any exception to the ban to preserve the health of the woman. The Court also found it unconstitutional because it imposes an undue burden on a woman's ability to choose a *particular type* of abortion, "thereby unduly burdening the right to choose abortion itself." It also noted that the Nebraska law did not distinguish between pre- and postviability abortions. Justice Stevens concurred, urging deference to doctors to select the procedure they reasonably believe will best protect the woman in exercising her constitutional liberty. He pointed out that Nebraska banned one procedure but claimed to still allow an "equally gruesome procedure." As Justice Ginsburg emphasized in her concurrence, the Nebraska law does not save a fetus from destruction or protect the woman; it targets a particular method of abortion: "[T]he law prohibits the procedure because the state legislators seek to chip away at the private choice shielded by *Roe v. Wade,* even as modified by *Casey*."

Avoidance again figured in the Court's decision making, particularly Justice O'Connor's concurring opinion. She pointed out that Nebraska's law covers several procedures, including the dilation and evacuation procedure ("DandE"), the most common method of performing second-trimester abortions *prior to viability*. She examined the laws of other states, which restrict their prohibitions to only the dilation and extraction procedure ("DandX"), thus avoiding a "principal defect" of Nebraska's law. O'Connor concluded that if Nebraska's law were so limited and included an exception for the life and health of the woman, the Court would face a very different question. She thus attempted to issue a more measured ruling, suggesting that some of the three narrower bans on "partial birth abortion" in other states might survive.

Justice Scalia, dissenting, attacked the Court for issuing an "immense" new constitutional ruling that ignored the avoidance doctrine. He first decried the requirement of a health exception for the woman as a broad new protection for abortion rights. In *Casey,* however, the joint opinion and the dissenting opinion by Chief Justice Rehnquist read the Pennsylvania law to

include a sufficient health exception. Plaintiffs had initially argued that the health exception—which allowed women to bypass most of the law's restrictions on abortions—was unduly narrow and failed to incorporate three medical conditions that might require emergency abortions. The trial court agreed, but the appellate court construed the law so as to avoid a potential constitutional problem of an unduly narrow health exception. The appellate court found that the legislature "did not choose its wording in a vacuum" and intended to keep compliance with abortion regulations safe for all women so that the law posed no "significant threat" to the life or health of the woman. Most justices in *Casey*—consistent with avoidance principles—deferred to the latter interpretation as "eminently reasonable" and did not rule clearly on what type of health exception is necessitated by the Constitution. Scalia argued in *Stenberg* that if an abortion restriction depends on medical judgment, it will leave too much discretion to physicians supportive of abortion rights. Scalia also accused the Court of misreading Nebraska's ban and imposing unattainable standards of statutory drafting on states. In a rare move for him—contradictory to his approach in *Rust* and many other cases—Scalia urged the Court to use the avoidance canon to construe Nebraska's law narrowly (to only cover the DandX procedure rather than both procedures) so as to avoid any constitutional problems.

Restrictions on Clinic Protestors

The final group of abortion rulings that deserve mention are those concerning protests at abortion clinics. The Court's fitful and contentious recognition of the essential aspects of *Roe* did little to disabuse the fringes of the pro-life movement of the notion that defeats in the courtroom could be offset by violence and intimidation. While the constitutional right to abortion had survived a series of legal challenges, "extralegal" obstacles were making the right increasingly difficult and dangerous to exercise. In the 1990s, violence at clinics increased, with bombings resulting in deaths and injuries. Operation Rescue and similar efforts systematically drew protestors from across the country to targeted locations with the avowed purpose of overwhelming law enforcement and shutting down clinics. The effort was successful in Wichita, Kansas, where the use of one hundred federal marshals, 2,741 arrests, and over a million dollars of the city's money failed to keep a clinic open in 1991. The combined effects of such activity were widespread and particularly debilitating to the

operation and staffing of clinics. Recruiting physicians and nurses had become extremely difficult. A survey of clinic staffers revealed that 21 percent had received death threats during the first seven months of 1993.[67] The National Abortion Federation has tracked seven killings and more than two hundred arson and bombing incidents at abortion clinics between 1980 and 2000. The overall decline in the number of clinics and medical personnel willing to provide abortion services weighed heavily upon poorer and minority women, who have fewer resources to travel to a neighboring county or city or to seek medical care from a private practitioner.

The courts and Congress provided limited relief. A Portland jury awarded $109 million to abortion clinic personnel who sued over a website and "wanted" posters that targeted doctors who perform abortions, listing their home addresses, the names of their children, and other personal information. Although *Planned Parenthood of the Columbia v. American Coalition of Life Activists* yielded the largest civil award in Oregon history, all fourteen defendants claimed no assets. They vowed to continue their activities underground or out in the open. Doctors providing abortion services in the area continue to wear bulletproof vests, carefully plan their commutes to work, and use electronic surveillance in their homes and offices.[68]

In 1994, Congress passed the Freedom of Access to Clinics Entrances Act to protect access to abortion clinics. Some states passed similar laws. In the same year, abortion protestors challenged a state court injunction on First Amendment grounds.[69] After numerous clashes at a Florida clinic, a state judge had issued a detailed injunction against the protestors to protect access to the clinic, prevent intimidation of patients, and protect health-care providers from harassment in their homes and other public places. The Supreme Court rejected the protestors' arguments that the entire injunction was a prior restraint on speech, but the Court severely limited portions of the injunction. Using an incredibly fact-specific approach unlikely to yield significant guidance for other judges and lawmakers, the Court upheld a 36-foot buffer zone around clinic entrances and driveways. Chief Justice William Rehnquist, for the majority, noted that the trial court had supported the injunction with evidence of the protestors' prior unlawful conduct in repeatedly interfering with access for patients and staff. The Court reasoned that the narrow confines around clinic limited the options, and that protestors could still be seen and heard from clinic parking lots. The Court also upheld limited noise

restrictions imposed by the injunction, restraining anti-abortion protestors from "singing, chanting, whistling, shouting, yelling, using bullhorns, auto horns, or sound amplification equipment, or making other sounds within earshot of patients inside the clinic," finding that they burdened no more speech than necessary to ensure health and well-being of patients at a clinic.

On the other hand, the Court struck down other portions of the injunction for being too broad. It found the requirement that anti-abortion protestors refrain from physically approaching any person seeking services of abortion clinic within 300 feet of the clinic, unless such person indicated a desire to communicate, burdened more speech than was necessary to prevent intimidation and to ensure access to a clinic. The Court emphasized that there was no evidence that the protestors' speech was so infused with violence as to be indistinguishable from a threat of physical harm or amount to "fighting words." The Court also threw out a 300-foot buffer zone around the homes of clinic workers as overly broad and invalidated a limit on protestors using images observable to patients inside the clinic because the curtains could simply be closed. The Court's detailed, fact-bound ruling, with mixed results for abortion protestors and supporters, is difficult to square with the Court's other First Amendment rulings. On the abortion topic, the Court's attempts to steer a middle-of-the-road course certainly appeared to drive its application of First Amendment law in this and other abortion protestor rulings.

For example, the Court in 2000 upheld a Colorado law that restricted the place and manner in which abortion protestors could communicate with clinic patients. The Court, by a 6-3 margin, found that protestors' First Amendment rights could sometimes be limited by the patients' rights to avoid unwanted communication. The Court said that the law did not single out anti-abortion speech because of its content, but emphasized the offensive nature of such speech and its intrusiveness. Chief Justice Rehnquist joined Justice O'Connor and the more liberal justices to form the majority.[70] The content may be less important than the nature of the speech, said the Court, alluding to confrontational, in-your-face protests that bombard the senses, amounting to a "deliberate verbal or visual assault." The Court revived an old formulation of privacy—a general "right to be let alone"—to support its restrictions on the protests. Although the Court does not explicitly reference the wave of violence at abortion clinics in the 1990s, that factual background surely informed its decision.

This ruling is a significant development of First Amendment law, in tension with the Court's interpretation of protection for unwelcome hate speech, and caps a line of "bubble" cases where the Court has approved of some efforts to limit speech around abortion clinics. Protestors can still speak around clinics and engage in unwelcome public advances to patients, but the "time, place and manner" of the speech is carefully regulated. Like much of current abortion law, the "bubble" rulings do not please activists on either side of the abortion debate. Protestors view the laws as unconstitutional limits on their fundamental speech rights. And, just like the gag rules that restricted pro-choice speech, it is hard to believe that the restrictions are not aimed at limiting speech partially because of its viewpoint. In contrast, threatening, racist speech is often tolerated in the name of the First Amendment. Restrictions like the Colorado law are also driven, however, by the extreme bullying tactics and violence of some anti-abortion protestors. With the gag rules, clinic counselors could not talk about abortion at the clinic. In the bubble cases, protestors can still speak and display their messages near the clinic, but individuals are shielded from some hostile, unwelcome speech, intimidating tactics and physical obstruction. Clinic patients and employees, however, remain the target of harassment and some unwelcome speech, designed to undermine their constitutional rights to secure, or help women secure, abortions.

Conclusion

The Court, through its confusing constitutional rulings in both the gender equity and abortion cases, has steered an indistinct middle course. Although the fundamental privacy right to contraception is well established and receives the highest constitutional protection, both the undue burden standard in Due Process law and the intermediate scrutiny test in Equal Protection analysis employ a balancing approach toward the clash of individual and state interests. Both those tests arose in cases raising politically and socially divisive issues implicating gender equality. If men could become pregnant or were frequently excluded from professional advancement because of their gender, privacy and equality rights would surely be much more secure, robust, and definitive.

The Court's middle-of-the-road course in abortion rulings is consistent with polls reflecting that people want some right of choice but favor

restrictions on the availability of abortion. The combination of the Court's avoidance technicalities and its language reaffirming *Roe* make it easy to miss the degree to which the Court has backtracked from *Roe* in the face of resistance. Similarly, the gender Equal Protection cases are full of important symbolism, with broad language about equal opportunity, which leaves the general impression that constitutional law requires gender equity. But the Court has sidestepped the most difficult issues of how biological differences and social stereotypes play out in the real world. The Court has opened educational opportunities to both sexes with cases challenging a female-only state nursing school and a male-only state military academy. Some job opportunities have been extended equally to both sexes. But the Court minimizes the equality problems women encounter on the job when they become pregnant or start a family.

In cases concerning forced maternity leave, the Court refused to deal with the merits of the Equal Protection claim, instead relying on broad but vague Due Process standards. In the case involving the exclusion of pregnancy from California's disability insurance program, the Court put blinders on when it overlooked the gender-based exclusion and disregarded one of the most important equity issues for women who need or want to work during their childbearing years. The Court somehow found that a gender-based characteristic like reproductive capacity is not a gender classification deserving heightened Equal Protection scrutiny. The employment cases underscore the danger of the Court's measured approach. Laws that harm women but do not segregate on their face by gender are only subject to the deferential rational basis test.

Reproductive control is critical to achieving gender equity. Contraception advocates repeatedly brought the privacy issue to the Court, but the Court managed to dodge and weave for a long period. When it finally reached the merits, the Court issued a broad ruling about privacy for intimate marital decisions. Quickly, the Court extended this right to single people and minors. Most Americans now accept the contraception rulings. But the Court is still reeling from *Roe*, which is not much more novel or broad than *Brown* or *Griswold*. The Court was not confined by the text or framers' intent in those opinions, yet they have come to be treasured symbols of the Court's role in protecting minorities and individuals from the tyranny of the majority.

Together, abortion rulings like *Webster* and *Rust*—whether broad or narrow—instruct that no matter what the Court does in the abortion context, it is unlikely to avoid controversy and criticism. It is just the na-

ture of the debate. In 2000, Justice Scalia, dissenting in an abortion ruling, warned that the abortion controversy could consume the Court. "If only for the sake of its own preservation, the Court should return this matter to the people . . . and let them decide, state by state," about abortion restrictions. Scalia is not urging avoidance. He is exhorting the Court to action, seeking to overrule *Casey* and *Roe* and take away all federal constitutional protection for abortions. For him, this is a federalism issue, a moral choice to be left to each state rather than a matter of individual liberty. Others, supportive of choice, see the need for the Court's uniform, certain protection of the right as a matter of federal constitutional law, whether grounded in privacy or equality.

The choice facing the Court about its role and the Constitution's role in the abortion debate should not be guided by fears about the Court's preservation or political viability. The justices have life tenure precisely to protect them from such political concerns and allow them, once they make it through the politicized nomination and confirmation processes, to exercise their independent judgment. The justices need to exert their voices on the merits rather than use avoidance techniques so extensively to evade challenges to abortion rights. Admittedly, the Court cannot completely abandon its avoidance proclivities. Sometimes justices need flexibility among their large group to attain majorities, so they issue a narrower ruling or suppress one claim, awaiting the next opportunity. Federalism and separation of powers concerns are more powerful reasons for avoidance, but the Court should debate those structural constitutional issues explicitly rather than using procedural tactics to accomplish subtle changes in the content of federalism law or the balance of power among the national branches. If the Court views reproductive autonomy for women solely as a matter for state and local control, it should so rule. If not, such structural concerns or the Court's fears of foreclosure should not diminish the importance of the Court's constitutional role in securing civil liberties, including abortion rights, against swings in majority opinion. The choice battle—as well as other gender equity issues—should be fought with clear guidance from the Court and robust arguments about the proper role of the Court and the Constitution, instead of hinging the rights of women on the votes of a few swing justices who are cautiously trying to avoid significant decisions. The Court should not tether the development of gender equality law to popular opinion.

7

The Court's Aggressive Expansion of States' Rights

Most of this book deals with the Supreme Court's purported passivity: its multiple avoidance techniques deployed in many areas of constitutional law. But the Court was also aggressive and active in some areas from the 1970s through 1990s, issuing broad new rules and significantly revising constitutional doctrines. This is most obvious in the critical area of federalism. Federalism concerns the balance of power between the states as independent sovereigns and the national government. By the 1990s, the Court had become extremely direct and adamant about transferring power from federal branches to the states in interpreting the Tenth, Eleventh, and Fourteenth Amendments. As Justice Kennedy summarized: "Although the Constitution grants broad powers to Congress, our federalism requires that Congress treat the states in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation."[1]

Despite the declining number of cases in which the Court accepted certiorari during the 1990s, many of its constitutional rulings involved federalism issues. Moreover, these rulings are among its most important because of their breadth, marked revision of existing constitutional doctrine, and substantial impact on numerous state and federal government actors. For example, in June 1999, the Court issued a trio of significant states' rights rulings, with the justices splitting 5-4. Justices Kennedy, O'Connor, Scalia, Thomas, and Chief Justice Rehnquist have formed a solid states' rights majority. In a dramatic end to the Court's term, three dissenters read their opinions from the bench, highlighting the majority's departure from established federalism doctrines.

To demonstrate the magnitude of the federalism changes, this chapter first summarizes the post–New Deal state of federalism law. Since the mid-1930s, the Court generally has shown great deference to the other

federal branches, believing that the states could protect their interests sufficiently through representation in Congress. The chapter then briefly chronicles the Court's early indications that it would alter the federalism balance. Those 1970s and 1980s cases led to the 1990s reformulation, with a sweeping vision of state power significantly limiting the federal government. The Court asserted its role as the ultimate interpreter of the Constitution and limited Congress's ability to regulate commerce and to commandeer state officers to carry out federal law. It imposed higher hurdles for Congress in enacting civil rights legislation under the Fourteenth Amendment. Finally, it barred lawsuits against states in federal and state courts under a broad theory of sovereign immunity not obvious on the face of the Eleventh Amendment. The chapter conveys the competing constitutional concerns by examining a few particularly important federalism rulings and portrays the human and political drama underlying these complex cases and tedious opinions.

Unlike its restraint in other areas, the Court did not avoid federalism issues from 1970 to 2000; it eagerly accepted federalism challenges and developed new constitutional law. This activism is not entirely problematic. It promises guidance for other constitutional actors as well as uniformity in federalism law, increasing the likelihood of consistent application nationwide. But several criticisms are worth noting. First, I believe that the Court's constitutional interpretation overestimates the extent of intrusion on the states by the national government. Most of the laws struck down under the Court's broad federalism rulings were attempts to remedy national problems rather than schemes to purloin or micromanage state resources. States were sometimes supportive of the national laws. As detailed below, the Court has severely constrained the problem-solving ability of the executive and legislative branches and deprived women and other groups from congressionally crafted civil rights remedies.

The second criticism concerns the role of the Supreme Court and lower federal courts. The Court has chosen to embrace a robust interpretive role for federal courts on federalism issues, in stark contrast to its avoidance and insistence on a limited role for federal courts on other constitutional claims. True, with both approaches the Court is consistently transferring power away from the federal government. It usually accomplishes this by invoking a limited vision for the federal courts, including the Supreme Court. Yet, in federalism cases, rather than using a procedural approach relying heavily on avoidance, a narrow majority of

the Court transfers power away from the federal government directly by altering the substantive content of constitutional law. The 1990s federalism rulings also contain a striking procedural twist: the Court claims ultimate authority to interpret the Constitution, ignoring its usual concerns about foreclosing debate and respecting the other national branches. It is ironic that the Court is more willing to take on a vigorous, countermajoritarian role when it protects the states. States are represented in the federal government through the majoritarian political processes, employ lobbyists, and can assert their shared interests in limiting liability. Protecting the states from monetary liability certainly helps taxpayers, but as the following cases show, this is often at the expense of individuals and companies relying on federal rights, who are in greater need of aggressive judicial protection than the states.

Modern Federalism Doctrine

The Court's Commerce Clause cases are a major federalism arena. The Commerce Clause grants Congress the power "to regulate Commerce . . . among the several states." During the *Lochner* era, in the early 1900s, the Court resisted progressive and New Deal programs from the states and federal government relying, in part, on a narrow construction of the Commerce Clause power. This era ended in 1937, when the Court yielded to overwhelming criticism for its active constitutional interpretation favoring business interests and threats from President Franklin Delano Roosevelt to pack the Court. From the mid-1930s to the mid-1990s, the Court was extremely deferential to Congress and the executive in reviewing legislation passed pursuant to the Commerce Clause, making it the primary ground on which Congress supported legislation. The Court only required that the laws have a rational basis, and it expressly noted that Congress was due substantial deference in economic regulation. The clause became a powerful tool for expanding federal regulation, including major civil rights legislation during the 1960s. Moreover, the post–New Deal Court termed the Tenth Amendment, which reserves to the states and the people all powers not delegated to the federal government, a "truism." It became an insignificant limit on congressional action and federal government activities. After the 1930s' "switch in time that saved nine," the Court did not strike down any federal legislation as exceeding the Commerce authority until 1995.

Federalism issues also arise frequently under the Eleventh Amendment, guaranteeing states immunity from some lawsuits. It provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens of Subjects of any Foreign State." Based on the common-law principle that "the King can do no wrong," immunity protects fiscal resources and supports sovereignty. The Court has invoked divergent interpretations of this amendment, sometimes tracking the text to preclude only suits by out-of-staters and foreigners against a state. At other times, the Court offered broader protection, precluding suits against a state by its own citizens. But it seemed clear that a safety valve always remained for litigants who had federal claims against the states. Even if they could not sue in federal court, the Court often indicated that litigants had other avenues, such as suing in state court to enforce their federal rights. In the 1990s, however, the Court markedly altered Eleventh Amendment interpretation, holding that Congress cannot use its Commerce Clause authority to empower individuals to sue states in either state or federal court. It has also undermined the *Ex parte Young* exception, which allowed some types of suits against state officers for unconstitutional action.[2]

Finally, Congress has authority to create appropriate legislation to enforce Fourteenth Amendment guarantees of Due Process and Equal Protection. Passed after the Civil War, the three Reconstruction amendments were aimed at increasing national power and protecting individuals against government abuses. Shortly after their passage, the Court construed the Fourteenth Amendment to protect individuals against only governmental, not private, misconduct. The Court upheld civil rights laws reaching private conduct during the 1960s on Commerce Clause grounds, without ruling on the extent of Congress's Fourteenth Amendment authority. In 1966, the Court suggested that Congress may interpret the Constitution independently, providing greater protections for civil rights than the Court's rulings had, when it legislates pursuant to the Fourteenth Amendment. Under the post–New Deal doctrine, the ability of Congress to regulate private conduct and the scope of its power to provide remedies for Fourteenth Amendment violations are less defined than its Commerce authority.[3] In the 1990s, however, the Court has posited itself as ultimate interpreter and has raised the requirements for both congressional redress of Fourteenth Amendment violations and judicial scrutiny of laws enacted under the Commerce Clause.

Early Indications of Federalism Concerns

The 1990s federalism rulings should not be a complete shock, although their breadth and degree of deference to the states are greater than some anticipated. The Court has been moving to afford more protection for state interests since the 1970s, albeit in less direct ways, sometimes employing avoidance techniques. For example, it created several abstention doctrines grounded in federalism concerns, used canons to construe statutes so as to avoid potential federalism problems with federal regulation of state functions, and required Congress to issue a clear statement before imposing certain obligations on states. This section will explore just a few examples of this trend.

In 1971, the Court fashioned the most important abstention doctrine, requiring federal courts to refrain from hearing federal claims—including constitutional issues—when a state court criminal proceeding on the issues is pending. California prosecuted a socialist leafletter, John Harris, Jr., under its Criminal Syndicalism Act. Although the Supreme Court had deemed the act constitutional in 1927, that ruling was called into question by the Court's 1969 decision striking down a similar Ohio law. Harris sued in federal court to stop his prosecution, on the theory that mere advocacy of illegal activity was protected under the Court's 1969 decision. The Supreme Court refused to address Harris's First Amendment challenge and found that the lower federal court should have abstained. Justice Hugo Black relied on "Our Federalism," which he described as requiring a proper respect for the state courts without blind deference to states' rights. Because Harris could raise his constitutional objection in the California prosecution, the federal courts should not interfere. Earlier doctrine, arising from dubious state prosecutions of civil rights leaders, allowed federal judges more discretion to address constitutional claims and provide relief to litigants in a more neutral forum. But the 1971 decision equated state and lower federal courts for addressing federal constitutional issues and essentially instructed the federal courts to trust state courts to do the right thing, to interpret the Constitution as the Court would. Thus, through a technical doctrine of jurisdiction, the Court fashioned a more limited role for federal courts based on federalism concerns.[4]

In 1976, the Court ruled in *National League of Cities v. Usery* that Congress could not apply the Fair Labor Standards Act to state employees.[5] Justice Rehnquist wrote for the Court that the Tenth Amendment limits Congress's Article I powers. Congress cannot impair states' integrity or

their ability to function effectively in a federal system. In *Usery,* the Court reversed a 1968 precedent upholding application of the act to some state employees. This appeared to usher in a new era of state sovereignty and reinvigorate the Tenth Amendment.[6] Justice Blackmun provided the fifth vote in *Usery,* however, and he described it as adopting a balancing approach that reserved federal powers where federal interests are demonstrably greater, citing environmental protection as one example. Nine years later, he authored *Garcia v. San Antonio Metropolitan Transit Authority*, in which five justices overruled *Usery*, finding its standard unsound and unworkable and reasoning that states could protect their interests sufficiently in the national political process. The dissenters decried the fact that the Court left no role for judicial review of the actions of federal political officials who subject states to liability, citing the lawsaying function enunciated in *Marbury v. Madison*. Dissenting, Rehnquist predicted that the sovereignty principle would "in time again command the support of a majority of this Court."[7]

Meanwhile, the Court continued to develop federalism principles in the Commerce Clause area at the subconstitutional level, relying on the avoidance canon. Several state judges sued the governor of Missouri in 1991, alleging that the state's mandatory retirement scheme for judges violated the Age Discrimination in Employment Act ("ADEA") and Equal Protection. The Court did not reach the constitutional question because it did not construe the ADEA to cover state judicial employees. Although the ADEA generally bars mandatory retirement, it contains some exclusions. The Court viewed coverage of judges as undermining sovereignty. It thus placed a new burden on Congress, requiring a clear statement from Congress before authorizing state judges to sue states for age discrimination. The Court was wary of Congress intruding on sovereign state governmental functions like employment conditions for state judges. This new hurdle is consistent with the traditional canon of construing statutes to avoid constitutional problems—here, a federalism concern. Although it is only a statutory ruling, *Gregory v. Ashcroft* demonstrates the way the Court uses such canons to develop constitutional law. Justice O'Connor sketched the outlines of a new federalism theory, emphasizing for the Court the values promoted by a system of joint sovereigns. She wanted the federalism balance to assure a decentralized government "more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen involvement in the democratic process; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the

states in competition for a mobile citizenry."[8] Most importantly, she concluded, it prevents "tyranny" by the national government. The Court relied on *Gregory* later as it construed the Constitution more overtly to transfer power from the federal government to states.

Similarly, in interpreting the Eleventh Amendment during the 1970s and 1980s, the Court used both clear statement rules and direct constitutional rulings to expand on protections afforded states. In a series of cases, the Court fashioned a rule requiring a clear statement from Congress before it sought to abrogate state sovereign immunity pursuant to the Commerce Clause. Congress had to clearly express its intent to let litigants sue states.[9] Additionally, in 1973, the Court construed the Eleventh Amendment to bar claims for past money damages because of the burden they posed for state treasuries. The Court limited litigants to claims for prospective injunctive relief against state officers under the long-standing *Ex parte Young* doctrine.[10]

The Court continued this trend in 1984, ruling in *Pennhurst State School and Hospital v. Halderman* that the Eleventh Amendment bars relief against state officers based on *state law claims* in federal court.[11] Thus, litigants with both federal and state claims against state officers must sue in state court or bifurcate the claims, taking only the federal claims to federal court. The Court emphasized the greater affront to states if federal courts decided state law claims. In *Pennhurst*, residents at a Pennsylvania home for the developmentally disabled sued state officials under the *Ex parte Young* doctrine, pursuing state and federal relief in federal court. The trial judge found that the institution's failure to meet minimum standards for staffing, hygiene, nutrition, and rehabilitative care violated state and federal statutory and constitutional provisions. The appellate court affirmed, but avoided the constitutional question and relied solely on a federal statute. The Supreme Court reversed on statutory grounds and remanded for consideration of other grounds. On remand, the appellate court held that plaintiffs were entitled to relief based on state law grounds proven at trial. The state again appealed to the Court and, after ten years of litigation, the Court again reversed to rule against the plaintiffs by crafting a new exception to *Ex parte Young* it deemed mandated by the Eleventh Amendment.

The protracted *Pennhurst* litigation highlights the dual impact of the Court's revised federalism. As the states' freedom from civil liability and congressional oversight expands, the federal protection afforded some of the most vulnerable individuals contracts. The Pennhurst residents won

their case on the facts, showing that the standard twenty-one-year stay at Pennhurst could result in over 650 days in restraining devices, hazardous sanitary conditions, the premature loss of one's adult teeth, and the deterioration of overall physical and mental health. But the Pennhurst residents lost their case to changes in the law designed to protect an "unconsenting state" from the infringement of a lawsuit in federal court by its own citizens.

Thus, from the 1970s to the early 1990s, the Court began to impose federalism as a serious constraint on the national government, sometimes through direct constitutional interpretation and sometimes by employing avoidance techniques like abstention, canons of statutory construction, and clear statement rules. These signals paved the way for the Court's numerous invalidations of congressional laws during the 1990s as it significantly revised its interpretation of the Commerce Clause as well as the Tenth, Eleventh, and Fourteenth Amendments.

The Shifting Commerce Clause Power

In 1995, the Court narrowly construed Congress's power under the Commerce Clause when it invalidated an act of Congress as exceeding Commerce Clause authority for the first time in nearly sixty years. In *United States v. Lopez*, the Court struck down the Gun-Free School Zones Act, which criminalized possession of a gun within 1,000 feet of a school.[12] Five justices found that although Congress can regulate the channels and instrumentalities of interstate commerce, plus activities with a substantial nexus to interstate commerce, mere possession of a gun near a school was not an economic act sufficiently related to interstate commerce. Justices Kennedy and O'Connor concurred, emphasizing the lack of factual findings to support the legislation. They also cited federalism concerns: the new federal crime duplicated laws in most states and affected education and crime control, two areas in which states had traditionally exercised substantial authority. The ruling's more literal test for finding a "substantial relation to interstate commerce," coupled with its more rigorous inspection of congressional findings, called into question numerous federal laws regulating the sale of drugs, environmental protection, and civil rights laws. The ruling gave no comprehensive account of the new federalism balance, and some optimistically tried to limit the decision to its facts. When viewed with other important 1990s federalism

decisions, however, *Lopez* is clearly a serious limit on existing and future Commerce Clause enactments. Had such limitations been in place during the 1960s, Congress may have been severely limited in combating segregation in restaurants, inns, and motels.

In 1992, the Court relied on the Tenth Amendment to invalidate a portion of the Low-Level Radioactive Waste Policy Amendments Act in *New York v. United States*.[13] This 6-3 decision recognized some congressional authority to deal with the national problem of safe disposal of hazardous waste. But the Court struck down the "take title" provision because it impermissibly "commandeered" state officials into accepting ownership of the waste or regulating according to congressional direction. Other than the 1976 *Usery* decision, reversed by *Garcia* in 1986, this was the first time in fifty-five years that the Court had used the Tenth Amendment to invalidate a law.

Examined against the backdrop of the *Pennhurst* decision, *New York* raises questions regarding the ultimate outcome of the Court's newly strengthened federalism. Writing for the *New York* majority, Justice O'Connor insisted that "[t]he Constitution does not protect the sovereignty of the States for the benefit of the States or state governments. . . . To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals." Arguably, the individuals seeking relief in *Pennhurst* would not view O'Connor's construction of federalism doctrines as a tool for their protection, although other Pennsylvania taxpayers might. Further, the officials elected to represent the state of New York (including Senator Patrick Moynihan and state energy department personnel) consented to the enactment of the federal hazardous waste law at issue in *New York v. U.S.* The Court nevertheless moved to protect "unconsenting states" or state taxpayers from a legislative solution to a nearly intractable health hazard.

Five years after *New York,* by a 5-4 margin, the Court invalidated some portions of the Brady Bill, relying on federalism concerns evident in *Lopez*. In *Printz v. United States*, the Court found that requiring state officials to conduct handgun background checks and process paperwork until a national system became operative amounted to commandeering that violated the Tenth Amendment.[14] The majority in these cases emphasized the intrusion on state resources and decision making, reasoning that accountability would be lessened if federal officials dealt with national problems by creating protections or rights while leaving state offi-

cials to bear the burdens of implementation. The dissenters charged that the Court was returning to *Lochner*-era activism by improperly limiting the scope of congressional power.

The Violence Against Women Act Challenge

A few years later, the Court accepted an opportunity to explicate the contours of *Lopez* after the Fourth Circuit invalidated the Violence Against Women Act ("VAWA")[15] as exceeding Congress's powers under the Commerce Clause and Fourteenth Amendment. Enacted in 1994, VAWA provides more than $1.6 billion to states for law enforcement and prosecution of violent crimes against women, for increased security in public transportation and public parks, for rape prevention and education programs, for shelters, and for a national domestic violence hotline. It revises the Federal Rules of Evidence to limit use of a victim's past sexual behavior in sexual offense prosecutions. It provides increased penalties for repeat offenders and makes some violent acts against women federal crimes (e.g., interstate travel to commit domestic violence or violate a restraining order). The only portion of VAWA challenged in *United States v. Morrison* was its civil rights remedy, which allows a victim of certain serious gender-motivated violent crimes to sue the offender for compensatory and punitive damages, injunctive, and other appropriate relief.

A lengthy version of the *Morrison* facts follows, based primarily on the plaintiff's allegations because the case had not progressed beyond the pleading stage when it reached the Court.[16] The details illustrate the problem that Congress attempted to redress through VAWA—that some institutions, including state law enforcement and judicial systems, do not take violent, gender-motivated crimes against women seriously. Congress perceived gender violence as a discrimination problem like race discrimination, needing a national solution. Many states cooperated with the federal effort, which built on the work of state gender-bias task forces. The civil rights remedy in VAWA was a compromise designed to supplement, but not replace, state remedies for gender violence. The Court's simplistic focus on separate spheres of state and federal authority ignores the need for a national remedy and the complex interaction of federal and state governments in the entire VAWA legislative package.

Factual Background

On September 21, 1994, Virginia Tech freshman Christy Brzonkala and her friend, Hope Handley, met fellow students Antonio Morrison and James Crawford in the men's dorm room. Brzonkala claims that fifteen minutes later, after Handley and Crawford left the room, Morrison twice asked her to have sex with him. Both times she refused. When she got up to leave the room, Morrison—a 222-pound football player—grabbed her and threw her down on the bed face up. He turned off the lights, pinned her down, and undressed her. He then proceeded to rape her without a condom. When Morrison finished, she says, James Crawford, another football player, came in the room and raped her without a condom. Then Morrison raped her a second time. Before he left, Morrison warned, "You better not have any fucking diseases."

In reaction to these rapes, Brzonkala became depressed, avoided contact with other students, changed her appearance, cut off her hair, dressed sloppily, and stopped attending classes. A few weeks after the incident she attempted suicide. She did not report the incident for four months because she was embarrassed, afraid, and ashamed. It took her a month to tell her roommate that she had been raped, and even then, she was unable to go into the details. Her resident adviser sent her to the campus Women's Center, where she was treated and antidepressants were prescribed. Brzonkala chose not to file criminal charges because she had not preserved any physical evidence and she did not think the police would believe her given her failure to report the assault immediately. Brzonkala received a retroactive withdrawal from Virginia Tech for the 1994–95 academic year.

Brzonkala filed a sexual assault complaint against both men in May 1995, triggering Virginia Tech's arduous and lengthy disciplinary process. After she filed the complaint, Brzonkala learned that another male student athlete had told Crawford that he should have "killed the bitch." Morrison allegedly announced in the dormitory's dining room that he "liked to get girls drunk and fuck the shit out of them." Virginia Tech did not report the alleged rape to the police.

At the campus judicial hearing, Morrison and Crawford disputed Brzonkala's rape allegations. Morrison admitted to having intercourse with Brzonkala, but maintained that it was consensual and that he used a condom. Crawford testified that Brzonkala was "really drunk." She said that she had attended a party earlier, but was "sober, pretty much." Crawford

denied having any sexual contact with Brzonkala, and his roommate, Cornell Brown, provided him with an alibi. The hearing officers ruled that there was not enough evidence to take action against Crawford, but found Morrison guilty of sexual misconduct. He was suspended for two semesters.

Morrison appealed the suspension, claiming that he had been denied due process and that the suspension was unduly harsh and arbitrary. Contrary to Virginia Tech's written policy, Morrison obtained a second hearing. Because the university had adopted its definition of sexual misconduct in August 1994, just missing the deadline for publishing it in the student handbook, sexual misconduct was not part of school policy at the time of the incident. In July, a dean and another Virginia Tech official went to Brzonkala's home to advise her of the need for a second hearing. They assured her that they believed her story and that the hearing was a mere formality.

The procedural complications only increased. The second hearing lasted seven hours, and both Morrison and Brzonkala were represented by attorneys. Brzonkala's counsel was prohibited from mentioning James Crawford because his charges had been dismissed. The university, without informing Brzonkala in advance, limited the scope of the second hearing so that it only encompassed abusive conduct. The school used a procedural barrier: the policy in place at the time of the assault addressed only abusive conduct (not sexual misconduct). Abusive conduct is defined as "any use of words or acts against one's self or others that causes physical injury or that demeans, intimidates, threatens, or otherwise interferes with another person's rightful actions or comfort" and "includes, but is not limited to, verbal abuse and physical batteries."

Thus, because the sexual misconduct policy was not in place at the time of the alleged rapes, the committee based its finding of abuse solely on the offensive language used toward Brzonkala. Morrison was again suspended for two semesters, but for the lesser charge of abusive conduct. He was advised of the action in early August. Morrison appealed again. Three weeks before Virginia Tech's first football game, a provost overturned the sanction as excessive compared with other cases of abusive conduct. The suspension was reduced to probation until graduation and mandatory attendance at a one-hour educational session. Brzonkala was not notified of the change; she learned it from a newspaper article. Fearing for her safety, she canceled plans to return to school.

Brzonkala went public with her allegations in late 1995. She filed suit

in federal court against Virginia Tech and the two men under VAWA. She "wanted [Morrison] out of school so [she] could go there." She sought $8.3 million in damages (equivalent to Virginia Tech's payout from the Sugar Bowl), an injunction against Virginia Tech from prosecuting future sexual assault charges in the school's judicial system, and the reinstatement of the judicial board's initial finding that Morrison was guilty of sexual misconduct. The suit also sought damages from Crawford's roommate for allegedly fabricating Crawford's alibi.

Virginia Tech asked that the suit be dismissed, claiming that Brzonkala had changed her story from what she said at the disciplinary hearings, that the school was not liable for any actions of the two men, and that Brzonkala failed to assert any sexual discrimination by the school. The individual defendants raised the constitutional objections to VAWA. A federal trial judge found VAWA unconstitutional, dismissed Brzonkala's claims, and declined to hear her state law claims. A federal appellate panel reversed and remanded, finding VAWA supported by the Commerce Clause, citing the abundant findings evidencing that Congress ensured that the regulated activity substantially affected interstate commerce. After en banc review, however, the Fourth Circuit held that the civil remedy in VAWA exceeded Congress's powers under both the Commerce Clause and the Fourteenth Amendment.

More than three years after she first filed the federal lawsuit, Brzonkala appealed to the Supreme Court. No court had yet heard the merits of her civil case. The Center for Individual Rights represented the two football players at the Supreme Court. After her suit was publicized in 1996, Virginia's attorney general asked state police to investigate Brzonkala's charges of rape. A grand jury found a lack of probable cause to indict the two men. While *Morrison* was pending before the Court, Brzonkala settled with Virginia Tech, which agreed to pay $75,000 but did not admit liability, leaving only the claims against the football players.[17]

Congress Identifies a Problem

The congressional findings identifying the problem of violence against women and the remedy carefully chosen by Congress provide a helpful background to the constitutional arguments pursued on appeal. VAWA was the product of four years of extensive investigation and information gathering. Congress heard testimony from state attorneys general, federal

and state law enforcement officials, business and labor representatives, physicians, mental health professionals, legal scholars, and victims of gender-motivated violence. This testimony was supported by twenty state task force reports on gender bias.

Congress concluded that violent crimes against women present a serious national problem, and that current law enforcement procedures were inadequate and misguided. "Violent attacks by men now tops the list of dangers to an American woman's health. Every 15 seconds a woman is battered, and every 6 minutes a woman is raped in the United States." "An estimated 4 million American women are battered each year by their husbands or partners. Approximately 95 percent of all domestic violence victims are women." Crimes of violence motivated by gender have a "substantial adverse effect on interstate commerce" by deterring women from interstate travel, engaging in interstate employment, and transacting business in interstate commerce. Such crimes diminish national productivity, increase medical and other costs, and affect demand and supply for interstate products. Congress found existing state and federal laws inadequate to protect women from gender-motivated crimes in their homes and on the streets. Moreover, bias in the criminal justice system often deprives victims of Equal Protection when they complain about such crimes. Congress found that the states had not been able to respond to this national problem and deemed a federal civil rights remedy necessary to combat the obstruction of commerce and threat to equality.[18]

Congress detailed the effect of such violence on the workplace. "[A]lmost 50 percent [of rape victims] lose their jobs or are forced to quit in the aftermath of the crime." Even sexual assault victims who remain employed are less productive. Battered women show higher absenteeism, tardiness, poor job performance, interpersonal conflicts in the workplace, depression, stress, substance abuse, and medical claims. The economic cost of absenteeism due to domestic violence may reach $3 billion to $5 billion a year. Congress also concluded that fear of gender-motivated violence limits women's job choices, including the places and hours women work. Homicide is the leading cause of death on the job for women, but not for men. Violence and fear of assault also thwarts women's full participation in commerce, affecting when and whether women go to malls, parking lots, campuses, and so on.

Congress estimated the cost of medical care for victims of domestic violence at more than $100 million a year. Domestic violence shelter costs are also substantial. As much as half of the homelessness of women and

children is attributed to attempts to escape domestic abuse. Witnesses testified about fleeing states to escape batterers and about batterers dragging them across state lines to evade law enforcement detection. Testimony showed that, like Christy Brzonkala, many college students who are raped drop out of school or interrupt their schooling.

Moreover, Congress concluded that state and federal criminal laws do not adequately protect against violent crimes motivated by gender bias. Although many states have made progress in modernizing their laws, state civil remedies for victims of sexual assault and domestic violence still have significant flaws. Rape victims in many states "may be forced to expose their private lives and intimate conduct to win a damage award." In some cases, tort immunity doctrines or marital exemptions may bar suit. As of 1990, a majority of states either had a marital rape exemption or required aggravating factors before charging.

The congressional record contains horrific accounts of police, prosecutors, and judges ignoring or berating women who complain of sexual assault. For example, when one student reported a rape, campus security told her it was her fault because she opened the door and did not scream. A state official said to another rape victim, "Isn't it your fantasy to be raped by four guys!" In 90 percent of domestic homicide cases, police had been summoned to the home more than once, and in 50 percent of those cases, police had been called five or more times, Congress heard. Police refused to respond when a man forced his girlfriend's car off the road daily, eventually killing her. A judge scolded a pregnant battered wife for "wasting the court's time" when she requested a restraining order, and told her she "should act more like an adult." Her husband later beat, strangled, shot, and killed the woman.

Congress also learned that there are other, less formal barriers. Crimes against women have been viewed historically as private, family matters or blamed on sexual miscommunication. Traditionally, the place of women was in the home, not the workforce or college campus. Congress found that these attitudes carried over into operation of the justice system. Many state justice systems are rife with discrimination affecting prosecution and punishment of such crimes. This finding was based on twenty state task force reports on gender bias. Those reports noted "that crimes disproportionately affecting women are often treated less seriously than comparable crimes against men." Police, prosecutors, judges, and juries do not accord female sexual assault victims the same level of credibility as victims of other types of assault. Women face credibility questions, with

the justice system requiring additional corroboration of their testimony, such as evidence of physical injuries, polygraphs, prompt complaints, or proof of no prior contact with the defendant. Congress found that many women, like Christy Brzonkala, choose not to report violent sexual crimes to a criminal system that is likely to traumatize them again.

In addition to facing credibility hurdles, sexual assault victims are often blamed, at least in part, for the assaults. One committee noted the "widespread belief that people who are raped precipitate it in some way, whether it be by dress, having a drink in a bar, accepting a ride in a car or accepting a date." State prosecutors routinely refuse to prosecute date rape or treat domestic abuse as an egregious crime. "[A] rape survivor may have as little as a 5 percent chance of having her rapist convicted." "[A] rape case is more than twice as likely to be dismissed as a murder case and nearly 40 percent more likely to be dismissed than a robbery case." "[O]ver one-half of all convicted rapists serve . . . 1 year or less in prison." From initial intake through sentencing, said a Senate report, crimes against women are often treated differently and taken less seriously. Feminist scholars argue that major changes in the legal process, such as substituting a "reasonable woman" standard for the traditional male perspective, are important to combat such discrimination in rape and domestic violence cases or other areas where male and female perspectives are likely to vary significantly.[19]

Not surprisingly in light of the extensive, painful testimony, Congress surmised that gender-based violence is a significant problem affecting national commerce and a serious equality problem that demands a national response. Most state attorneys general agreed: "[T]he problem of violence against women is a national one, requiring federal attention, federal leadership, and federal funds." Forty-one signed a letter supporting the proposed act in 1993. When *Morrison* reached the Supreme Court, thirty-six states joined in filing a brief supporting VAWA. Only Alabama protested its validity.

The Civil Rights Remedy

VAWA provides a separate federal civil claim against perpetrators of violent crimes motivated by gender. Brzonkala and the solicitor general argued that the civil rights remedy leaves state criminal and tort laws undisturbed; it supplements them and assists state enforcement. Initial drafts of VAWA al-

lowed all victims of gender-based violence to seek civil rights redress, but sponsors narrowed the law to acts of violence substantial enough to be prosecuted as felonies and to cover only crimes committed because of "animus based on victim's gender." The latter limit poses questions for judicial decision makers and is a hurdle for victims of violence in civil cases. Any rape of a woman may be gender motivated to some extent, but when does a rape fit within VAWA's definition of violence motivated by gender animus? A particular rape could be motivated by several other factors, including personal animosity or political targeting. For example, rape is a tool used as a political weapon in some countries during war or conflict. Nevertheless, rape has not traditionally been an offense recognized for establishing political asylum on the grounds of political persecution in the United States because it is hard to establish that a particular rape was motivated by political reasons rather than gender animus. A Senate report provides some guidance for VAWA claims, indicating that, as with some other civil rights laws, violence motivated by gender animus can be proven by circumstantial evidence, such as the "language used by the perpetrator; the severity of the attack (including mutilation); the lack of provocation; a previous history of similar incidents; absence of any other apparent motive (battery without robbery, for example); [and] common sense." Lower courts have followed the legislature's lead, interpreting the "gender animus" provision broadly. Judges have ruled that most cases of sexual harassment or sexual assault will rise to the level of "gender animus." Others have examined dependents' patterns of conduct toward women and the particular circumstances of the offense.

Congress undertook other revisions on a bipartisan basis to minimize federalism concerns. In the early 1990s, Chief Justice Rehnquist, acting in his capacity as chair of the Federal Judicial Conference, opposed the civil remedy in VAWA, expressing concern about a new cause of action overburdening federal courts. The Conference of Chief Justices of the State Courts also opposed the remedy. State and federal judges warned that the act would "flood" federal courts and deprive state courts of traditional jurisdiction over domestic relations matters. (In fact, only about fifty cases relying on VAWA's civil rights remedy were reported in five years, and about 40 percent of those arose from violence in commercial or educational settings rather than from disputes among family members.) In part because Congress made compromises adding further jurisdictional limits to the pending legislation, the Federal Judicial Conference dropped its opposition. To address the judges' concerns, the final version of VAWA

incorporated a compromise that preserves state enforcement options and minimizes impact on federal caseloads by giving state courts concurrent jurisdiction over the civil remedy and clarifying that federal courts cannot exercise supplemental jurisdiction over related divorce, alimony, property, or custody claims. The civil remedy is also limited in that federal courts have no supplemental jurisdiction over related state law claims "seeking the establishment of a divorce, alimony, equitable distribution of marital property, or child custody decree." But the Chief Justice continued to oppose VAWA after its enactment, criticizing it as an intrusion on states' rights in a speech to the American Law Institute.[20] Soon, he had his chance to pronounce this condemnation as a constitutional principle when he authored *Morrison*.

The Court Strikes Down the VAWA Remedy

The VAWA dispute attracted extensive media attention. States, scholars, and interest groups filed amicus briefs with the Court in *Morrison*. Its potential import for federalism jurisprudence was huge. *Morrison* gave the Court a chance to apply *Lopez* to a law where Congress had made careful findings to support its conclusion that a sufficient connection existed between gender-motivated violence and the national economy. Would the law be saved because Congress did its homework, or does the *Lopez* test allow courts to invalidate federal laws readily when judges disagree with the nexus conclusion reached by Congress? For example, some federal judges distrusted the evidence Congress relied on to support VAWA, including the state task force reports cataloging extensive bias in state judicial systems, a movement which some federal judges had resisted.[21] *Morrison* was also important because it presented a discrimination aspect missing from *Lopez*. Would the Court be more deferential because the law was supported by Congress's Fourteenth Amendment power? Congress had arguably acted in an area of traditional federal concern by targeting the nationwide problem of violent discrimination against women.

In *Morrison*, by a 5-4 vote, the Court found VAWA's civil rights remedy unconstitutional under both the Commerce Clause and the Fourteenth Amendment. Chief Justice Rehnquist set the tone by relying on *Lopez*:

> [The] scope of the interstate commerce power must be considered in light of our dual system of government and may not be extended so as to

> embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would obliterate the distinction between what is national and what is local and create a completely centralized government.

The Court found that gender-motivated crimes are not economic activity and that VAWA lacks a jurisdictional element limiting the civil rights remedy to activity substantially impacting interstate commerce. Although Congress had supplied a record of the "serious impact" of gender-motivated violence on women and their families, the Court deemed Congress's causal link between violence and interstate commerce too attenuated. Finally, the Court found the congressional findings "substantially weakened" because they relied heavily on "costs of crime" and "national productivity," arguments the Court said it had rejected in *Lopez*. The Court projected that those arguments would enable Congress to regulate crime nationwide and interfere in traditional state law areas such as family matters.

The Court summarily rejected the Fourteenth Amendment authorization for VAWA, finding that Congress can regulate only the actions of states or state actors, but not those of individuals. This analysis narrowly construes congressional power and may make it difficult for Congress to outlaw racial discrimination by individuals in many settings. The federalism prescription emphasizing a nexus and posing a commercial/noncommercial distinction could undermine modern civil rights laws upheld on Commerce Clause grounds. Additionally, the Court found Congress's remedy unsubstantiated in part because it applies uniformly throughout the nation, while, according to the majority, problems of gender-motivated violence have not been shown to exist in all states. The Court thus appears to require a nearly impossible showing, examining every state, before Congress can establish a nationwide pattern of discrimination.

In dissent, Justice Souter charged that the only purpose of the distinction between economic and noneconomic activity was to provide the majority with a "constitutional warrant for its current conception of a federal relationship enforceable by this Court through limits on otherwise plenary commerce power." The dissenters did not rely on the Fourteenth Amendment. Instead, they challenged the Court's Commerce Clause analysis as a departure from precedent, supplanting rational basis review with a new review criterion. Despite the majority's disregard for Congress's findings, the information supplied a rational basis for the civil

rights remedy. Souter noted that the legislative record was greater than that compiled by Congress to support Title II of the Civil Rights Act of 1964. "Equally important, though, gender-based violence in the 1990's was shown to operate in a manner similar to racial discrimination in the 1960's in reducing the mobility of employees and their production and consumption of goods shipped in interstate commerce." Gender-based violence affects supply and demand, charged the dissenters, and the Court's economic/noneconomic distinction is doomed to fail, as similar attempts during the *Lochner* era to identify appropriate topics for Commerce regulation disappointed. The dissenters argued that the majority's requirement of "substantial effects" on interstate commerce conflicted with precedent and failed to allow Congress sufficient authority to address national economic problems.

Souter was also critical of the Court for reviving outworn ideas of "traditional state spheres." Congress has authority to override countervailing state interests when it acts within its delegated powers. The majority's approach contravenes "the Founders' considered judgment that politics, not judicial review, should mediate between state and national interests as the strength and legislative jurisdiction of the National Government inevitably increased through the expected growth of the national economy." In conclusion, the dissenters argued that the federalism concern was lessened because most states and their highest law enforcement officials viewed VAWA as welcome assistance rather than a significant intrusion.

The Court issued a sweeping opinion, not a measured step, in *Morrison*. It did not use the avoidance canon to construe VAWA narrowly and reach only gender-motivated crimes with a close connection to interstate commerce or to avoid the federalism concerns the Court identified. As explored in the chapter's conclusion, the Court selectively used its lawsaying power to revise constitutional law. In *Morrison,* the Court displayed its bias. In ruling that the civil rights remedy invaded the province of states, the Court carved out a distinction between national/commercial and local/family matters that mirrors the traditional distinction between the public and private spheres employed to constrain women. By insulating gender discrimination, making it a matter of only state law and not federal concern, the Court minimized the national nature of the problem identified by Congress. A national effort was needed to combat race discrimination in the 1960s, and gender violence now needs a national solution, along with state and local efforts.

The Court ignores a history of discrimination in which women were subject to discriminatory state laws about their legal status, their contract and property rights, and their ability to protect themselves from gender-based crimes through the state judicial systems on an equal footing with men. As the many states which supported VAWA's civil rights remedy argued, because that history is not so distant, the national antidiscrimination law was valid and necessary. Allowing Congress to take extraordinary measures in the face of serious social problems has become an accepted part of our federal system since the *Lochner* era. The Congress is well equipped to identify and assess the seriousness of such national problems. Courts retain a role of providing a constitutional check, but the courts can be deferential to legislative solutions when state interests are fairly well represented in Congress.

Morrison is not just harmful for women who are subject to gender-motivated violence or for individuals seeking to assert civil rights claims. The Court's broad, insistent attack on federal authority leaves many interests unprotected by federal law and subject to whatever protection each state chooses, or can afford, to provide. The Court's other rulings shoring up sovereign immunity for states and limiting Congress's Fourteenth Amendment power in the 1990s demonstrate this paucity of federal protection.

The Expansion of Sovereign Immunity

The Eleventh Amendment provides only that states cannot be sued in federal court by citizens of other states or foreign nations. The Court in the 1990s expanded the constitutional law of sovereign immunity for states far beyond the text of the amendment, reasoning that it reflects a broad, common-law principle of immunity necessary to preserve dual sovereignty. The amendment was ratified in the late eighteenth century after a Supreme Court decision allowed an out-of-stater to sue Georgia for money it owed.[22] The Georgia legislature authorized the death penalty for anyone attempting to execute process in the case! Other states also worried about exhausting their treasuries if all claimants could seek repayment of Revolutionary War debts. The states quickly ratified the Eleventh Amendment to protect their fiscal and sovereignty interests. The modern Court recognizes that even legitimate suits against states can deplete their treasuries while consuming the time and other valuable re-

sources of public officials. The new rulings leave individual creditors or others with claims against states (including state residents) little recourse in the courts unless states choose to waive immunity in a particular contract, lawsuit, or area of law. If a state does not relinquish its immunity, claimants must seek relief from legislative or executive officials.

Immunity cases often appear technical and dry, but the underlying political and legal fight has been lively for two hundred years. The Court has varied from narrow to broad interpretations of immunity and has crafted confusing exceptions to immunity, producing many pendulum swings in the scope of immunity. For example, the Marshall Court, asserting a broad vision of federal power early in the nineteenth century, allowed suits against state officers, as long as states were not parties of record.[23] Late that century, however, as it reacted to the aftermath of the Civil War and Reconstruction, the Court broadened the immunity principle to bar suits by residents (not just out-of-staters) against states.[24] In contrast, to protect a railroad from Minnesota's attempt to cap rates in the early twentieth century, the Court allowed entities and individuals to sue state officers in federal court when they violate federal rights. This *Ex parte Young* doctrine is based on a shaky distinction between the officers as individuals and the state authority authorizing their action, even if the state indemnifies the officer. Interpretation of the Eleventh Amendment has long been conflicting, and it dovetails with Court-created exceptions to immunity and the growth of federal civil rights laws to make a complicated thicket of law.[25]

In the 1990s, the Court achieved some cohesion in a series of 5-4 rulings that interpreted the Eleventh Amendment broadly and saw its text as only one indicator of the extensive immunity retained by states. In *Seminole Tribe of Florida v. Florida*, the Court determined that Congress cannot abrogate immunity—i.e., allow suits against states—when it legislates pursuant to the Indian Commerce Clause.[26] Congress has more authority when it acts pursuant to the Indian than Interstate Commerce Clause because states have no authority in the federal area of tribal relations, other than through representation in Congress.[27] The *Seminole* Court thwarted Congress' attempt to even the playing field by allowing tribes to sue state officials in federal court when officials failed to negotiate in good faith about gaming operations. In a broad ruling, *Seminole* made clear that Congress did not have power to abrogate immunity under either the Indian or Interstate Commerce Clauses. The Court overruled a fractured precedent, only seven years old, declaring that Congress

could use the Commerce power to abrogate immunity when state activity is sufficiently connected to interstate commerce. *Seminole* is consistent with the Court's other 1990s rulings under the Commerce Clause and Tenth Amendment, closely scrutinizing Congress's ability to legislate and not hesitating to invalidate measures it deems detrimental to the federalism balance.

Seminole is important as the Court's treatise on a broad theory of immunity, clearly not constrained by the text of the Eleventh Amendment, which the five conservative justices deem a convenient "shorthand" for the broader principle. This obvious departure from constitutional text even secures support from justices Scalia and Thomas, who regularly invoke a strict textualist approach in most areas of constitutional interpretation. *Seminole* is also critical because it undercuts the *Ex parte Young* doctrine. In the mid-1970s, the Court had limited the doctrine so that litigants could recover prospective injunctive relief, but not money damages, against states. In *Seminole* and a subsequent ruling involving another tribal challenge to a state, the Court delineated the tension between its broad immunity theory and *Ex parte Young* relief. The Court said in *Idaho v. Coeur d'Alene Tribe of Idaho* that when plaintiffs seek certain kinds of relief against states and their officers, federalism concerns are heightened.[28] To allow all actions for declaratory and injunctive relief against state officers under *Ex parte Young* would adhere to an "empty formalism" and undermine *Seminole*. The Court instructed federal courts to carefully examine whether relief is "warranted in the particular circumstances." Without overruling the venerable *Ex parte Young*, the Court sent a strong signal that lower federal courts should be cautious about granting relief against states.

Thus, states can challenge requested relief on vague federalism principles, and federal judges should measure its intrusiveness. For example, the Idaho case involved the claim of a tribe as an independent sovereign to ownership of some of the beds and water of beautiful Lake Coeur d'Alene and nearby rivers. This claim conflicted with Idaho's claim of ownership to the same property. The fight thus involved a dispute about designations made under federal law in establishing the tribe's reservation boundaries and Idaho's state law. Chief Justice Rehnquist and Justice Kennedy found the tribe's claim very intrusive because of its nature: it concerned sovereign state interests in land and water. Because a state court forum was available for the tribe's claim, federal courts need not rule on it, they asserted.

Justices O'Connor, Thomas, and Scalia concurred in the result but diverged in important respects. They thought the case presented unique facts analogous to a state action to quiet title to property, which state courts traditionally handle. They did not want to replace the Court's "straightforward" *Ex parte Young* doctrine "with a vague balancing test that purports to account for a 'broad' range of unspecified factors." They warned that the precedent did not require federal courts to evaluate the importance of the federal right claimed before allowing a suit against a state officer to proceed. O'Connor concluded: "We have frequently acknowledged the importance of having federal courts open to enforce and interpret federal rights. There is no need to call into question the importance of having federal courts interpret federal rights—particularly as a means of serving a federal interest in uniformity—to decide this case."

The dissenters argued that the relief sought was no more intrusive than most sought under *Ex parte Young*. Moreover, they charged that the federal courts were abdicating their proper role of hearing federal claims, citing the tribe's reliance on a federal executive order establishing the reservation boundaries, which allegedly conflicted with state law. Federal courts may be particularly appropriate settings for disputes about tribal sovereignty, as such sovereignty has often been undervalued and because Native Americans are a discreet and insular minority, discriminated against throughout our history.[29] Moreover, claims based on tribal sovereignty often run counter to states' political and economic interests, increasing the political pressure on state judges.

A majority of justices indicated in *Couer d'Alene* that a federal forum should be available at times for federal claims, *but all of them assumed that at least a state court forum was available* for this tribal-state dispute. At times, the Court has indicated that it may be less intrusive if state judicial employees decide claims against states. Arguably, preferencing a state forum shows respect by viewing state courts as equal with federal courts in the ability to hear such claims and by allowing the states to regulate themselves through their own judges. But such a scheme may ignore political reality by asking state judges, who are part of an institution dependent on state funding and who do not have life tenure, to rule against states. But as long as state courts remain available, the blow the Court dealt Congress in *Seminole* is lessened. Congress can still provide federal rights against states under its Article I powers, but litigants must take those claims to state court rather than federal court for federalism reasons.

Shortly after *Seminole,* however, the hope that an alternative court

forum in state courts for plaintiffs suing states was constitutionally mandated evaporated. In 1999, the Court again expanded sovereign immunity and refused to allow state employees to sue to force state compliance with federal labor law standards in *either state or federal court*. In *Alden v. Maine,* sixty probation officers sued under the Fair Labor Standards Act ("FLSA"), claiming that Maine owed them $440,000 in back overtime pay.[30] When their suit was first thrown out of federal court in light of *Seminole,* they refiled in state court. The Maine courts and the Supreme Court then found that the doctrine of sovereign immunity likewise barred the suit from state court. The Court relied on the Tenth Amendment (as the Eleventh only refers to the federal judicial power) and the state sovereignty principle inherent in our federal design. Based on a historical analysis, it found that the framers initially intended to preserve extensive immunity for states and that this was not altered by subsequent national legislative or judicial action or by the Eleventh Amendment. The Court reasoned that because the national government retains immunity, the states must, too. Finally, the Court noted that people with complaints about state activity can still sue municipalities and state officers, if not the states themselves. This safety valve may be illusory, however, in light of the Court's recent undermining of *Ex parte Young* and because such relief conflicts with the broad immunity theory.

Alden is an extremely significant ruling. Its reasoning calls into question not just FLSA, but many other congressional laws in the environmental, business, and civil rights areas enacted pursuant to Article I. It leaves the Maine employees and five million other state employees across the country with no forum to sue when states violate their federal rights. And the reasoning of *Alden* extends to all potential plaintiffs, whether they are public employees or private individuals and companies. Unless states waive immunity, claimants can only seek redress from the legislative and executive branches of state government. The majority noted that federal agencies can sue states when they violate federal law, but the resources of these agencies are so limited that the dissenters termed this idea "not much more than whimsy." The majority maintained that states must still obey federal law, but the dissenters distrusted the "hope of voluntary compliance." They pointed out that although Maine had reformed its pay practices during the lawsuits so that their compliance with FSLA could not be questioned, Maine had still refused the employees their back pay.

In many of the sovereign immunity cases of the 1990s, with 5-4 splits, the dissenters have issued long and eloquent opinions refuting the major-

ity's broad immunity theory. They attacked the Court's federalism balance, arguing that the states can protect their interest sufficiently in Congress and lamenting that the sovereign immunity question has been "driven by the great and recurrent question of state debt." They argued that Congress, and not the states, has sovereignty with respect to national problems, as established by the Tenth Amendment cases of the 1970s and 1980s, when the Court quickly reversed itself on how to interpret the Tenth Amendment. As noted earlier, the *Usery* Court held that Congress could not apply the Fair Labor Standards Act to state employees because the Tenth Amendment limits Congress's Article I powers so that Congress cannot impair states' integrity or their ability to function effectively in a federal system. In *Usery,* the Court reversed a precedent upholding application of the act to some state employees. This resuscitation of the Tenth Amendment soon faltered. Within a decade, the Court overruled *Usery* in *Garcia,* finding the standard unsound and unworkable and reasoning that states could protect their interests sufficiently in the national political process. The *Alden* majority neglected to address *Usery* and *Garcia*.

The dissenters viewed the *Alden* majority's common-law views about sovereignty as erroneous and its natural law ideas as dangerous, accusing the Court of activism reminiscent of *Lochner*. They disputed the majority's historical understanding, providing detailed accounts indicating that the framers' intent was at least ambiguous, if not directly opposed, to the majority's version. If the majority were right, the Eleventh Amendment would have been unnecessary, they argued. While the dissenters clearly sowed seeds for challenging the majority's vision in future cases, they failed to strengthen their own federalism vision by linking it to modern needs and political conditions. As does the majority, they root it extensively in historical analysis, which is often subject to frustrating ambiguity because the framers often chose generalities rather than try to resolve all competing interests. In the immunity field, many justices neglect the intrepetivism they use in other areas of constitutional law when they interpret the Constitution so as to be meaningful in light of contemporary needs and values.

Alden is the most significant case in a long line of revolutionary immunity rulings during the 1990s in which the Court neglected to heed the rule of measured steps and issue a narrow ruling, such as one confined to the facts of a given dispute. In several of these rulings, the dissenters question whether the majority's broad, constitutional approach was necessary. For example, although *Seminole* involved only the Indian

Commerce Clause, the Court made clear that Congress lacked power to abrogate sovereign immunity under the Interstate Commerce Clause. Because Congress's power is plenary under the Indian Clause, this conclusion is logical and waiting for a Commerce Clause challenge seems unnecessary. In *Couer d'Alene,* dissenters argued that the Court reached Eleventh Amendment issues when it could have confined itself to federal common law issues like *Ex parte Young*. Although immunity has historically involved a messy mix of constitutional and federal common law, the majority would likely respond that it must view the entire area as part of constitutional law to be true to its federalism vision of extremely broad state immunity extending beyond the text of the Eleventh Amendment. Although the extent of claimants' ability to pursue exceptions to immunity like *Ex parte Young* relief remains unclear at the close of the 1990s, the Court's vision of federalism definitely incorporates great deference to states' claims of intrusion and significant hesitancy to assure access to federal court, whether the suit is against the state or its officers. This deference is at the expense of the authors of federal laws and those who seek to vindicate federal rights in federal or state courts—be they tribes, vendors, or state employees.

Limiting Congress's Fourteenth Amendment Power: The Court as "Ultimate Interpreter"

Finally, in its rulings construing the Fourteenth Amendment, the Court in the 1990s limited congressional power to provide remedies for discrimination and property deprivation. In these broad decisions, the Court boldly proclaimed an expansive vision of its power as the "ultimate interpreter" of the Constitution. It required Congress to conform to the Court's conception of constitutional rights when it relies on its textual authority to enforce the amendment's protections against the states through appropriate legislation. Although the Fourteenth Amendment reflects the shift in the federalism balance after the Civil War, the Court used a generalized theory of state sovereignty in these rulings. It did not distinguish markedly between the deference due Congress when it legislates pursuant to its Fourteenth Amendment power rather than its Article I powers. The heightened barriers to congressional legislation developed by the Court in the late 1990s are not merely procedural. They bear significant substantive import, which the Court has not justified with a

careful federalism balance reflecting post–Civil War history and current concerns.

The Court invalidated the Religious Freedom Restoration Act ("RFRA") in *Boerne*.[31] Congress had passed RFRA in 1993, in response to *Smith,* a Court decision revising the Free Exercise standard to be more deferential to government. In *Smith,* the Court ruled that a facially neutral Oregon criminal statute outlawing peyote use, which incidentally inhibited a Native American religious practice, was not subject to stringent review.[32] Invoking a standard from the Court's earlier precedents, Congress attempted to protect religious practices to a greater extent in RFRA. In 1997, the *Boerne* Court found that RFRA exceeded Congress's Fourteenth Amendment power because it was designed to change the content of constitutional law prescribed by the Court, and it was not carefully circumscribed to remedy a problematic state law infringing on religious practices. Establishing a new hurdle, the Court required Congress to identify a civil rights violation by states and then select a "proportional" and "congruent" remedy when it uses its Fourteenth Amendment power.

Although the justices in *Boerne* remained closely divided over the wisdom of *Smith*'s Free Exercise standard, they unanimously repudiated Congress's rejection of the *Smith* decision through RFRA. They invoked a broad version of judicial review, proclaiming that the Court has ultimate authority—not just co-equal authority with other branches—to construe the Constitution.

> Our national experience teaches that the Constitution is preserved best when each part of the government respects both the Constitution and the proper actions and determinations of the other branches. When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is . . . . [I]t is this Court's precedent, not RFRA, which must control.

Boerne involved the fairly unusual circumstance of Congress directly repudiating a constitutional ruling of the Court, and separation of powers concerns fueled the Court's adamant claim. Arguably, its unique posture might mute the significance of *Boerne*'s Fourteenth Amendment restriction. In subsequent rulings, however, the Court made clear that it was serious about the new limit. As it enlarged the scope of the restriction, the Court threatened the viability of many federal civil rights laws.

In June 1999, on the same day that it issued *Alden,* the Court invalidated federal trademark and patent laws to the extent they authorized

patent owners to sue states. These rulings were consistent with *Seminole* in their rejection of Congress's ability to abrogate immunity pursuant to its Article I powers. But the rulings also addressed Congress's Fourteenth Amendment power. First, the Court protected state universities and other state agencies from claims of infringement and unfair competition. The Court read the Fourteenth Amendment narrowly to exclude false advertising provisions designed to protect patent owners from the type of property safeguarded by Due Process.[33] In a related case, the Court followed *Boerne* in emphasizing that Congress must choose a proportional remedy responsive to the unconstitutional behavior. But the Court also expanded *Boerne,* faulting Congress for not engaging in specific, extensive fact finding to justify the legislation. Prior to enacting federal remedies, Congress must identify a history of widespread and persisting deprivation of constitutional rights by states and then determine whether states are providing adequate remedies. The Court concluded that Congress had not done enough homework before allowing patent owners to sue states.[34] As in *Lopez,* the Court held out the possibility that Congress might deserve more deference if it only did its homework properly. Again, the hope appears elusive, as the Court demonstrated in *Morrison* by striking down VAWA's carefully researched civil rights remedy.

The Court issued a Fourteenth Amendment decision with enormous ramifications shortly after *Alden. Kimel v. Florida Board of Regents* seemingly raised the bar even higher to require extensive fact finding and comprehensive legislative history before Congress supplies civil rights remedies against the states.[35] The Court requires evidence of a "significant pattern of constitutional discrimination," going beyond "anecdotal evidence" or "isolated sentences clipped from floor debates and legislative reports." Additionally, the Court insisted in *Kimel,* as in *Boerne,* that Congress's vision of the Constitution must conform to its own because it retains ultimate interpretive authority. Thus, instead of the Court establishing the constitutional minimum—the equality floor—and Congress providing more relief if it deems more appropriate, the Court's rulings establish the maximum—the ceiling—of permissible federal equality protection. This is a sweeping aggrandizement of the Court's power at the expense of Congress and the executive branch that will affect many areas of law. If unchecked, this proclamation of the Court's ultimate authority will minimize the role of all other constitutional interpreters. Of course, this undercuts the deference rationale for avoidance relied on frequently

by some supporters who want to encourage a dialogue in which the Court and other constitutional interpreters interact on more equal terms.

Kimel started out as three distinct cases in which thirty-six professors and librarians sued Florida public universities for age discrimination under the Age Discrimination in Employment Act ("ADEA"), seeking money damages and other relief. Despite plaintiffs' experience, their salaries remained low compared to new hires. Two business professors, who were among the longest-serving but lowest paid faculty members, filed similar claims against an Alabama university. And a Florida corrections official who had been passed over for promotion while younger, less-qualified employees were promoted also sued. In a fractured opinion, the Eleventh Circuit consolidated the ADEA claims and ruled against the plaintiffs. Of the three-judge panel, two found the suits problematic, concurring in part and dissenting in part. One judge found that Congress had not clearly stated its intent to abrogate sovereign immunity. Another judge ruled that because the ADEA was not a valid exercise of Congress's Fourteenth Amendment power, sovereign immunity barred ADEA claims against states.

By the same 5-4 lineup in other recent federalism cases, the Supreme Court in *Kimel* found that Congress exceeded its powers. All five conservative justices agreed that, per *Seminole,* Congress could not authorize the ADEA under the Commerce Clause. Despite their finding that Congress had not made a sufficiently clear statement of its intent to abrogate immunity under the Fourteenth Amendment, justices Thomas and Kennedy joined the others in limiting the scope of congressional power to abrogate sovereign immunity. The Court recognized Congress's Fourteenth Amendment power to remedy state violations of rights by prohibiting a "somewhat broader swath of conduct" than that forbidden by the text of the amendment and enacting reasonable prophylactic measures for intractable problems. But the Court reiterated the *Boerne* congruence and proportionality test, ruling that the remedies provided by Congress must square with the Court's vision of Equal Protection because it remains the ultimate interpreter of the amendment.

Reviewing its age discrimination precedent, the Court noted it has held that, unlike racial minorities and women, older persons are not a discreet and insular minority who have been historically subject to discrimination. Thus, the Court reviews laws discriminating against older persons under the lax rational basis test. Under this minimal standard,

the Court has allowed governments to force law enforcement officers to retire at fifty, Foreign Service officers to retire at sixty, and state judges to retire at seventy. Rationality review merely requires states to reasonably pair age classifications with legitimate interests. Age can serve as a proxy for other qualities or characteristics. Even though age may be an inaccurate proxy for a given individual, that is not a constitutional violation, the Court concluded. Thus, because the ADEA rejects practices that would likely be constitutional under the Court's rational basis test, it does not conform to the Constitution when applied to states.

Additionally, the Court continued, Congress failed to prepare a sufficient legislative record to justify the remedies granted against the states. It had not established a *pattern* of state and local governmental discrimination against employees on the basis of age. Patterns in the private sector were not sufficient. The Court concluded Congress had "virtually no reason to believe" such discrimination was occurring in the governmental sector and thus had no support for its broad, prophylactic measures. Indeed, it termed Congress's application of the ADEA to the states an "unwarranted response to a perhaps inconsequential problem."

The Court attempted to assuage those concerned about employees by pointing out that most states bar age discrimination and provide state law remedies, enforceable in state courts. This is dangerous reasoning because half the states did not protect older state workers when Congress extended the ADEA and other labor laws to the states in 1974. If Congress had not led the way in protecting state workers, many states might not have enacted similar legislation. Even if most states now protect state employees from age discrimination, the Court's safety valve is illusory in other areas of civil rights unless state law already confers (and chooses to retain) significant nondiscrimination protections for state employees.

The *Kimel* dissenters argued that the states can protect themselves in Congress, pointing to the flexible legislative tools available to balance national and local interests. They accused the Court of aggrandizing its own power with a sovereign immunity theory not supported by the constitutional text or history. Viewing *Seminole, Alden,* and the other recent cases informing *Kimel* as misguided and a "radical departure from the proper role" of the Court, the dissenters refused to accept their validity. At oral argument, Justice Ginsburg also expressed concern about the ramifications of the controversy for Title VII protections against race and gender discrimination in the workplace. Just a week after *Kimel,* the Court remanded two Equal Pay Act cases to the lower courts for reconsideration.

In those cases, female professors sought pay equal to what male faculty members at their institutions earned. The Second and Seventh Circuits allowed the suits to proceed, finding that Congress had appropriately abrogated the states' immunity pursuant to the Fourteenth Amendment.[36] A few months later, the Court issued *Morrison,* in which it rejected Congress's attempt to redress gender-motivated violence against women. The Court set out a limited role for the Fourteenth Amendment, and it established a nearly impossible standard for Congress in addressing nationwide patterns of discrimination that will reverberate beyond the area of womens' safety.

The Court's Fourteenth Amendment rulings jeopardize much civil rights legislation with their requirements that Congress conform to the Court's vision of equality, that Congress choose congruent and proportional remedies, and that Congress develop extensive legislative history and findings of specific state patterns of discrimination before imposing remedies against states or state actors.

Conclusion

While I find the Court's substantive rulings in the federalism area unconvincing and overly simplistic, I admire the Court's decisive procedural approach. The Court has not avoided decisions involving state sovereign immunity and other aspects of federalism. This robust lawsaying role is valuable because it offers guidance, promoting uniformity and predictability in constitutional law nationwide. The conservative majority is starting to develop spheres of political accountability in our shared governmental system with Justices Kennedy and O'Connor displaying less deference to Congress than they urged in earlier opinions. Both the majority and dissenting opinions offer much reasoned argument over the proper role of Congress and the states, with lengthy, passionate opinions full of history. The justices should build on this ground rather than focus exclusively on greatly divergent histories of the immunity tradition. The justices should buttress their burgeoning theories with explanations of how the federalism balance should be weighted and justifications for that balance linked to current governmental concerns and political realities.

Although the Court's procedural approach to federalism decision making is more admirable than its avoidance catalogued throughout this book, the Court's willingness to create new law to help states is troubling

in light of the Court's refusal to help those seeking to vindicate civil rights or enforce environmental laws. In the federalism cases, the Court stakes out a striking procedural role for itself and other courts. This role is easy to miss in light of the substantive importance of the rulings, but it should not be ignored due to its long-term potential to alter constitutional dialogue and minimize the contribution of voices other than the Court's in constitutional interpretation. In contrast to much of its constitutional adjudication from the 1970s to 1990s, the Court disregards the avoidance concerns of deference to other constitutional actors and of fostering, rather than foreclosing, debate, and instead invokes its ultimate authority to interpret the Constitution. The federalism decisions are a far cry from the Court's assertion of that power to protect African American children attempting to integrate Central High during the Little Rock crisis. Today, the Court is willing to engage in lawsaying to protect the states rather than their employees, patent holders, the tribes, and others Congress deems worthy of protection. This seems incongruent when the states are represented in Congress, employ lobbyists, and gain strength from their shared interests. They are not oppressed and in dire need of the Court acting as their countermajoritarian champion.

The Court has disregarded the authority of the federal legislative and executive branches under Article I and the Fourteenth Amendment, rendering the federal government less capable of protecting rights and dealing with problems that require national solutions, calling into question much civil rights legislation and extensive areas of federal lawmaking. For those who need protection, the safeguards the Court holds out—state nondiscrimination laws and *Ex parte Young* relief against state officers—may prove largely illusory. For example, in *Alden,* the Court used its broad immunity theory to wipe out the resort to state court assumed to be a safeguard by all the justices only two years earlier in *Couer d'Alene*. This thin vision of national power—except for U.S. Supreme Court power—and the minimal role for federal and state courts in protecting the less powerful, are the most troubling aspects of the Court's federalism activism.

Conclusion

Looking toward the Future: A Presumption against Avoidance

The Burger Court emphasized avoiding unnecessary constitutional questions so as to steer around "head-on collisions" with the states.[1] The Rehnquist Court has developed this into an art form, employing avoidance techniques that skew civil liberties law to privilege the status quo and protect state and local governments or individuals with traditional harms. The Rehnquist Court operates with a presumption in favor of avoidance, urging federal courts to "pause" and ask if a constitutional ruling is really necessary. *Playing It Safe* demonstrates why that presumption should be reversed.

The Court has used many different forms of avoidance, for a variety of reasons, from 1970 to 2000. Avoidance strategies can be grouped along a spectrum of types, with differing implications for the dispute. For example, rejecting a case on standing grounds (as in the racial and environmental cases of chapters 2 and 3) removes certain types of claims completely from the federal court system. A ruling that a dispute is not ripe or certifying an issue to a state court postpones federal court interpretation. Using the avoidance canon to construe a statute to avoid potential constitutional problems, as the Court suggested with Arizona's English-Only law (chapter 1), can develop law at a quasi-constitutional level. Issuing a measured ruling (as in some sexual orientation and gender discrimination cases covered in chapters 5 and 6) offers some development of constitutional law but limits the reach of a particular ruling as illuminating precedent.

The Court does not always avoid divisive controversies. It is easy to find exceptions to avoidance in each of the areas profiled in earlier chapters. During the term that ended in June 2000, for example, the Court issued significant substantive decisions on abortion, school prayer, and aid

to parochial schools. It upheld the *Miranda* warnings over law enforcement objections, and allowed the Boy Scouts to exclude a gay leader over civil rights objections. It further developed federalism, invalidating portions of congressional acts protecting women, state employees, and older workers. In an election year, the Court issued a mixed set of constitutional decisions that did not completely please either political conservatives or liberals, and then played a pivotal role in the outcome of the 2000 presidential election. This seems a far cry from Justice Frankfurter urging that the Court avoid deciding a precursor to *Brown* during the 1952 presidential election. But a set of important decisions during the 1999–2000 term or in a particular area of law like federalism or intervention in a closely disputed election does not signal a retreat from avoidance.

The Court calls avoidance a foundational rule of judicial restraint. The Court's inconsistent use of the malleable avoidance methods profiled throughout this book is particularly troubling. While the Rehnquist Court has carefully avoided developing many civil liberties doctrines, it has actively expanded state power and entrenched a limited role for the federal courts through federalism and standing rulings sometimes premised on avoidance. In the name of avoidance and judicial restraint, the Court has been quite activist. It has aggressively transferred power to states and local governments and preferenced selected groups of litigants by avoiding issues and retaining the status quo. This selective avoidance is consistent with the Court's vision of a limited role for the federal courts. Even in the areas in which the Court has vigorously developed constitutional doctrine, it has employed its power to send disputes to others (to states and localities via federalism and to other decision makers through standing barriers). Ultimately, this will bar or discourage litigants from seeking federal redress for certain claims.

As Judith Resnik details, the federal courts as an institution regularly advised Congress to refuse federal court access to certain groups and types of claims during the latter part of the twentieth century. The Federal Judicial Conference has lobbied Congress to stop creating new federal causes of action and to limit growth in the number of life-tenured judges. This is consistent with the long-range institutional vision of a limited role for federal courts. When Congress created a civil rights remedy for gender-motivated violence against women, the federal courts opposed it, and the Court later invalidated it as an unconstitutional aggrandizement of federal power.[2] After the Judicial Conference unsuccessfully urged Congress to limit the scope of habeas corpus law (in which federal

courts review state court criminal proceedings for serious error), the Court restricted habeas itself, altering Warren Court precedent in which habeas review served to develop many modern constitutional protections for criminal defendants.[3]

In addition to being inconsistent in avoiding constitutional questions, the Supreme Court has also voiced two very different visions of its own power during the 1990s. When reviewing many civil liberties claims, the Court still seems troubled by criticism that the Warren Court was arrogant in developing constitutional law ahead of the states and other federal branches.[4] In abortion, for example, the Court is sensitive about *Roe v. Wade,* partly because of attacks on its judicial approach and partly because current justices are simply less supportive of the choice right. In the 5-4 federalism decisions, however, the Court has proclaimed that it is the "ultimate interpreter" of the Constitution and rejected congressional legislation under both the Commerce Clause and Fourteenth Amendment. Despite the increased political pressure on the Court when it invalidates (rather than upholds) a law,[5] the Court has not been reluctant in the 1990s to invalidate a host of congressional laws to advance its vision of federalism. Instead of acting as mild-mannered "advicegivers,"[6] the justices engage in more aggressive forms of judicial review in selected areas of law.

Because the current Court is politically conservative, some liberals praise avoidance and seek a more limited role for the Court. They appreciate the flexibility offered by avoidance. Many political liberals who are likely to disagree with the Court's substantive outcomes prefer that the Court issue fewer constitutional rulings. The federalism rulings, with their sweeping theories and broad language—and *Bush v. Gore*—certainly pose a dilemma for liberals who are skeptical about avoidance. A more measured approach to federalism, for example, might afford deference to Congress, allowing other branches the flexibility to deal with emerging national problems. It could establish less firm and sweeping precedents, making federalism doctrine more easily modified by a subsequent Court. It is difficult to separate disagreement with the content of the Court's federalism doctrine from the Court's stance on judicial review, particularly when it proclaims itself the ultimate interpreter. Avoidance choices are in themselves an exercise of judicial authority. The Court's avoidance decisions cannot be separated from its view of the merits of the underlying dispute, whether it is using standing to reject claims of governmental misconduct by racial minorities or construing a

statute narrowly so as to avoid serious constitutional doubts concerning gender discrimination. A Court that venerates avoidance is likely to use avoidance on novel claims that challenge the constitutional status quo.

It is important instead to take a long-term view of the Court's role, regardless of our politics. The Supreme Court has a unique responsibility to face difficult constitutional questions and offer some guidance. Judge Richard Posner emphasizes the value appellate courts offer with broad, well-supported rulings:

> It is a matter of judgment whether to base the decision of an appeal on a broad ground, on a narrow ground, or on both. . . . If [the judges] are confident of the broad ground, they should base decision on that ground (as well as on the narrow ground, if equally confident of it) in order to maximize the value of the decision in guiding the behavior of persons seeking to comply with the law.[7]

The Court deprives the nation of reasoned elaboration when it cloaks substantive constitutional arguments in avoidance techniques. Instead of well-articulated clashes between majority and dissenting factions, the current Court often provides chimerical unity, opaqueness, and confusion. Instead, we need candor about the underlying social, racial, gender, class, or political tensions illuminating a dispute.[8] This would foster better dialogue about the Constitution and keep it meaningful over time in our dynamic society.

The justices should disagree openly about the meaning of the Constitution rather than submerge their constitutional differences in procedural wrangling. Where are the "great dissenters" on the current Court? As Justice Brennan declared, the right to dissent is "one of the great and cherished freedoms that we enjoy by reason of the excellent accident of our American births."[9] In the 5-4 federalism rulings of the 1990s, the Court began to provide a more robust discussion about competing constitutional visions of shared governance. Such airing of our differences is more constructive than pretending we are homogeneous in constitutional belief or clear and settled on contentious issues.

The Court's avoidance or "minimalism" in many civil liberties areas is applauded by those who view courts as an undemocratic, unelected branch of government.[10] But the courts, including the Supreme Court, are part of the democratic balance. Judicial review is a check on other constitutional interpreters, advancing a long-term view of the Constitution, not just what today's majority or a local majority desire. The Court

can advance constitutional reasoning even when it cannot address definitively all ramifications of new technology or anticipate all applications of its constitutional doctrine. The fear of foreclosing future options expressed by some judges and scholars is overstated. Too often, the "final" nature of judicial review and the importance of the question has given the Court pause. The public can disagree with the Court and revise our visions of constitutional law over time, as we have done to some extent with race and gender discrimination. During the New Deal, the people reconstructed the role of the federal government,[11] and the current Court is revising that role through its federalism rulings. If we disagree sufficiently with the Court's interpretation, we can pressure other branches of government, altering the Court's composition over time. The other federal branches and the states can amend the Constitution, although this is designedly difficult. The Court can change its own precedents over time, and, as Justice Brandeis argued, flexibility in revising precedent is particularly important in constitutional cases.

When the Rehnquist Court promotes deference to other decision makers through avoidance, it increases the lack of uniformity in federal constitutional law. Minimalist rulings by the Court leave a vacuum in which lower courts and other constitutional actors can exercise great power. Sometimes when the Court predicates avoidance on deference concerns, it ignores the difficulty others face in confronting "socially sensitive" constitutional claims seeking to alter a status quo that is comfortable for most people. As preceding case examples demonstrate, politicians do not always appreciate the Court returning controversies to them. While some state judges probably appreciate opportunities to articulate their own interpretations of the Constitution, state judges generally face more political pressure than federal judges to please majorities. Some state supreme court justices, for example, have been targeted in the 1990s and ousted from the bench for their views on reproductive choice or decisions to afford constitutional protection to criminal defendants.

Attacks on judicial independence also affect federal judges. The composition of the federal bench and the route to reaching it have changed in the last decades of the twentieth century, increasing political pressure on nominees and some judges. Congress has not always enjoyed a warm relationship with the Supreme Court, but the 1990s brought an unprecedented loss of respect for the importance of an independent judiciary.[12] About half the federal judicial personnel are now magistrates, who do not have life tenure and who are subject to a localized reappointment process

every eight years. Moreover, the federal courts are having some difficulty attracting people to fill judgeships due to the highly contentious nomination and confirmation process. In the 1990s, the Senate appeared to target heavily the female and minority judicial appointees advanced by President Clinton in drawn-out confirmation battles.[13] The people likely to make it through the federal nomination and confirmation process in such an atmosphere are generally moderates who have avoided controversy in the past.

Thus, some state judges subject to the electoral process understandably worry about appearing activist. Federal judges must pass through a system that values moderation and candidates with politically noncontroversial experience. At the same time, the prevalence of direct democracy measures in the late decades of the twentieth century presented many state and federal judges with novel laws posing constitutional questions. Many direct democracy measures are poorly drafted or ambiguous. As supporters and opponents campaign, contrary interpretations of measures are offered, and voter intent is difficult to gauge in some circumstances. Such measures often require careful interpretation to ensure they are constitutional and to analyze how they interact with preexisting law. Of course, initiatives and referenda frequently concern socially sensitive and contentious issues such as civil liberties restrictions. In this highly politicized atmosphere, it takes courage for a judge to face a controversial constitutional challenge directly and not rely on avoidance techniques.

If the Supreme Court is waiting for an issue to "percolate" up through the lower courts, those courts must address controversial constitutional questions and develop consensus or division. If trial and intermediate appellate courts shy away from constitutional claims or always issue measured rulings, how will pressing issues with the capacity to change constitutional law ever reach the Court? Even when lower courts differ directly on an issue, some minimalist justices often want a circuit conflict to "deepen" before the Court weighs in. This adds another layer of expense and delay to the already cumbersome litigation process. This lowest common denominator approach to constitutional adjudication—issuing measured rulings that foment less disagreement or awaiting popular acceptance—yields too thin a vision for courts in shaping constitutional law.

Some commentators find avoidance so problematic they would scrap it entirely.[14] Despite the problems accompanying some avoidance strategies, courts must retain some flexibility in constitutional adjudication, partly because of practical time and resources constraints and partly to

encourage approaches to constitutional law that change over time. Instead of presuming that unnecessary constitutional decisions should be avoided, the courts—particularly appellate courts—should reverse that presumption. When courts pause to consider avoidance, they should also consider its costs. Federal courts should engage in more direct constitutional decision making when the parties seek it. In particular, U.S. Supreme Court justices and state and federal appellate judges are important voices in a long-term constitutional dialogue.

When they pause to reflect on the dangers of avoidance, courts should consider whether avoidance thwarts the chance for parties to present novel injuries or emerging approaches to interpreting the Constitution in light of current conditions. Judges should also inquire whether they should assert a countermajoritarian role, checking other government entities on a given issue. Even in an era of robust direct democracy and attacks on judicial independence, courts should not shy away from examining the political controversy surrounding a dispute, which may provide reasons to rule on the merits. To promote evenhandedness, provide needed guidance, and defuse the most tyrannical characteristics of temporary majoritarian opinion, the courts should use avoidance techniques sparingly and conduct a careful assessment of their reasons for avoiding a particular issue.[15]

The cases examined in *Playing It Safe* instruct that the Court invokes avoidance for a variety of reasons, some of which are persuasive and some of which are misguided. Avoidance predicated on concerns about a hostile reaction to the courts or the overriding importance of an issue are less powerful. If a court is concerned about perceived foreclosure because of the finality of its decision, it should weigh its desire to respect other decision makers against the cost and delay for the litigants and the likelihood of redress through a political process. Finally, courts should articulate thoroughly federalism and separation of powers grounds for avoidance to provide clearer signals to other constitutional interpreters that the constitutional responsibility is now theirs. The federal courts—most notably the Supreme Court—best fulfill their constitutional duty when they offer guidance and participate with other constitutional interpreters in a candid, meaningful, and long-term dialogue about the meaning of the Constitution. Even if the Court reveals its internal division or the justices need to revise their interpretation over time, the Court's contribution is an essential part of a vibrant dialogue that will help keep our Constitution meaningful over time.

Notes

NOTES TO INTRODUCTION

1. Barbara Palmer, “Issue Fluidity and Agenda Setting on the Warren Court,” *Pol. Res. Q.* 52 (1): 39–65 (1999).

2. Stephen L. Wasby, “Two Perspectives on Judicial Decision-Making: The Case of Civil Rights,” Working Paper 1998-2, *Centre for Int'l Stud.,* University of Toronto (1998).

3. *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936).

4. *See, e.g.,* Barbara A. Perry, *The Supreme Court's Image in the American Mind* (Westport: Praeger, 1999); Kathryn McCabe, “And the survey says . . . ,” *Judicature*, vol. 82, no. 6, at 292 (May–June 1999) (national survey indicates high confidence in U.S. Supreme Court and other courts).

5. *See, e.g.,* H. W. Perry, Jr., *Deciding to Decide: Agenda Setting in the United States Supreme Court* (Cambridge: Harvard University Press, 1991).

6. Stephen M. Shapiro, “Certiorari Practice: The Supreme Court's Shrinking Docket,” *Litig.*, vol. 24, no. 3, at 5; see also J. Mitchell Armbruster, Note, “Deciding Not to Decide: The Supreme Court's Expanding Use of the ‘GVR’ Power Continued,” 76 *N.C. L. Rev.* 1387 (1998).

7. *Duffield v. Robertson Stephens and Co.*, 114 F.3d 1182 (9th Cir. 1998), *cert. denied*, 525 U.S. 982 (1998) (discussing conflicts between arbitration and statutory purposes).

8. *Agostini v. Felton*, 521 U.S. 203 (1997) (overruling *Aguilar v. Felton*, 473 U.S. 402 (1985), which had ruled congressional legislation unconstitutional).

9. Lisa A. Kloppenberg, “Avoiding Serious Constitutional Doubts: The Supreme Court's Construction of Statutes Raising Free Speech Concerns,” 30 *U.C. Davis L. Rev.* 1 (1996).

10. *Dickerson v. United States*, 120 S. Ct. 2326 (2000).

11. Thomas Morawetz, “Symposium: The Paradox (?) of Charismatic Judging,” 32 *Conn. L. Rev.* 1705 (2000).

12. *Railroad Commission of Texas v. Pullman Company*, 312 U.S. 496 (1941); Lisa A. Kloppenberg, “Avoiding Constitutional Questions,” 35 *B.C. L. Rev.* 1003 (1994).

13. Judith Resnik, “Rereading ‘The Federal Courts,’” 47 *Vand. L. Rev.* 1021 (1994).

14. Michael Wells, "Why Professor Redish Is Wrong about Abstention," 19 *Ga. L. Rev.* 1097 (1985) (urging that abstention doctrine does not lead to judicial usurpation of power, but is acceptable in the absence of specific congressional rules proscribing abstention); Martin Redish, "Abstention, Separation of Powers, and the Limits of the Federal Function," 94 *Yale L. J.* 71 (1994) (questioning the institutional legitimacy of judge-made abstention doctrine and its funneling of constitutional law from federal to state courts).

15. Abner J. Mikva, "The Role of Theorists in Constitutional Cases," 63 *U. Colo. L. Rev.* 451 (1992).

16. Mary L. Dudziak, "Desegregation as a Cold War Imperative," 41 *Stan. L. Rev.* 61 (1988).

17. *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974) (standing ruling); *Atlee v. Laird,* 347 F.Supp. 689 (E.D. Pa. 1972), *affirmed*, *Atlee v. Richardson*, 411 U.S. 911 (1972); *see generally*, Anthony D'Amato and Robert M. O'Neil, *The Judiciary and Vietnam* (New York: St. Martin's Press, 1972).

18. For a wonderful description of the lack of neutrality and politics inherent in judicial decision making, *see* the Preface to *The Politics of Law: A Progressive Critique*, 2nd ed., David Kairys, ed. (New York: Pantheon Books, 1990).

19. *Siler v. Louisville and Nashville Railroad Co*., 213 U.S. 175 (1909) (discussing federal court interpretation of state law in diversity and supplemental jurisdiction cases).

20. *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1992).

21. *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964).

22. *Bush v. Palm Beach County Canvassing Board,* 121 S. Ct. 471 (Dec. 4, 2000); *Bush v. Gore,* 121 S. Ct. 512 (Dec. 9, 2000); *Bush v. Gore,* 121 S. Ct. 525 (Dec. 12, 2000).

NOTES TO CHAPTER 1

1. Telephone interview by Nicole Markey with Robert Pohlman, attorney for Ms. Yniguez (June 2, 1999). This chapter draws frequently on Susan Kiyomi Serrano's comment, "Rethinking Race for Strict Scrutiny Purposes: *Yniguez* and the Racialization of English Only," 19 *Haw. L. Rev.* 221 (1997).

2. *Yniguez v. Mofford*, 730 F.Supp. 309 (D. Ariz. 1990); *Yniguez v. Arizona,* 939 F.2d 727 (9th Cir. 1991); *Arizonans for Official English and Robert D. Park v. Arizona Et Al.*, 520 U.S. 43 (1997); *Arizonans for Official English and Robert D. Park v. Arizona Et Al.*, 525 U.S. 1093 (1999).

3. Adrianne Flynn, "English-Only Case Could Raise Language Barrier; U.S. Supreme Court to Rule on Arizona Law," *Arizona Republic*, Dec. 2, 1996, at A1.

4. Dennis E. Baron, *The English-Only Question: An Official Language for Ameri-*

cans? (New Haven: Yale University Press, 1990); James Crawford, *Hold Your Tongue: Bilingualism and the Politics of English-Only* (Reading: Addison-Wesley, 1992).

5. *See* Richard Delgado, "Rodrigo's Fourteenth Chronicle: American Apocalypse," 32 *Harv. C.R.-C.L. L. Rev.* 275 (1995); Bill Piatt, *Only English?: Law and Language Policy in the United States* (Albuquerque: University of New Mexico Press, 1990); Juan Perea, *Immigrants Out! The New Nativism and the Anti-Immigrant Impulse in the United States* (New York: New York University Press, 1997); Margaret E. Montoya, "Law and Language(s)," in Richard Delgado and Jean Stefancic, eds., *The Latina/o Condition* (New York: New York University Press, 1998).

6. *See, e.g.*, Brief of Amici Curiae of Hawaii Civil Rights Commission, et al., *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1996).

7. Rennard Strickland, "Genocide-at-Law: An Historic and Contemporary View of the Native American Experience," 34 *Kan. L. Rev.* 713 (1986).

8. *See* Brief of FLA-187 Committee, et al., as Amicus Curiae in Support of Petitioners, *Yniguez v. Arizonans for Official English*, 69 F.3d 920 (9th Cir. 1996) (No. 95-974).

9. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995).

10. Brief of the Washington Legal Foundation, et al., as Amici Curiae in Support of Petitioners at 27-28, *Yniguez*, 69 F.3d 920 (9th Cir. 1995) (No. 95-974).

11. "In Buchanan's Words," *Washington Post*, Feb. 29, 1992, at A2 (quoting "This Week with David Brinkley," ABC TV, Dec. 8, 1991).

12. *See* Ronald Takaki, *Strangers from a Different Shore: A History of Asian Americans* (Boston: Little, Brown, 1989); Martha Hodes, ed., *Sex, Love, Race: Crossing Boundaries in North American History* (New York: New York University Press, 1999).

13. *Loving v. Virginia*, 388 U.S. 1 (1967); *Naim v. Naim*, 350 U.S. 985 (1956); Alexander M. Bickel, *The Least Dangerous Branch* (Indianapolis: Bobbs-Merrill, 1962); Steven L. Wasby, Anthony A. D'Amato, and Rosemary Metrailer, *Desegregation from* Brown *to* Alexander*: An Exploration of Supreme Court Strategies* (Carbondale: Southern Illinois University Press, 1977).

14. James Crawford, "U.S. English—Agendas Hidden between the Lines," *Houston Chronicle,* Oct. 30, 1988, at 4 (citing John Tanton, memo to WITAN IV).

15. Tom McArthur, Comment, "Worried about Something Else," 60 *Int'l J. Soc. Lang.* 87 (1986).

16. Ariz. Att'y Gen. Op. No. 189 (Jan. 1989).

17. *Ruiz v. Symington*, 1 CA-CV 94-0235, 1996 Ariz. App. Lexis 120 (June 11, 1996), vacated in *Ruiz v. Hull*, 957 P.2d 984 (Ariz. 1998), *cert. denied, Arizonans for Official English v. Arizona*, 525 U.S. 1093 (1999).

18. John Kolbe, "Why Ruling on English United Foes," *Arizona Republic*, March 9, 1997.

19. *See* John Howard, "High Court Action Has Uncertain Impact on California," *Associated Press Political Service*, March 3, 1997.

20. "U.S. ENGLISH Lauds Supreme Court Ruling on Arizona English Amendment," *U.S. Newswire*, March 3, 1997.

21. Frank J. Murray, "High Court Rebukes Federal Judges for Flouting Federalism," *Washington Times*, March 4, 1997, at A12.

22. John Howard, "High Court Action Has Uncertain Impact on California," *Associated Press Political Service,* March 3, 1997 (quoting Sen. Mountjoy).

23. James A. Gardner, "Southern Character, Confederate Nationalism, and the Interpretation of State Constitutions: A Case Study in Constitutional Argument," 76 *Tex. L. Rev.* 1219 (1998).

24. *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 498 (1941).

25. USC Symposium on Judicial Independence (Nov. 1999) http://www.usc.edu/dept/law/symposia/judicial/index.html.

26. It is difficult for judges to determine the "intent" behind a popularly enacted measure. *See* Jane S. Schacter, "The Pursuit of 'Popular Intent': Interpretive Dilemmas in Direct Democracy," 105 *Yale L. J.* 107 (1995).

27. See Pamela Hartman, "Justices Question 'Official English': Arizona Supreme Court Hears Arguments at UA on Voter-Approved Amendment," *Tucson Citizen*, Nov. 7, 1997.

28. Julie Amparano, "'Official English' Tossed, Arizona Law First in Nation Overturned," *Arizona Republic*, April 29, 1998, at A1.

29. Philip P. Frickey, "The Communion of Strangers: Representative Government, Direct Democracy, and the Privatization of the Public Sphere," 34 *Willamette L. Rev.* 421 (1998).

30. Steven W. Bender, "Direct Democracy and Distrust: The Relationship between Language Law Rhetoric and the Language Vigilantism Experience," 2 *Harv. Latino L. Rev.* 145 (1997).

NOTES TO CHAPTER 2

1. Michael D. Axline, *Environmental Citizen Suits* (Charlottesville: Michie, 1995).

2. *New York Times,* "Novel Antipollution Tool Is Being Upset by Courts," June 5, 1999.

3. Elizabeth Glass Geltman, Andrew E. Skroback, "Reinventing the EPA to Conform with the New American Environmentality," 23 *Colum. J. Envt'l L.* 1 (1988).

4. *Colorado River Water Cons. District v. U.S.*, 424 U.S. 800 (1976).

5. *United Pub. Workers v. Mitchell*, 330 U.S. 75 (1947).

6. Erwin Chemerinsky, *Federal Jurisdiction,* 3d ed. (New York: Aspen, 1999).

7. Joseph Vining, *Legal Identity: The Coming of Age of Public Law* (New Haven: Yale University Press, 1978).

8. *Allen v. Wright*, 468 U.S. 737 (1984).

9. Gene Nichol, Jr., "Abusing Standing: A Comment on *Allen v. Wright,*" 133

U. Pa. L. Rev. 635 (1985); Mark Tushnet, "The New Law of Standing: A Plea for Abandonment," 62 *Cornell L. Rev.* 663 (1977).

10. *Lujan v. Defenders of Wildlife*, et al., 504 U.S. 555 (1992).

11. *United States, et al., v. Students Challenging Regulatory Procedures (SCRAP)* 412 U.S. 669 (1973).

12. Andy Smith, "The Endangered Species Act and the Zone of Interest Test: An Analysis of *Bennett v. Spear,*" MS (3/24/97) (on file with author).

13. *Hunt v. Washington State*, 432 U.S. 333 (1977).

14. Eric K. Yamamoto, "Efficiency's Threat to the Value of Accessible Courts for Minorities," 25 *Harv. C.R.-C.L. L. Rev*. (1990).

15. *U.S. v. Raines*, 521 U.S. 811 (1997).

16. *See,* e.g., *SCRAP*, 412 U.S. 669 (1973).

17. *Cohens v. Virginia*, 19 U.S. 264 (1821).

18. Cass R. Sunstein, "What's Standing after *Lujan*? Of Citizen Suits, Injuries, and Article III," 91 *Mich. L. Rev.* 163 (1992).

19. David A. Logan, "Standing to Sue: A Proposed Separation of Powers Analysis," 1984 *Wis. L. Rev*. 37 (1984).

20. Abner J. Mikva and Eric Lane, *An Introduction to Statutory Interpretation and the Legislative Process* (New York: Aspen, 1997).

21. *Trafficante v. Metropolitan Life Ins. Co.,* 409 U.S. 205 (1972); *Gladstone Realtors v. Bellwood,* 441 U.S. 91 (1979).

22. *SCRAP,* 412 U.S. 669 (1973).

23. *Bennett v. Spear,* 520 U.S. 154 (1997).

24. Abram Chayes, "Foreward: Public Law Litigation and the Burger Court," 96 *Harv. L. Rev*. 4 (1982); Susan Bandes, "The Idea of a Case," 42 *Stan. L. Rev.* 227 (1990).

25. 42 U.S.C. §11046.

26. *Steel Co. v. Citizens for a Better Env't.*, 523 U.S. 83 (1998).

27. Denis Binder, "May a Citzens Group Sue a Business Covered by Federal Toxic Waste Laws for Past Violations of Reporting Requirements?" 1 *Preview* 58 (Sept. 18, 1997).

28. C. Jim Hecker, "EPCRA Citizen Suits after *Steel Co. v. Citizens for a Better Environment,*" 28 ELR 10306 (June 1997).

29. Oregon Revised Statutes §18.540 (1999).

30. *See* Katarina K. Boer, Comment, "*United Musical Instruments v. The Steel Company*: The Conflict over the Safety of Our Communities and the Emergency Planning and Community Right-to-Know Act," 91 *Nw. U. L. Rev.* 1599, 1630–40 (1997); Julie Shambarger Mitchell, Note, "Environmental Law—A Citizen Suit under EPCRA is No Longer a Threat—*Steel Co. v. CBE*," 118 S.Ct. 1003 (1998), 21 *U. Ark. Little Rock L. J.* 343 (1999).

31. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 149 F.3d 303 (4th Cir. 1998), 528 U.S. 167 (2000).

32. *New York Times,* "Novel Antipollution Tool Is Being Upset by Courts," June 5, 1999.

33. *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972).

34. *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149 (4th Cir. 2000).

NOTES TO CHAPTER 3

1. This description is taken almost verbatim from Justice Thurgood Marshall's dissent. The facts were uncontroverted. *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983). Prior history in the case includes: No. CV 77-0420-RMT (C.D. Cal. 1980); 615 F.2d 1243 (9th Cir. 1980), *cert. denied,* 449 U.S. 934 (1980); 656 F.2d 417 (9th Cir. 1981).

2. Mark Starr and Janet Huck, "The Chokehold Controversy," *Newsweek*, May 24, 1982.

3. Susan Bandes, "Patterns of Injustice: Police Brutality in the Courts," 47 *Buff. L. Rev.* 1275 (1999).

4. Abram Chayes, "Foreword: Public Law Litigation and the Burger Court," 96 *Harv. L. Rev.* 4 (1982).

5. Lou Cannon, *Official Negligence* (New York: Random House, 1997).

6. *Blake v. City of Los Angeles*, 595 F.2d 1367 (9th Cir. 1979).

7. *Morgan v. Woessner*, 975 F.2d 629 (9th Cir. 1992).

8. Kathryn K. Russell, *The Color of Crime: Racial Hoaxes, White Fear, Black Protectionism, Police Harassment, and Other Macroaggressions* (New York: New York University Press, 1998).

9. Tina Daunt, "High Court Rebuffs LAPD, Santa Monica," *Los Angeles Times*, June 27, 2000. "New Oversight of Police Urged in Los Angeles," *New York Times*, Sept. 11, 2000.

10. *See* Charles Lawrence, "The Id, the Ego and Equal Protection," 39 *Stan. L. Rev.* 317 (1987); David Benjamin Oppenheimer, "Negligent Discrimination," 141 *U. Pa. L. Rev*. 899 (1993).

11. "Federal Officers Must Collect Race Data," *Eugene Register-Guard*, June 10, 1999; Michael Fletcher, "Report Finds Bias in Criminal Justice System," *Eugene Register-Guard*, May 4, 2000.

12. Erwin Chemerinsky, *Federal Jurisdiction,* 3d ed. (New York: Aspen, 1999).

13. *Allen v. Wright*, 468 U.S. 737 (1984); *Wright v. Reagan*, 656 F.2d 820 (D.C. Cir. 1981); *Wright v. Miller*, 480 F.Supp. 790 (D. D.C. 1979).

14. Michael J. Klarman, "*Brown*, Racial Change, and the Civil Rights Movement," 80 *Va. L. Rev.* 7 (1994); Gary C. Leedes and James M. O'Fallon, "School Desegregation in Richmond: A Case History," 10 *U. Rich. L. Rev.* 1 (1975).

15. *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983).

16. *Allen*, 468 U.S. at 748; James J. Fishman and Stephen Schwartz, *Nonprofit Organizations* (Westbury: Foundation Press, 1995); Stuart Taylor, Jr., "Tax Exemption Ruling: An Old Question Still Lingers," *New York Times*, June 14, 1983.

17. William A. Fletcher, "The Structure of Standing," 98 *Yale L. J.* 221 (1998); Richard B. Stewart, "The Reformation of American Administrative Law," 88 *Harv. L. Rev.* 1667 (1975).

18. Gene Nichols, "Abusing Standing: A Comment on *Allen v. Wright*," 133 *U. Pa. L. Rev*. 635 (1985).

19. Susan Bandes, "The Idea of a Case," 42 *Stan. L. Rev.* 227 (1990).

20. *Rizzo v. Goode*, 423 U.S. 362 (1976).

21. *O'Shea v. Littleton*, 414 U.S. 488 (1974).

22. *Council on Phil. Police Accountab. and Responsib. v. Rizzo*, 357 F.Supp. 1289 (E.D. Pa. 1973).

23. Marc A. Graber, "The Clintonification of American Law: Abortion, Welfare, and Liberal Constitutional Theory," 58 *Ohio St. L. J.* 731 (1997).

24. *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26 (1976).

25. *Warth v. Seldin,* 422 U.S. 490 (1975).

26. *Shaw v. Reno*, 509 U.S. 630 (1993).

27. *Miller v. Johnson*, 515 U.S. 900 (1995).

28. *Bush v. Vera*, 517 U.S. 952 (1996).

29. *Shaw v. Hunt*, 517 U.S. 899 (1996).

30. *United States v. Hays*, 515 U.S. 737 (1995); *Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v. Hunt*, 517 U.S. 899 (1996).

31. *See, e.g.,* Justice Frankfurter's opinions in *Baker v. Carr*, 369 U.S. 186 (1962) (dissenting) and *Colegrove v. Green*, 328 U.S. 549 (1946).

32. Samuel Issacharoff and Pamela S. Karlan, "Standing and Misunderstanding in Voting Rights Law," 111 *Harv. L. Rev*. 2276 (1998). *See also* David R. Dow, "The Equal Protection Clause and Legislative Redistricting Cases—Some Notes Concerning the Standing of White Plaintiffs," 81 *Minn. L. Rev*. 1123 (1997).

33. David Kairys, "Unexplainable on Grounds Other than Race," 45 *Am. U. L. Rev.* 729 (1996).

34. Keith Cunningham, "Teaching Sting Leaves Murky Images of the Delta," *Eugene Register-Guard*, June 10, 1999.

35. "Little Rock's Central High Still Struggles with Integration in 1997," *Associated Press*, Sept. 24, 1997, *available in* 1997 WL 14135204.

36. MaryAnn Dadisman, "Still Segregated: The Legacy of *Brown*," *Human Rights* 12 (Spring 1994).

37. Derrick Bell, *And We Are Not Saved: The Elusive Quest for Racial Justice* (New York: Basic Books, 1987); Cheryl I. Harris, "Whiteness as Property," 106 *Harv. L. Rev*. 1707 (1993).

NOTES TO CHAPTER 4

1. Jed Rubenfield, "Affirmative Action," 107 *Yale L. J.* 427 (1997). For a general discussion of affirmative action, *see* William Bowen and Derek Bok, *The Shape of the River* (Princeton: Princeton University Press, 1998); Stephen L. Carter, *Reflections of an Affirmative Action Baby* (New York: HarperCollins, 1991); Susan Welch and John Gruhl, *Affirmative Action and Minority Enrollment in Medical and Law Schools* (Ann Arbor: University of Michigan Press, 1998).

2. George Stephanopoulos, *All Too Human: A Political Education* (Boston: Little, Brown, 1999).

3. Ryan James Hagemann, "Diversity as a Compelling State Interest in Higher Education: Does *Bakke* Survive Affirmative Action Jurisprudence?" 79 *Oregon Law Review* 493 (2000).

4. Daniel A. Farber, William N. Eskridge, Jr., and Philip P. Frickey, *Cases and Materials on Constitutional Law: Themes for the Constitution's Third Century* (St. Paul: West Group, 1993).

5. *DeFunis v. Odegaard*, 82 Wash.2d 11 (1973), *cert. granted by*, 44 U.S. 1038 (1973), *and judgement vacated by*, 416 U.S. 312 (1974), *on remand to*, 84 Wash.2d 617 (1974).

6. Fed. R. Civ. P. 23(b).

7. *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 78 (1978).

8. Joseph P. Lash, *From the Diaries of Felix Frankfurter* (New York: Norton, 1975).

9. Lisa A. Kloppenberg, "Avoiding Constitutional Questions," 35 *B.C. L. Rev.* 1003 (1994).

10. Lisa A. Kloppenberg, "Avoiding Serious Constitutional Doubts: The Supreme Court's Construction of Statutes Raising Free Speech Concerns," 30 *U.C. Davis L. Rev.* 1 (1996); William N. Eskridge, Jr., and Philip P. Frickey, "Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking," 45 *Vand. L. Rev.* 593 (1992).

11. *Michigan v. Long*, 463 U.S. 1032 (1983) (Stevens, J., dissenting).

12. Marc Galanter, "The Day after the Litigation Explosion," 48 *Md. L. Rev*. 3 (1986) (citing research of others, primarily political scientists).

13. *Regents of the* University of California v. Bakke, 438 U.S. 265 (1978).

14. Patrick Healy, "A Lightning Rod on Civil Rights," *Chronicle of Higher Education,* September 17, 1999, at A42.

15. Joel Dreyfuss and Charles Lawrence III, *The* Bakke *Case: The Politics of Inequality* (New York: Harcourt Brace Jovanovich, 1979).

16. Ellis Close, "The Color Bind," *Newsweek,* May 12, 1997 at 58.

17. *See* W. Michael Byrd et al., "African-American Physicians' Views on Health Reform: Results of a Survey," 86 *J. Nat'l Med. Ass'n* 191 (1994).

18. Bernard Schwartz, *Behind* Bakke: *Affirmative Action and the Supreme Court* (New York: New York University Press, 1988).

19. U.S. Commission on Civil Rights Report (1971).

20. http://www.osdbuweb.dot.gov (website for the Office of Small and Disadvantaged Businesses Utilization—Bureau of the Department of Transportation).

21. *Northeastern Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 896 F.2d 1283 (11th Cir. 1990), *rev'd*, 508 U.S. 656 (1993).

22. Jim Beard, "Is Article III Standing a Black and White Issue?" (on file with Lisa A. Kloppenberg) (1997).

23. Erwin Chemerinsky, *Federal Jurisdiction,* 3d ed. (New York: Aspen, 1999).

24. 42 U.S.C. sec. 2000d (1964).

25. Dennis Hutchinson, *The Man Who Once Was Whizzer White: A Portrait of Justice Byron R. White* (New York: Free Press, 1998).

26. Keith Aoki, "No Right to Own?: The Early Twentieth-Century 'Alien Land Laws' as a Prelude to Internment," 40 *B.C. L. Rev.* 37 (1998); Ralph James Mooney, "Formalism and Fairness: Matthew Deady and Federal Public Land Law in the Early West," 63 *Wash. L. Rev.* 317 (1988).

27. Lino A. Graglia, "*Hopwood v. Texas*: Racial Preferences in Higher Education Upheld and Endorsed," 45 *J. Legal Educ.* 79 (1995).

28. John Calvin Jeffries, *Justice Lewis F. Powell, Jr*. (New York: Charles Scribner's Sons, 1994).

29. *Plyler v. Doe*, 457 U.S. 202 (1982) (Powell, J., concurring).

30. J. Harvie Wilkinson III, "In Memoriam: Lewis F. Powell, Jr.," 112 *Harv. L. Rev.* 590, 593 (1999).

31. Nina Totenberg, "In Memoriam: Lewis F. Powell, Jr.," 112 *Harv. L. Rev*. 602, 603 (1999).

32. *Morton v. Mancari*, 417 U.S. 535 (1974). Between *DeFunis* and *Bakke,* Court upheld preference for hiring and promotions for Native Americans in the Bureau of Indian Affairs, but reasoned that this was a political, rather than racial, preference, limited to officially recognized members of the sovereign Tribes.

33. *Fullilove v. Klutznick*, 448 U.S. 448 (1980); Drew Days III, "Fullilove," 96 *Yale L. J.* 453 (1987).

34. *Wygant v. Jackson Bd. Of Educ.*, 476 U.S. 267 (1986).

35. *Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421 (1986).

36. *U.S. v. Paradise*, 480 U.S. 149 (1987).

37. *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990).

38. Neal Devins, "*Adarand Constructors, Inc. v. Pena* and the Continuing Irrelevance of Supreme Court Affirmative Action Decisions," 37 *Wm. & Mary L. Rev.* 673 (1996).

39. Donna Meredith Matthews, "Avoiding Gender Equality," 19 *Women's Rights Law Reporter* 127 (Winter 1998).

40. *Dallas Fire Fighters Association v. City of Dallas,* 150F.3d438 (5th Cir. 1998), cert. denied 526 U.S. 1046 (1999).

41. *See, e.g.*, *Lamprecht v. FCC,* 958 F.2d 382 (D.C. Cir. 1992).

42. *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), rehearing and rehearing en banc denied, 84 F.3d 720 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996).

43. *Nixon v. Herndon,* 273 U.S. 536 (1927); *Nixon v. Condon,* 286 U.S. 73 (1932); *Grovey v. Townsend,* 295 U.S. 45 (1935); *Smith v. Allwright,* 321 U.S. 649 (1944); *Terry v. Adams,* 345 U.S. 461 (1953).

44. *Sweatt v. Painter*, 339 U.S. 629 (1950).

45. *Hopwood v. State of Texas*, 861 F.Supp. 551 (W. D. Tex. 1994).

46. Mari J. Matsuda and Charles R. Lawrence, "Myths about Minorities," *New York Times*, April 2, 1996.

47. *Adarand Constructors, Inc. v. Pena*, 965 F.Supp. 1556 (D. Colo. 1997), vacated, *Adarand Constructors, Inc. v. Slater*, 169 F.3d 1292 (10th Cir. 1999).

48. Elliot E. Slotnick, "The Meaning of Cert Denial," 81 *Judicature*, no. 3 (Nov.–Dec. 1997).

49. Christy Hoppe, "Colleges Fight for Diversity: Texas Heads to Court for Affirmative Action," *Dallas Morning News,* June 6, 2000, at 27A.

50. Peter Applebome, "In Shift, U.S. Tells Texas It Can't Ignore Court Ruling Barring Bias in College," *New York Times,* April 15, 1997, at A1.

51. Patrick Healy, "A Lightning Rod on Civil Rights," *Chronicle of Higher Education*, Sept. 17, 1999, at A42.

52. Jeffrey Selingo and Stephen Burd, "Texas Attorney General Rescinds Opinion Barring Race-Exclusive Scholarships," *Chronicle of Higher Education*, Sept. 17, 1999, at A44. For more information on the *Hopwood* litigation, see http://www.chronicle.com.

53. William H. Honan, "New Attack on Race-Based Admissions," *New York Times*, April 10, 1996.

54. Peter Schrang, "Backing Off *Bakke*: The New Assault on Affirmative Action," *The Nation*, April 22, 1996, at 11–14.

55. *Podberesky v. Kirwan*, 38 F.3d 147, *modified and rehearing en banc denied*, 46 F.3d 5, *cert. denied*, 514 U.S. 1128 (1995).

56. David Folkenflik, "Its Banneker Program Scuttled, UM Puzzles Over Racial Remedies," *Baltimore Sun*, May 24, 1995, at 1B.

57. James Vicini Reuter, "Court Won't Review Race-based Scholarships; Rejection of University of Maryland Case May Be Fatal Blow to Minority Education Programs," *Detroit News,* May 23, 1995, at A3.

58. Steven A. Holmes, "Supreme Court Casts Shadow over Minority Scholarships," *Portland Oregonian,* May 23, 1995, at A5.

59. David Folkenflik and Lyle Denniston, "Blacks-Only Aid Program Dies after Justices Refuse Review," *Baltimore Sun,* May 23, 1995, at 1A.

60. David G. Savage, "Race-based Scholarship Ban Allowed to Stand," *Los Angeles Times,* May 23, 1995, at A1.

61. Troy Duster, "Individual Fairness, Group Preferences, and the California Strategy," *Representations* 55 (Summer 1996).

62. Cal. Const. art. I, §31(a).

63. Lydia Chávez, *The Color Bind: California's Battle to End Affirmative Action* (Berkeley: University of California Press, 1998).

64. Girardeau A. Spann, "Proposition 209," 47 *Duke L. J.* 187 (1997).

65. Andre Douglas Pond Cummings, "'Never let me slip, 'cause if I slip, then I'm slippin': California's paranoid Slide from *Bakke* to Proposition 209," 8 *B.U. Pub. Int. L. J.* 59 (Fall 1998).

66. Jerome Karabel, "Stuck in the Station," *The Nation,* Dec. 15, 1997, at 22.

67. *Coalition for Economic Equity v. Wilson*, 946 F.Supp. 1480 (N.D. Cal. 1996), vacated by, in part, stay denied by, remanded by, 110 F.3d 1431 (9th Cir. 1997), *cert. denied*, 522 U.S. 963 (1997).

68. Garrett Epps, "Black Robe Activism," *The Nation*, May 5, 1995.

69. Armatta v. Kitzhaber, 327 Or. 250 (1998) (citing Vannatta v. Keisling, 324 Or. 514 (1997)).

70. Ashbel S. Green, "Voters Give Crime Measures Mixed Verdict: Four Proposals Pass, Including a Victims' Guarantee, but Three Fail," *The Oregonian,* Nov. 3, 1999, at A1.

71. Editorial, "Affirmative Action in Play," *New York Times,* Nov. 6, 1997, at A30.

72. *Id.*

73. George Stephanopoulos, *All Too Human: A Political Education* (Boston: Little, Brown, 1999), at 367–368.

74. Robert Salladay, "Diversity Report on Davis's Back Burner. Panel Recommends State Outreach for Minorities, Women, but Governor Delays," *San Francisco Examiner,* June 4, 2000, at A1.

75. Editorial, "A Messy Way to Settle Proposition 187 Dispute," *San Francisco Chronicle*, July 30, 1999, at A24.

76. Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Cambridge: Harvard University Press, 1999), at 124.

77. David A. Strauss, "Affirmative Action and the Public Interest," 1995 *Sup. Ct. Rev*. 1.

78. *Poderbesky v. Kirwan*, 838 F.Supp. 1075, 1099 (D. Md. 1993).

NOTES TO CHAPTER 5

1. *See* William N. Eskridge, Jr., *Gaylaw: Challenging the Apartheid of the Closet* (Cambridge: Harvard University Press, 1999); Andrew Koppleman, "Why Discrimination against Lesbians and Gay Men Is Sex Discrimination," 69 *N.Y.U. L.*

Rev. 197 (1994); Sylvia Law, "Homosexuality and the Social Meaning of Gender," 1988 *Wis. L. Rev.* 187; Dominick Vetri, "Almost Everything You Always Wanted to Know about Lesbians and Gay Men, Their Families and the Law," *South. L. Rev.,* vol. 26, no. 1 (1998).

2. William N. Eskridge, Jr., "Multivocal Prejudices and Homo Equity," 74 *Ind. L. J.* 1085 (1999).

3. Philip P. Frickey, "The Communion of Strangers: Representative Government, Direct Democracy, and the Privatization of the Public Sphere," 34 *Willamette L. Rev.* 421 (1998).

4. Hanna Rosin, "Same-Sex Couples Win Rights in Vermont; Gay Activists Say Ruling Is a Legal Breakthrough," *Washington Post,* Dec. 21, 1999, at A1.

5. http://www.lieberman.senate.gov/enda.html (citing studies).

6. *See, e.g.*, *Tanner v. Oregon Health Sciences Univ.*, 971 P.2d 435 (1998) (interpreting Oregon's general employment discrimination statute to provide some protection for gays, and ordering the state to offer insurance benefits on an equal basis to the domestic partners of homosexual state employees).

7. Francis X. Clines, "Soldier Guilty in Gay Private's Killing Crime," *Orange County Register*, Dec. 9, 1999, at A10.

8. Eric D. Marchand and Andrew M. Gilbert, "Splitting the Atom or Splitting Hairs—The Hate Crimes Prevention Act of 1999," 30 *St. Mary's L. J.* 931 (1999).

9. Scott Fincher, "Suspect Arrested in Lesbians' Murders," *Chicago Tribune*, Dec. 14, 1995, Zone N, at 18.

10. http://www.hrc.org/issues/hate/index/html.

11. National incident data show that, in cases where homophobic violence was reported to police, 37 percent of victims classified police response as "indifferent" and 8 percent as "abusive." National Coalition of Anti-Violence Programs and N.Y. City Gay and Lesbian Anti-Violence Project, Anti-Lesbian/Gay Violence in 1995, at 52–53 (1996).

12. Valerie Jenness and Kendal Broad, *Hate Crimes: New Social Movements and the Politics of Violence* (New York: Aldine de Gruyter, 1997).

13. *See* Anthony S. Winer, "Hate Crimes, Homosexuals, and the Constitution," 29 *Harv. C.R.-C.L. L. Rev.* 387, 412 and n.161 (1994) (citing Lisa Belkin, "Texas Judge Eases Sentence for Killer of Two Homosexuals," *New York Times*, Dec. 17, 1988, at 8, and Kevin Gerrity, "On Life's Dark Underside, the Evil of Gay Bashing," *Kansas City Times*, Aug. 3, 1989, at A1, A13).

14. *See* Kyle Velte, "Paths to Protection: A Comparison of Federal Protection Based on Disability and Sexual Orientation," 6 *Wm. and Mary J. Women and L.* 323 (2000).

15. *Washington v. Glucksberg,* 521 U.S. 702 (1997); *see also* Carol A. Pratt, "Efforts to Legalize Physician-Assisted Suicide in New York, Washington, and Oregon: A Contrast between Judicial and Initiative Approaches—Who Should Decide?" 77 *Or. L. Rev.* 1027 (1998).

16. Eskridge, *Indiana,* at 1086.

17. 478 U.S. 186 (1986), reversing 760 F.2d 1202 (11th Cir. 1985).

18. David Lauder, "Complex Issue Still Unresolved on Gay Rights," *National Law Journal,* April 14, 1986, at 1.

19. Kendall Thomas, "The Privacy Principle," 92 *Colum. L. Rev.* 1431 (1992).

20. John C. Jeffries, Jr., *Justice Lewis F. Powell, Jr.* (New York: Charles Scribner's Sons, 1994).

21. *See*, e.g., *Steffan v. Perry*, 41 F.3d 677, 684 n.3 (D.C. Cir. 1994) (en banc) ("[I]f the government can criminalize homosexual conduct, a group that is defined by reference to that conduct cannot constitute a 'suspect class'"); *High Tech Gays v. Defense Indus. Sec. Clearance Office,* 895 F.2d 563, 571 (9th Cir. 1990); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989); *Woodward v. United States,* 871 F.2d 1068, 1076 (Fed. Cir. 1989).

22. 517 U.S. 620 (1996).

23. *See* Aspen, Colo., Mun. Code sec. 13-98 (1977); Boulder, Colo., Rev. Code sec. 12-1-2–4 (1987); Denver, Colo., Mun. Code art. IV, sec. 28-91–116 (1991).

24. *See* Joseph S. Jackson, "Persons of Equal Worth: *Romer v. Evans* and the Politics of Equal Protection," 45 *UCLA L. Rev.* 453, 459–60 nn.28 and 31 (1997) (quoting CFV campaign material).

25. Pamela Coukos, "Civil Rights and Special Wrongs—The Amendment 2 Litigation," 29 *Harv. C.R.-C.L. L. Rev.* 581, 583–84 (1993).

26. Carole Jenny et al., "Are Children at Risk for Sexual Abuse by Homosexuals?" 94 *Pediatrics* 41 (1994) (cited in Respondents' Brief at 48 n.33, *Romer v. Evans* (No. 94-1039), available in 1995 WL 417786, at 48 n.33).

27. *See* Kurt Freund et al., "Heterosexuality, Homosexuality, and Erotic Age Preference," 26 *J. Sex Res.* 107 (1989) (stating that although one-third of child sexual abuse victims are boys, the adult erotic preference of at least 95 percent of perpetrators is for women); A. Nicholas Groth and H. Jean Birnbaum, "Adult Sexual Orientation and Attraction to Underage Persons," 7 *Archives Sexual Behav.* 175–81 (1978) (suggesting that homosexuality and homosexual pedophilia are mutually exclusive).

28. Eskridge, *supra* note 2, at 1093 and n. 38 (quoting sources).

29. The citation chain for this litigation includes: *Evans v. Romer*, 1993 WL 19678 (Colo.Dist.Ct. Jan. 15, 1993); *Evans v. Romer*, 854 P.2d 1270 (Colo. July 19, 1993), *cert. denied* in *Romer v. Evans*, 510 U.S. 959 (1993); *Evans v. Romer*, 1993 WL 518586 (Colo.Dist.Ct. Dec. 14, 1993); *Evans v. Romer*, 882 P.2d 1335 (Colo. Oct. 11, 1994); *Romer v. Evans*, 517 U.S. 620 (1996).

30. Samuel A. Marcosson, "*Romer* and the Limits of Legitimacy: Stripping Opponents of Gay and Lesbian Rights of Their 'First Line of Defense' in the Same-Sex Marriage Fight," 24 *J. Contemp. L.* 217 (1998).

31. John C. Jeffries, Jr., and Darryl J. Levinson, "The Non-Retrogression Principle in Constitutional Law," 86 *Cal. L. Rev.* 1211 (1998).

32. *See* Cass Sunstein, "Leaving Things Undecided," 110 *Harv. L. Rev.* 4, 9 (1996).

33. *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 860 F.Supp. 417 (S.D. Ohio 1994); reversed and vacated by *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 54 F.3d 261 (6th Cir. 1995); *cert. granted* and judgment vacated by *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 518 U.S. 1001 (1996); on remand *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati,* 128 F.3d 289 (6th Cir. 1997) (*Equality Foundation II*); rehearing and suggestion for rehearing en banc; denied by *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 1998 WL 101701 (6th Cir. 1998); *cert. denied* by *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati,* 119 S.Ct. 365 (1998).

34. "The City of Cincinnati and its various Boards and Commissions may not enact, adopt, enforce or administer any ordinance, regulation, rule or policy which provides that homosexual, lesbian, or bisexual orientation, status, conduct, or relationship constitutes, entitles, or otherwise provides a person with the basis to have any claim of minority or protected status, quota preference or other preferential treatment. This provision of the City Charter shall in all respects be self-executing. Any ordinance, regulation, rule or policy enacted before this amendment is adopted that violates the foregoing prohibition shall be null and void and of no force or effect."

35. See *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 838 F.Supp. 1235, 1236 (S.D. Ohio 1993); see James E. Barnett, "Updating *Romer v. Evans*: The Implications of the Supreme Court's Denial of Certiorari in *Equality Foundation of Greater Cincinnati v. City of Cincinnati*," 49 *Case W. Res. L. Rev.* 645 (Spring 1999).

36. *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 525 U.S. 943 (1998).

37. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995).

38. *Dale v. Boy Scouts of America*, 2000 WL 826941, reversing 160 N.J. 562, 734 A.2d 1196 (1999).

39. "Ex-Scout's Day in Court," http://www.washingtonpost.com/wp-dyn/articles/A21273-2000Apr26.html.

40. David Cole and Nan Hunter, amicus brief for the Society of American Law Teachers; *see* "Open to All Boys? The Boy Scouts and Gay Rights," http://www.cnn.com/2000/LAW/04/20/boy.scout/index.html.

41. Randy Shilts, *Conduct Unbecoming: Lesbians and Gays in the U.S. Military, Vietnam to the Persian Gulf* (New York: St. Martin's Press, 1993).

42. *Report of the Board Appointed to Prepare and Submit Recommendations to the Secretary of the Navy for the Revision of Policies, Procedures, and Directives*

Dealing with Homosexuals, app. 23 (Chaplain's Presentation [WAVE Recruits]) at 2 (Dec. 21, 1956, to March 15, 1957) (unpublished report, on file with author).

43. *Lustig-Prean and Beckett v. United Kingdom* (2000) 29 E.H.R.R. 548 ECHR; *see also* Ray Moseley, "Britain Told to Let Gays in Military; European Court Rules That Ban Is 'Grave Intrusion' on Private Lives," *Chicago Tribune,* Sept. 28, 1999, at A8.

44. *Watkins v. United States Army*, 847 F.2d 1329, vacated en banc, 872 F.2d 699 (9th Cir. 1989).

45. 721 F.2d 687 (9th Cir. 1983).

46. 847 F.2d 1329 (9th Cir. 1988).

47. *Meinhold v. United States Department of Defense*, 808 F.Supp. 1455, 1458 (C.D.Cal. 1993), aff'd in part and vacated in part, 34 F.3d 1469 (9th Cir. 1994). For a further evaluation of this case, *see* Lisa A. Kloppenberg, "Measured Constitutional Steps," 71 *Ind. L. J.* 298 (1996).

48. Dan Turner, "Moffett Gay Sailor Hopes for Exception to Policy," *San Francisco Chronicle*, May 23, 1992, at A18.

49. *Cammermeyer v. Aspin*, 850 F.Supp. 910 (W.D. Wash. 1994), appeal dismissed and remanded by 97 F.3d 1235 (9th Cir. 1996). See "Newsmakers 1995," *Time,* Dec. 1995, issue 4; "Government Won't Appeal Gay Sailor's Reinstatement," *Los Angeles Times*, Nov. 29, 1994, at A17. Her autobiography is *Serving in Silence* (New York: Viking, 1994).

50. *Steffan v. Perry,* 41 F.3d 677 (1994); 780 F.Supp. 1 (1991), *rev'd*; 8 F.3d 57 (1993).

51. *See Thomasson v. Perry*, 80 F.3d 915 (4th Cir. 1996) (en banc), *cert. denied*, 117 S.Ct. 358 (1996).

52. Bradley Graham, "U.S. Shields New Military-Gay Policy by Backing Old Expulsions in Court," *Washington Post*, June 22, 1994, at A7.

53. *See* "National Defense Authorization Act for FY'94," Pub. L. No. 103-160, §571 (1993), 10 U.S.C. §654.

54. *Hrynda v. U.S.*, 933 F.Supp. 1047 (M.D. Fla. 1996).

55. *Richenberg v. Perry*, 97 F.3d 256 (8th Cir. 1996).

56. *Philips v. Perry,* 106 F.3d 1420 (9th Cir. 1997).

57. *Holmes v. California Army National Guard*, 124 F.3d 1126 (9th Cir. 1997), *cert. denied*, 119 S.Ct. 794 (1999).

58. *Able v. United States*, 880 F.Supp. 968 (E.D.N.Y. March 30, 1995) (vacated and remanded); *Able v. U.S.*, 88 F.3d 1280 (2nd Cir. 1996); *Able v. U.S.*, 968 F.Supp. 850 (E.D.N.Y. 1997); *Able v. United States,* 155 F.3d 628 (2d Cir. 1998).

59. Kalpana Srinivasan, "Debate Flares over Gay Policy," *Eugene Register-Guard*, Dec. 13, 1999.

60. Philip Shenon, "Military Offers Rules to Curb Abuse of Gays," *San Francisco Chronicle*, Aug. 13, 1999.

61. *Baker v. State of Vermont*, 744 A.2d 864 (Vt. 1999).

62. Hans A. Linde, "First Things First: Rediscovering the States' Bill of Rights," 9 *U. Balt. L. Rev*. 379 (1980). For a detailed examination of the populist nature of state constitutions, *see* David Schuman, "The Origin of State Constitutional Direct Democracy: William Simon U'ren and 'The Oregon System,'" 67 *Temp. L. Rev*. 947 (1994).

63. "Gay Marriage Decision Affects Family Lawyers," *Lawyers Weekly*, 2000 *LWUSA* 22 (Jan. 10, 2000).

64. *See*, e.g., Carey Goldberg, "Forced to Act on Gay Marriage, Vermont Finds Itself Deeply Split," *New York Times,* Feb. 3, 2000, at A16.

65. HB 847 (March 16, 2000).

NOTES TO CHAPTER 6

1. The U.S. Bureau of Labor Statistics (BLS), 1994. *See* http://www.advancingwomen.com/wk_glassceiling2.html (visited Feb. 2, 2000).

2. Patrick Butler, "Insurance Sex Discrimination in the United States," *Fact Sheet, National Organization for Women*, updated 1993.

3. Leslie Friedman Goldstein and Diana Stech, "Explaining Transformations in Supreme Court Policy," *Judicature*, vol. 79, no. 2 (Sept.–Oct. 1995) (analyzing the Court's gender decisions, 1965–94).

4. *Grove City College v. Bell,* 104 S.Ct. 1211 (1984).

5. *Poe v. Ullman* 367 U.S. 497 (1961); *Buxton v. Ullman*, 147 Conn. 48, 55, 156 A.2d at 512 (1959), appeal dismissed, 367 U.S. 497 (1961), reh'g denied, 368 U.S. 869 (1961).

6. This section draws heavily from Mary L. Dudziak, "Just Say No: Birth Control in the Connecticut Supreme Court before Griswold v. Connecticut," 75 *Iowa L. Rev*. 915 (1990).

7. *Tileston v. Ullman*, 318 U.S. 44 (1943).

8. C. Lee Buxton, "Birth Control Problems in Connecticut: Medical Necessity, Political Cowardice and Legal Procrastination," 28 *Conn. Med. Rev.* 581 (Aug. 1964).

9. *Quill v. Vacco*, 80 F.3d 716 (2d Cir. 1996).

10. Alexander Bickel, *The Least Dangerous Branch* (New Haven: Yale University Press, 1962), at 156.

11. See *New York Times,* Nov. 3, 1961, at 37, col. 4.

12. *State v. Griswold*, 151 Conn. 544, 200 A.2d 479 (1964), rev'd, 381 U.S. 479 (1965).

13. Erwin Chemerinsky, "Practicing Law Institute Section 1983 Civil Rights Litigation Symposium: Substantive Due Process," 15 *Touro L. Rev*. 1501 (1999).

14. *J.E.B. v. Alabama*, 114 S.Ct. 1419 (1994).

15. *Stanton v. Stanton*, 421 U.S. 7 (1975).

16. *Frontiero v. Richardson*, 411 U.S. 677 (1973) (Powell, J., concurring).

17. *Craig v. Boren*, 429 U.S. 190 (1976).

18. *See* Ann E. Freedman, "Sex Equality, Sex Differences, and the Supreme Court," 92 Yale L. J. 913 (1991); Catharine MacKinnon, "Reflections on Sex Inequality Under Law," 100 *Yale L. J.* 1281 (1991).

19. *Michael M. v. Superior Court*, 450 U.S. 464 (1981).

20. *Rostker v. Goldberg*, 453 U.S. 57 (1981).

21. *Muller v. Oregon*, 208 U.S. 412 (1908). For a more recent treatment of this area, *see International Union v. Johnson Controls, Inc.,* 499 U.S. 187 (1991).

22. *See* Julie F. Kay, "If Men Could Get Pregnant: An Equal Protection Model for Federal Funding of Abortion under a National Health Care Plan," 60 *Brook. L. Rev*. 349 (1994).

23. *Struck v. Secretary of Defense,* 460 F.2d 1372 (9th Cir. 1971).

24. *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953).

25. *See* Ruth Bader Ginsburg, "Speaking in a Judicial Voice," 67 *N.Y.U. L. Rev.* 1185, 1202 (1992).

26. *Reed v. Reed*, 404 U.S. 71 (1971). *See* Ginsburg, *supra* note 25, at 1202–3.

27. Donna Meredith Matthews, "Avoiding Gender Equality," 19 *Women's Rts. L. Rep*. 127 (1998).

28. *Liverpool, N.Y. and Phila. S.S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39 (1885).

29. *Cleveland Board of Education v. La Fleur*, 414 U.S. 632 (1974), and *Cohen v. Chesterfield Board of Education*, 414 U.S. 632 (1974); 326 F.Supp. 1208 (C.D. Ohio) 1971; 465 F.2d 1184 (6th Cir.) (1972).

30. *Stanley v. Illinois*, 405 U.S. 645 (1972).

31. 326 F.Supp. (E.D. Va.) 1971; 1972 WL 2594 (4th Cir. [Va.]) aff'd, 474 F.2d 395 (1973) (en banc).

32. 417 U.S. 484 (1974).

33. *Massachusetts v. Feeney,* 442 U.S. 256, 270 (1979).

34. Angie K. Young, "Assessing the Family and Medical Leave Act in Terms of Gender Equality, Work/Family Balance, and the Needs of Children," 5 *Mich. J. Gender and Law* 113 (1998).

35. 410 U.S. 113 (1973).

36. Reva Siegel, "Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection," 44 *Stan. L. Rev*. 261 (1992).

37. *See* Cass Sunstein, "Six Theses on Interpretation," 6 *Const. Comm.* 91 (1989).

38. Catharine MacKinnon, "*Roe v. Wade*: A Study in Male Ideology in Abortion," in *Abortion: Moral and Legal Perspectives* (J. Garfield, ed. 1985), at 45, 49–51.

39. Ruth Bader Ginsburg, "Some Thoughts on Autonomy and Equality in Relation to *Roe v. Wade,*" 63 *N.C. L. Rev.* 375 (1985).

40. Laurence H. Tribe, *Abortion: The Clash of Absolutes* (New York: Norton, 1990).

41. *U.S. v. Vuitch*, 402 U.S. 62 (1971).

42. Kathleen Sullivan and Susan Estrich, "Abortion Politics: Writing for an Audience of One," 138 *U. PA. L. Rev*. 119 (1989).

43. Jeff Wright, "Choices: Four Women Reflect on What the Abortion Decision Has Meant in Their Lives," *Eugene Register-Guard*, Jan. 18, 1998.

44. Council on Scientific Affairs, American Medical Association, "Induced Termination of Pregnancy before and after *Roe v. Wade,*" *J. Amer. Med. Assoc.,* vol. 268 (Dec. 1992): 3231, 3238; Stanley K. Henshaw and Lynn S. Wallisch, "The Medicaid Cutoff and Abortion Services for the Poor," *Family Planning Perspectives*, vol. 16, no. 4 (July–Aug. 1984): 170; Willard Cates, Jr., "The Hyde Amendment in Action," *J. Amer. Med. Assoc.*, vol. 246, no. 10 (Sept. 1981): 1111. See also http://www.naral.org.

45. U.S. Bureau of the Census, Current Population Reports, Series P60-185, *Poverty in the United States: 1992* (Washington, D.C.: U.S. Government Printing Office, 1992), 10.

46. Nancy Binkin et al., "Illegal-Abortion Deaths in the United States: Why Are They Still Occurring?" *Family Planning Perspectives*, vol. 14, no. 3 (May–June 1982): 165, table 3 (analyzing circumstances surrounding the seventeen deaths resulting from illegal abortions reported to the Abortion Surveillance Branch of the CDC between 1975 and 1979).

47. *Stenberg v. Carhart,* 120 S.Ct. 2597 (2000).

48. *Webster,* 112 S.Ct. 2791, 2854–55 (1992).

49. 492 U.S. 490 (1989); *Reproductive Health Services v. Webster,* 662 F.Supp. 407 (1987), affirmed, *Reproductive Health Service v. Webster*, 851 F.2d 1071 (8th Cir. 1988). For further analysis, see Lisa A. Kloppenberg, "Measured Constitutional Steps," 71 *Ind. L. J.* 297 (1996).

50. Jack E. Rossotti, Laura Natelson, and Raymond Tatalovich, "Nonlegal Advice," *Judicature*, vol. 81, no. 3 (Nov.–Dec. 1997).

51. David Savage, "Justices Strike Down a Nebraska Law That Bans 'Partial-Birth' Procedures," *Eugene Register-Guard*, June 29, 2000, at A1.

52. Cates, Jr., *supra.*

53. *See* Michael C. Dorf, "Facial Challenges to State and Federal Statutes," 46 *Stan. L. Rev.* 235 (1994).

54. Tamar Lewin, "States Testing Limits on Abortion," *New York Times,* April 2, 1990, at A14.

55. Margaret Carlson, "The Battle over Abortion," *Time*, July 17, 1989, at 62, 63.

56. Anne Kornhauser, "Abortion Case Has Been Boon to Both Sides; With New Membership, and Funding, Rivals Gird for Next Round," *Legal Times*, July 3, 1989, at 1.

57. *See* Suzanne Pence Ferguson, "The Latest Battleground—Abortion Groups Meet at the Clinic" 11 *N.Y. L. Sch. J. Hum. Rts.* 127 (1993).

58. Tribe, *supra* at 189; R. W. Apple, Jr., "The Abortion Question: Backlash at the Polls," *New York Times*, Nov. 9, 1989, at B14.

59. Interview with David B. Frohnmayer, president of the University of Oregon, in Eugene, Oregon, May 13, 1994.

60. La. Rev. Stat. Ann. 14:87 (West Supp. 1995) (historical and statutory notes); "Abortion Test Cases," *Time*, July 1, 1991, at 22.

61. Michael J. Malinowski, "Hello Dad. This Is Your Daughter. Can I Get An Abortion?": An Essay on the Minor's Right to a Confidential Abortion, in *Abortion, Medicine, and the Law* 182, at 197 (citing National Abortion Rights Action League, 137, at vi–vii).

62. *Rust v. Sullivan*, 500 U.S. 173 (1991); *New York v. Bowen*, 690 F.Supp. 1261 (S.D.N.Y. 1989); *New York v. Sullivan*, 889 F.2d 401 (2d Cir. 1989).

63. *See* 42 U.S.C. §§300a, 300a-6 (1994). Walter Dellinger, "Gag Me with a Rule: Bush and Abortion Counseling," *New Republic*, Jan. 6, 1992, at 14 nn.28–29.

64. Linda Maher, "Government Funding in Title X Projects: Circumscribing the Constitutional Rights of the Indigent: Rust v. Sullivan," 29 *Cal. W. L. Rev*. 143 (1992).

65. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

66. 505 U.S. 833 (1992).

67. Brief of Amici Curaie of N.O.W. Legal Defense and Education Fund, et al., at 15, citing national survey administered by Feminist Majority Foundation, *Madsen v. Women's Health Center,* 512 U.S. 753 (1994) (no. 93-880).

68. Nena Baker, Mark O'Keefe, and Julia Wotipka, "Verdict against Abortion Foes Is Proving Far from Decisive," *Portland Oregonian,* Feb. 7, 1999, at A1.

69. *Madsen v. Women's Health Center,* 114 S.Ct. 2516 (1994).

70. *Hill v. Colorado*, 2000 WL 826733.

NOTES TO CHAPTER 7

1. *Alden v. Maine*, 527 U.S. 706 (1999).

2. *Ex parte Young*, 209 U.S. 123 (1908).

3. Erwin Chemerinsky, *Constitutional Law: Principles and Policies* (New York: Aspen, 1997), sec. 3.6 at 215.

4. *Younger v. Harris*, 401 U.S. 37 (1971).

5. *National League of Cities v. Usery*, 426 U.S. 833 (1976) (overruling *Maryland v. Wirtz*, 392 U.S. 183 [1968]).

6. *See, e.g.,* Laurence Tribe, "Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services," 90 *Harv. L.*

Rev. 1065 (1977); Frank Michelman, "States' Rights and States' Roles: The Permutations of "Sovereignty" in *National League of Cities v. Usery*," 86 *Yale L. J.* 1165 (1977).

7. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

8. *Gregory v. Ashcroft*, 501 U.S. 452 (1991). See Philip P. Frickey, "Revisiting the Revival of Theory in Statutory Interpretation: A Lecture in Honor of Irving Younger," 84 *Minn. L. Rev.* 199 (1999).

9. See, e.g., *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985); *Welch v. Texas Dep't. of Highways and Public Transportation* (1987).

10. *Edelman v. Jordan*, 415 U.S. 651 (1974).

11. *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89 (1984).

12. *United States v. Lopez*, 514 U.S. 549 (1995).

13. *New York v. United States*, 505 U.S. 144 (1992).

14. *Printz v. United States*, 521 U.S. 898 (1997).

15. Pub. L. No. 103-322, Title IV, Subtitle C—Civil Rights for Women (codified as amended at 42 U.S.C. §13981) (1994).

16. The factual background is taken from the court opinions and the following press accounts. See *Brzonkala v. Virginia Polytechnic Institute*, 935 F.Supp. 779 (W.D. VA. Roanoke Division 1996); *Brzonkala v. Virginia Polytechnic Inst. and State U.*, 132 F.3d 949 (4th Cir. 1997) (three-judge panel); *Brzonkala v. Virginia Polytechnic Inst. and State U.*, 169 F.3d 820 (4th Cir. 1999) (en banc); *United States v. Morrison*, 2000 U.S. Lexis 3422. *The Virginia-Pilot* (Norfolk), Dec. 1, 1995, Sports, at C1, Final Edition, Landmark News Service; *Roanoke Times and World News*, Dec. 2, 1995, Metro Edition, Virginia section, at C1, Allison Blake and Betty Hayden; *Roanoke Times and World News*, Dec. 6, 1995, Metro Edition, Virginia section, at A1, Allison Blake; *Virginia-Pilot* (Norfolk), Dec. 8, 1995, Sports, at C1, Final Edition, Landmark News Service; *Roanoke Times and World News*, Jan. 3, 1996, Metro Edition, Virginia section, A1, Betty Hayden and Jan Vertefeuille; *Virginia-Pilot* (Norfolk), Jan. 6, 1996, Sports, at C1, Final Edition, Betty Hayden and Jan Vertefeuille; *Roanoke Times and World News*, Jan. 20, 1996, Metro Edition, Virginia section, at C1, Betty Hayden and Jan Vertefeuille; *Roanoke Times and World News*, Jan. 21, 1996, Metro Edition, Virginia section, at A1, Betty Hayden.

17. *Washington Times*, Feb. 27, 2000, Final Edition.

18. *See* 1990 S. Rep. 33, 37; 1990 Jud. Hearings 58, 109; "Women and Violence: Hearings before the Senate Comm. On the Judiciary," 101st Cong., 2d sess., pt. I, at 58 (1990)(1990 S. Jud. Hearings); 1991 S. Rep. 34 (citing Illinois, Texas, and Vermont Task Force Reports), 36, 38, 44; H.R. Rep. No. 395, 103rd Cong., 1st sess. 26 (1993); S. Rep. No. 103-138, at 42 (1993); 1993 S. Rep. 45n.29, 46, 47 and nn.42–44, 49n.52 (citing 20 state reports conducted between 1984 and 1991), 54n.70, 55; "Crimes of Violence Motivated by Gender: Hearing before the Subcommittee on Civil and Constitutional Rights of the House Committee on the

Judiciary," 103d Cong., 1st sess. 35 (1993)(1993 H. Jud. Hearing 34–36)(quoted statement came from a July 22, 1993, letter, signed or concurred in by forty-one state attorneys general); H.R. Conf. Rep. No. 711, 103d Cong., 2d sess. 385 (1994) (Conf. Rep.). *See also* Brief of Senator Joseph R. Biden, Jr., as Amicus Curiae in Support of Petitioners, 1999 U.S. Briefs 5 (Nov. 12, 1999) (Lexis).

19. Caroline Forell and Donna Matthews, *A Law of Her Own: The Reasonable Woman Standard as the Measure of Man* (New York: New York University Press, 2000).

20. Judith Resnik, "Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III," 113 *Harv. L. Rev.* 924 (2000); Judith Resnik, "The Programmatic Judiciary: Lobbying, Judging, and Invalidating the Violence against Women Act," 74 *So. Cal. L. Rev.* 269 (2000).

21. Judith Resnik, "'Naturally' without Gender: Women, Jurisdiction, and the Federal Courts," 66 *N.Y.U. L. Rev.* 1682 (1991).

22. *Chisholm v. Georgia*, 2 Dall. 419 (1793). For a collection of views on sovereign immunity, including recent rulings, see Symposium, "State Sovereign Immunity and the Eleventh Amendment," *Notre Dame L. Rev.*, vol. 75, no. 3 (March 2000).

23. *Osborn v. Bank of United States*, 22 U.S. 738 (1824).

24. *Hans v. Louisiana,* 10 S.Ct. 504 (1890); Erick Fonter, *Reconstruction: America's Unfinished Revolution, 1863–1877* (New York: Harper and Row, 1988).

25. John C. Jeffries, Jr., "In Praise of the Eleventh Amendment and Section 1983," 84 *Virginia L. Rev.* 47 (1998) (discussing interconnectedness of Eleventh Amendment, its exceptions and case law construing the major federal civil rights statute, 42 U.S.C. sec. 1983). *See also* Vicki C. Jackson, "The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity," *Yale L. J.,* vol. 98, no. 1 (1988).

26. *Seminole Tribe of Florida v. Florida*, 517 U. S. 44 (1996) (overruling *Pennsylvania v. Union Gas*, 491 U.S. 1 [1989]).

27. F. Cohen, *Handbook of Federal Indian Law* (1982 ed.) *See also* Rose L. Ppfefferbaum, Betty Pfefferbaum, Everett Rhoades, Rennard J. Strickland, "Providing for the Health Care Needs of Native Americans: Policy, Programs, Procedures, and Practices," 21 *American Indian L. Rev.* 211 (1997) (discussing Native Americans' overlapping roles as state residents, U.S. citizens, and members of sovereign tribes).

28. *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997).

29. Mary Christina Wood, "Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited," 1994 *Utah L. Rev.* 1471, 1567–1569.

30. *Alden v. Maine*, 527 U.S. 706.

31. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

32. *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990). For the story behind *Smith,* see Garrett Epps, *To an Unknown God: Religious Freedom on Trial* (New York: St. Martin's Press, 2001).

33. *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999).

34. *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 527 U.S. 627 (1999).

35. *Kimel v. Florida Bd. of Regents*, 120 S.Ct. 631 (2000).

36. *State University of New York, College at New Paltz v. Anderson*, 169 F.3d 117 (2d Cir. 1998); *Illinois State University v. Varner*, 150 F.3d 706 (7th Cir. 1998).

NOTES TO CONCLUSION

1. *Wisconsin v. Constantineau*, 400 U.S. 433, 442 (1971) (Burger, C.J., dissenting).

2. Judith Resnik, "Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III," 113 *Harv. L. Rev.* 924 (2000).

3. William N. Eskridge, Jr., and Philip P. Frickey, "The Supreme Court 1993 Term: Foreword: Law as Equilibrium," 108 *Harv. L. Rev.* 26 (1994).

4. *See, e.g.*, Kathleen M. Sullivan, "The Nonsupreme Court," 91 *Mich. L. Rev.* 1121 (1993) (reviewing Robert A. Burt, *The Constitution in Conflict* (Cambridge: Harvard University Press, 1992)).

5. Lisa A. Kloppenberg, "Avoiding Constitutional Questions," 35 *B.C. L. Rev.* 1003 (1994); Donald Grief Stephenson, Jr., *Campaigns and the Court: The U.S. Supreme Court in Presidential Elections* (New York: Columbia University Press, 1999).

6. Neal Kumar Katyal, "Judges as Advicegivers," 50 *Stan. L. Rev.* 1709 (1998).

7. *Rodriguez v. City of Chicago*, 156 F.3d 771 (7th Cir. 1998) (Posner, J., concurring).

8. John C. Jeffries, Jr., and Daryl J. Levinson, "The Non-Retrogression Principle in Constitutional Law," 86 *Cal. L. Rev.* 1211 (1998); Laura E. Little, "Hiding with Words: Obfuscation, Avoidance, and Federal Jurisdictional Opinions," 46 *UCLA L. Rev.* 75 (1998); Michael Wells, "Who's Afraid of Henry Hart?" 14 *Const. Commentary* 175 (1997).

9. William J. Brennan, Jr., "In Defense of Dissents," 37 *Hastings L. J.* 427 (1986).

10. Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Cambridge: Harvard University Press, 1999).

11. Bruce Ackerman, *Reconstructing American Law* (Cambridge: Harvard University Press, 1984), and *We the People: Transformations,* vol. 2 (Cambridge: Harvard University Press, 1991).

12. Judith Resnik, "The Federal Courts and Congress," 86 *Geo. L. J.* 2589 (1998).

13. Hon. Sonia Sotomayor, U.S. Court of Appeals for the Second Circuit, Speech at Yale Law School, April 30, 2000; Victoria Harker, "Congress Drags Its

Feet on Judges. 6 New Seats for Arizona Stay Empty," *Arizona Republic*, Nov. 15, 1999, at A1; Carl Tobias, "Leaving a Legacy on the Federal Courts," 53 *U. Miami L. Rev.* 315 (1999).

14. Frederick Schauer, "Statutory Construction and the Coordinating Function of Plain Meaning," *Sup. Ct. Rev.* 231 (1990).

15. Penny J. White, "It's a Wonderful Life, or Is It? America without Judicial Independence," 27 *U. Mem. L. Rev.* 1 (1996).

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