

The Yale Law Journal

Volume 91, Number 7, June 1982

The Origins of Judicial Activism in the Protection of Minorities*

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I. Introduction: The Counter-majoritarian Difficulty

During the first third of the twentieth century, the Supreme Court afforded constitutional protection to certain vaguely defined substantive interests that have since been loosely tied together under the label of “substantive due process.” Throughout that period, a rich and complex dissenting tradition was carried on first in the opinions of Holmes, then Brandeis and, still later, Stone. That dissenting tradition—an elaboration of the teachings of Professor James Thayer of Harvard Law School—placed the majoritarian lawmaking process at the center of constitutional theory. Judicial review was suspect insofar as it invalidated outcomes of this presumptively legitimate process.

The thrust of the Holmes, Brandeis, and Stone opinions was largely negative at first. Though the three dissenters also attacked the internal inconsistencies that any theory of substantive entitlements will necessarily manifest, most often they emphasized the simple fact that the Court was thwarting majoritarian mechanisms of social choice. Their delegitimation strategy revolved around the supposed superiority of democratic—that is, legislative—choice mechanisms to any judicially imposed theory of sub-

* This Article is a slightly altered version of a paper presented at the American Enterprise Institute (“A.E.I.”) Conference on the Role of the Judiciary, December 1979. The original paper will be published in 1982 by the A.E.I. in a book to be edited by S. Moore. This version is published here with the permission of the A.E.I.

† Professor of Law, Yale Law School. I wish to acknowledge a special debt to Louis Lusky, who taught me constitutional law fifteen years ago and first had me look through the lens of footnote four. His fervor and commitment to the values of footnote four and his development of its principles in his scholarship have been important guides to me and to others through the years.

stantive rights.¹ Thus, they attacked the exercise of judicial review with the blunt instrument that has become known as the "counter-majoritarian difficulty."²

In fact, none of the dissenters went so far in his opinion as to deny the due process clauses all substantive implications. Holmes and Brandeis went along with opinions striking down such "extreme" instances of state experimentation as the Kansas Industrial Court Act, which authorized compulsory arbitration not only for public utilities and transportation companies but for all industries relating to the production or distribution of food, clothing, shelter, and fuel.³ And both joined the opinion in *Pierce v. Society of Sisters*⁴ striking down Oregon's compulsory education law, which in effect outlawed private schools. Moreover, Holmes and Brandeis pioneered (in dissent) recognition of freedom of speech and of the press as liberties entitled to substantive protection under the due process clause of the fourteenth amendment.⁵

Nowhere in their opinions did the dissenters satisfactorily explain how even the limited substantive due process rights that they accepted could survive their own general attack with the heavy artillery of the counter-majoritarian difficulty. Indeed, some passages in the opinions of Justice Brandeis gave the impression that the dissenters' recognition of a limited role for substantive due process was tactical only and highly contingent: if there had to be a general doctrine of substantive entitlement under the due process clauses, Brandeis would have it protect free speech or education as more fundamental than the various property interests previously afforded protection.⁶ His early attempts to extend substantive free speech protection against the states did not resort to the methodology of substantive due process.⁷

The majoritarianism of Brandeis, Stone, and Holmes persisted into the

1. See, e.g., *Tyson & Brother v. Banton*, 273 U.S. 418, 447 (1927) (Stone, J., dissenting); *Truax v. Corrigan*, 257 U.S. 312, 354 (1921) (Brandeis, J., dissenting); *Lochner v. New York*, 198 U.S. 45, 74 (1905) (Holmes, J., dissenting).

2. The "counter-majoritarian difficulty" has spawned the central line of constitutional scholarship for the past thirty years. See, e.g., A. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962); C. BLACK, *THE PEOPLE AND THE COURT* (1960); L. HAND, *THE BILL OF RIGHTS* (1958); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). But see J. ELY, *DEMOCRACY AND DISTRUST* 43-72 (1980); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (1978) (especially ch. 3).

3. *Charles Wolff Packing Co. v. Court of Indus. Relations (I)*, 262 U.S. 522 (1922); *Charles Wolff Packing Co. v. Court of Indus. Relations (II)*, 267 U.S. 552 (1925).

4. 268 U.S. 510 (1925). Holmes had dissented, however, in *Meyer v. Nebraska*, 262 U.S. 390 (1923) (holding unconstitutional state law proscribing teaching of German).

5. See *Whitney v. California*, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring); *Gitlow v. New York*, 268 U.S. 652, 672 (1925) (Holmes, J., dissenting).

6. See *Gilbert v. Minnesota*, 254 U.S. 325, 334 (1926).

7. Cover, *The Left, The Right and The First Amendment, 1918-1928*, 40 MD. L. REV. 349, 377-81 (1981) (arguing that those attempts constitute highly original and often misunderstood masterpieces).

1930's and lay at the heart of the New Deal critique of the Court. Roosevelt's appointment of Hugo Black in 1937 established a slim Court majority for majoritarianism. Where once it had been a dissenting tradition, majoritarianism became more entrenched as a dominant doctrine with each subsequent Roosevelt appointment.

But the doctrine proved more serviceable as a dissenting position than as a reigning ideology. The Supreme Court must ultimately justify the outcomes generated by polity and society, reconciling them to the first principles of political structure. It must speak to those questions that most urgently challenge the legitimacy of the social and legal structure as a whole. And by the 1930's popular government and the institutions of mass democracy had themselves become so problematic that they could not, in and of themselves, serve to justify outcomes that appeared intrinsically unjust. The manipulation of mass politics had become for the twentieth century what "special interest" politics had been for the age of the Robber Barons: a practical and theoretical challenge to the sufficiency of popular government as the governing constitutional principle.

If all or most substantive interests were to be subordinated to the process principle of popular government, to majoritarianism, the Court would have to explain how the virtues of popular government were to triumph in the age that had seen the rise of bolshevism and fascism, the orchestration of mass oppression of minorities, the cynical manipulations of elections, and the ascendancy of apparatus and party over state and society. It was not that the dissenters of 1905-1937 had failed to see these problems—although the problems had become more obvious and pressing as the century advanced—but, rather, that an idea can serve admirably as critique without being even adequate as justification. Substantive due process applied to economic regulation was properly subject to the criticism that it was anti-democratic. But that did not mean that, in the age of Hitler, majoritarianism itself would not require more in the way of justification than its professedly democratic nature.

II. Footnote Four and the Concept of Minorities

The terms of the modern debates on judicial activism were thus spawned in the context of both the New Deal at home and totalitarianism abroad, emerging by 1937-38 in a decidedly contemporary mode. It was then that the Court committed itself to the now familiar dichotomy between the scope of review for economic legislation—a nearly absolute majoritarianism—and that afforded legislation affecting a vague and dimly perceived set of other "personal" rights.⁸ The Court first articulated that

8. Almost simultaneously the Court conceded vast powers to Congress in economic matters, see

dichotomy clearly in *United States v. Carolene Products Co.*,⁹ which upheld federal legislation that prohibited the shipment in interstate commerce of filled milk. After reiterating, with respect to economic matters,¹⁰ the newly established deference to legislative judgments, Justice Stone gave us in footnote four the classic text that is the subject of this essay:

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth. See *Stromberg v. California*, 283 U.S. 359, 369-370; *Lovell v. Griffin*, 303 U.S. 444, 452.

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. On restrictions upon the right to vote, see *Nixon v. Herndon*, 273 U.S. 536; *Nixon v. Condon*, 286 U.S. 73; on restraints upon the dissemination of information, see *Near v. Minnesota ex rel. Olson*, 283 U.S.

e.g., *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), while articulating several alternative theories by which judicial oversight of non-economic personal rights would be retained. Compare *Palko v. Connecticut*, 302 U.S. 319, 324-25 (1937) (protecting rights deemed "implicit in the concept of ordered liberty") with *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

9. 304 U.S. 144, 152-53 (1938). Cardozo's enunciation in *Palko* of rights "implicit in the concept of ordered liberty" preceded footnote four, but did not speak to the same issue of dichotomous review. The burden of *Palko* was to justify a different set of distinctions: that among the varying treatments afforded different provisions in the Bill of Rights when invoked against the states—that is, how to select for selective incorporation. It is noteworthy that footnote four of *Carolene Products* does not distinguish between review of state and federal legislation. The case itself, of course, involved a federal statute; but the citations in footnote four involve, with one exception (*Farrington v. Tokushige*, 273 U.S. 284 (1927), which invalidated a federal territorial law), local statutes, regulations, and ordinances. Thus, while it is clear that footnote four, as a method, cuts across state-federal lines, it might be supposed that the "ordered liberty" notion of *Palko* is a method only for choosing among enumerated rights those applicable against the states. The *Palko* idea is, however, susceptible to being generalized in giving content to all relatively imprecise clauses in the Constitution, whether they be applied against state or federal legislation.

Although footnote four is the first, and, I believe, most convincing formulation of the dichotomous standard for judicial review, it has not gone unchallenged. The most direct attack upon the authority of the footnote is by Justice Frankfurter in his concurring opinion in *Kovacs v. Cooper*, 336 U.S. 77, 89-92 (1949). Frankfurter, in a single sentence that has about it the aura of the hysterical, makes three condemning assertions: 1) a footnote is an inappropriate way to announce new doctrine; 2) it did not purport to create new doctrine anyway; 3) and it did not have the concurrence of a majority of the court. *Id.* at 90-91. Frankfurter's diatribe is contained within an attack on a "preferred freedoms" approach to the First Amendment. Insofar as his attack is premised on the idea that the doctrine "expresses a complicated process of constitutional adjudication by a deceptive formula," *id.* at 96, Frankfurter seems more on target with respect to the first paragraph of the footnote than with respect to paragraphs two and three.

10. The text of *Carolene Products* to which footnote four is appended affords judicial deference to "legislative facts," whether explicitly or implicitly found by the legislature. The presumption is that legislation rests upon "some rational basis within the knowledge or experience of the legislator." 304 U.S. at 152.

697, 713-714, 718-720, 722; *Grosjean v. American Press Co.*, 297 U.S. 233; *Lovell v. Griffin*, *supra*; on interferences with political organizations, see *Stromberg v. California*, *supra*, 369; *Fiske v. Kansas*, 274 U.S. 380; *Whitney v. California*, 274 U.S. 357, 373-378; *Herndon v. Lowry*, 301 U.S. 242; and see Holmes, J., in *Gitlow v. New York*, 268 U.S. 652, 673; as to prohibition of peaceable assembly, see *De Jonge v. Oregon*, 299 U.S. 353, 365.

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, *Pierce v. Society of Sisters*, 268 U.S. 510, or national, *Meyer v. Nebraska*, 262 U.S. 390; *Bartels v. Iowa*, 262 U.S. 404; *Farrington v. Tokushige*, 273 U.S. 484 [sic]; or racial minorities, *Nixon v. Herndon*, *supra*; *Nixon v. Condon*, *supra*: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry. Compare *McCulloch v. Maryland*, 4 Wheat. 316, 428; *South Carolina v. Barnwell Bros.*, 303 U.S. 177, 184, n. 2, and cases cited.¹¹

Footnote four combined a textual and a functional justification for the differing standards of review. The textual touchstone in the first paragraph—apparently added by Chief Justice Hughes to the clearer, purely functional justification in the original Stone draft¹²—requires a more rigorous standard of scrutiny for rights specifically enumerated or mentioned in the Constitution.¹³

The functional justifications in the second and third paragraphs of the footnote accept the general terms of the counter-majoritarian difficulty, extending the scope of judicial review not in terms of the special *value* of

11. *Id.* at 152-3.

12. For a good account of the authorship of footnote four, see A. MASON, HARLAN FISKE STONE, PILLAR OF THE LAW 513-15 (1956). The authorship in the first instance of paragraphs two and three of the footnote is usually attributed to Louis Lusky, Stone's clerk in 1938. Professor Lusky has never denied that authorship, but has qualified it by insisting upon the fact that whatever the Justice accepted as a part of an opinion must be regarded as his own. *Id.* at 513. That Stone knowingly embraced footnote four is evidenced by the fact that he, more than any other justice, used it as authority in later cases. Moreover, he used it sensitively to designate its implicit structural values, not as a simple citation for a "preferred freedoms" doctrine. See, e.g., *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 544 (1942) (Stone, J., concurring); *Minersville School Dist. v. Gobitis*, 310 U.S. 586, 606 (1940) (Stone, J., dissenting). Only Justice Murphy approached Justice Stone in his use of the footnote as authority. As this article went to press, Professor Lusky published a new and important article that treats the history and meaning of the footnote. See Lusky, *Footnote Redux: A Carolene Products Reminiscence*, 82 COLUM. L. REV. 1093 (1982).

13. This approach, which would later form the basis of Justice Black's jurisprudence, has, to be sure, its functional justifications at a different and perhaps deeper level; but the justifications for textualism (or interpretivism) are not part of textualism's methodology. See J. ELY, *supra* note 2, at 1-41, for a sensitive discussion of the basis of what he labels the interpretivist approach. Ely, quite rightly, sees paragraphs two and three of the *Carolene Products* footnote as complementing paragraph one. J. ELY, *supra* note 2, at 76 ("[T]he objection to interpretivism is that it is incomplete.")

certain rights¹⁴ but in terms of their *vulnerability* to perversions by the majoritarian process. They do not require that one accept on any authority the privileged character of any specific interest. Rather, paragraphs two and three offer a justification that is entirely responsive to the political theory premises of the counter-majoritarian difficulty itself.

A. *Paragraph Two: Protecting the Vitality of the Political Process*

The second paragraph suggests that "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation" should be subject to "more exacting judicial scrutiny." In other words, the footnote acknowledges that those representatives enjoying office, its power, and its perquisites may conspire to entrench themselves and to defeat the very majoritarian processes that render the acts of legislatures presumptively more legitimate than the acts of judges. The footnote gives as examples of such legislation restrictions on voting rights, on dissemination of information, on political organization, and on peaceable assembly. The premise of the paragraph seems to be that a politically free citizenry and honest, suitable mechanisms for transforming public politics into governmental action are prerequisites for majoritarian choice.¹⁵

14. These paragraphs do, of course, designate certain rights or types of rights as occupying a "preferred" position in claims for judicial protection. But citation of the footnote for a "preferred freedoms" doctrine engenders the confusion Stone was trying to avoid. There is a vast conceptual gulf between saying that the Court is charged with protecting whatever interests and rights are more valuable, precious, or important in some ultimate ethical sense and saying that the court is charged with protecting interests and rights that entail predictable perversions of majoritarian government. The first position rests conceptually on a distrust of democratic choices, on a willingness to reverse them if they are too wrong. The second position rests upon the premise that the mechanisms of government may pervert and destroy the substance of democratic choices in predictable ways.

Though the conceptual bases of these positions are quite different, the practical results may often converge. As a result, practical people may choose to pursue their ends with both theories, interchanging them as they see fit for rhetorical purposes. Footnote four has frequently been cited for a "preferred freedoms" position, and Justice Frankfurter attacked it as such. See *Kovacs v. Cooper*, 336 U.S. 77, 90-92 (1949); see also *supra* note 8. Stone's identification with a "preferred freedoms" position can most plausibly be related to his dissenting opinion in *Jones v. Opelika*, 316 U.S. 584, 608 (1942) ("The First Amendment is not confined to safeguarding freedom of speech and freedom of religion against discriminatory attempts to wipe them out. On the contrary, the Constitution . . . has put those freedoms in a preferred position.") But Frankfurter mentions this dissent only in passing, see 336 U.S. at 93, although he concedes that it is the place where the adjective "preferred" is first used in this context. The point Stone is making in the *Jones* dissent—that the First Amendment must be read as creating a certain space free of regulation of speech and religion, even if the regulation is not specifically and discriminatorily directed at speech or religion—seems defensible. It is consistent with footnote four's functional justification for judicial enforcement of the freedom of the public political space. What is essential in footnote four is not that certain rights are designated "preferred" but the reasons for the preference. Here, of course, paragraph one gives a textual justification and rests on a different basis from paragraphs two and three. For the idea that paragraphs two and three do not rest on a single consistent foundation, see *infra* pp. 1310-12.

15. The unsavory character of political bossism was occupying the Court more and more in the late 1930's as private individuals, unions, and the federal government began to seek ways to challenge the structure of local and state fiefdoms. See, e.g., *United States v. Classic*, 313 U.S. 299 (1941);

Judicial Activism

In contemporary terms—and given the hindsight of forty years—I would paraphrase the danger: incumbency may degenerate into “apparatus,” manipulating the formal machinery of choice in elections, districting, and control of public benefits. We also fear that the political society will degenerate into the party, circumscribing the space for free, unconstrained public politics and allowing no “natural” political life, antecedent and superior to the party and the state, to survive.

The footnote suggests that these dangers must be met from two angles. First, the incumbents must not be permitted to manipulate or to control unchecked the machinery that links public choices to representation. For if they could, even wholesome public politics would not avail. Second, the incumbents must not be permitted to orchestrate public choice. The space for politics in the Greek sense must be ample and unencumbered. For were the party able to orchestrate mass politics, even honest elections would not avail.¹⁶

I believe paragraph two of the footnote captures, in a marvelously concise sentence with a few suggestive citations, the lesson of twentieth century perversions of the majoritarian forms of politics. In 1938 it was, of course, no wonder that such perversions attracted attention.¹⁷ The footnote neatly captures the concern both for developing totalitarianism abroad and

Hague v. CIO, 307 U.S. 496 (1939).

16. For a contemporaneous treatment of legal problems associated with totalitarian techniques in the orchestration of politics, see, e.g., Riesman, *Democracy and Defamation: Control of Group Libel*, 42 COLUM. L. REV. 727 (1942); Riesman, *Democracy and Defamation: Fair Game and Fair Comment* (pts. 1 & 2), 42 COLUM. L. REV. 1085, 1282 (1942); see also Lusky, *Minority Rights and the Public Interest*, 52 YALE L.J. 1, 32-38 (1942).

17. In his exhaustive biography of Justice Stone, Alpheus Thomas Mason quotes a letter written by Stone and dated the day after *Carolene Products* came down:

I have been deeply concerned about the increasing racial and religious intolerance which seems to bedevil the world, and which I greatly fear may be augmented in this country. For that reason I was greatly disturbed by the attacks on the Court and the Constitution last year, for one consequence of the program of ‘judicial reform’ might well result in breaking down the guaranties of individual liberty.

A. MASON, *supra* note 12, at 515 (quoting letter from Stone to Judge Irving Lehman, April 26, 1938).

Moreover, some of the defenders of the Supreme Court in the court-packing fight of 1937 had strongly linked the objective of maintaining the independence of the judiciary from political retaliation to the struggle against totalitarianism. At least one prominent witness at the Senate Judiciary Committee hearings on the court-packing legislation had raised the experience of Nazi Germany and fascist Italy as cautionary spectres for those considering Roosevelt’s scheme for the discipline of the Court. Dorothy Thompson, renowned columnist and journalist, testified in part as follows:

I am not an expert on constitutional law, . . . I have been for some years, as a foreign correspondent, an observer at the collapse of constitutional democracies. You might say I have been a researcher into the mortality of republics. The outstanding fact of our times is the decline and fall of constitutional democracy. A great need of our time is for more accurate analysis of the pathology of constitutional government. . . .

Reorganization of the Federal Judiciary: Hearings before the Comm. on the Judiciary of the United States Senate on S. 1391, 75th Cong., 1st Sess. 859 (1937).

for the less virulent but more immediate perversions of democracy at home.

B. *Paragraph Three: Protecting Minorities*

While paragraph two concerns itself with the question of perversion of democratic forms, paragraph three concerns itself with the limits of permissible democratic purposes. Minorities, in the sense of that paragraph and in the sense we use the term today—religious, ethnic, national and racial minorities—became a special object of judicial protection only with footnote four, which was written at almost the exact moment when majoritarianism became the dominant constitutional perspective.¹⁸

Many constitutional sources from before 1938 speak of judicial protection of minorities. But they use the phrase in an obviously different sense: to refer to losing factions in political struggles¹⁹ or, more importantly, to broad sectional or economic interests that may be at a majoritarian political disadvantage.²⁰ In this latter sense the term was current coin among the Framers. One of their solutions to this “minority” problem was judicial review. We also find cases prior to 1938 that do in fact extend judicial protection to minority groups in our sense of the word.²¹ But these cases

18. I have chosen to consider footnote four as the watershed. Obviously, the choice is not written in stone. The justification appears within.

19. Madison thought that the tyranny of the majority would be most likely to occur at the local and state level. He was not sanguine about the possibility of effective judicial protection against such a “tyranny” and advocated the more radical measure of a congressional “negative” on state legislation. See 10 THE PAPERS OF JAMES MADISON 206-19 (1840) (letter from James Madison to Thomas Jefferson, October 24, 1787). The problem of protecting the public interest, individuals, and minorities (in a most general sense) from a majority faction preoccupied Madison. His classic essay on the subject, THE FEDERALIST No. 10, characteristically relies upon the enlargement of the political space as the major counterforce to majority tyranny. In effect, Madison argues that appeal to a sufficiently large and heterogeneous political constituency makes it unlikely that the forces of passion and interest will prevail. For a now classic critique of this argument, see R. DAHL, A PREFACE TO DEMOCRATIC THEORY 128-29 (1956). See also G. WILLS, EXPLAINING AMERICA xv-xxi, 208-215 (1981).

20. Madison saw economic interests as the primary determinants of “faction.”

From the protection of different and unequal faculties of acquiring property, the possession of different degrees and kinds of property immediately results; and from the influence of these on the sentiments and views of the respective proprietors, ensues a division of the society into different interests and parties.

. . . But the most common and durable source of factions, has been the various and unequal distribution of property.

THE FEDERALIST No. 10, at 131 (J. Madison) (B. Wright ed. 1961). Note the depth of the point Madison makes: property not only is itself an interest over which groups struggle, but also is an “influence” on the “sentiments and views” of its holders.

The critical place of property in giving rise to “factions” is compounded in our constitutional history by the identification of certain kinds of property interests with certain sections of the nation. The South has always been identified with slave property, and the Northeast with mercantile and shipping interests. For considerations of the structural protection of such “minority” interests in a national scheme, see S. LYND, CLASS CONFLICT, SLAVERY, AND THE UNITED STATES CONSTITUTION (1967) (especially chs. 7, 8, & 10).

21. See, e.g., *Nixon v. Herndon*, 273 U.S. 536 (1927) (striking down state statute requiring white primary); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (invalidating Oregon statute requir-

present no theory that it is this characteristic of the group—its “minority-ness”—that requires special judicial solicitude. They justify constitutional protection by the substantive character of the rights involved rather than by the nature of the groups protected.²²

Perhaps this generalization needs to be qualified with a word concerning the earlier understanding of the Reconstruction Amendments. The *Slaughter House Cases*, to prevent the fourteenth amendment from being a comprehensive source of rights against the state, made use of the common knowledge that the Amendments were designed to ameliorate the condition of Blacks.²³

This view of constitutional law and history did perceive Negroes as a special object of protection.²⁴ Had the pattern of decisions over the ensuing fifty years taken a very different turn from its actual course, this assertion, from which there has never been real dissent, might have proven the starting point for articulating a special judicial role in protecting minorities, or at least in protecting the most important minority in American experience. But an observation about the purpose of a constitutional text is not in terms a theory about the role of the judiciary. And the massive retreat from protecting Black rights between the 1870's and the 1920's—a retreat led by the Court in many instances—eliminated any chance of inferring such a role from practice.²⁵ Thus, the explicit articulation of a special

ing children to attend public schools); *Buchanan v. Warley*, 245 U.S. 60 (1917) (invalidating city ordinance requiring, in effect, residential segregation); *Guinn v. United States*, 238 U.S. 347 (1915) (striking down grandfather clauses).

22. Some of the cases prior to 1938—*Pierce v. Society of Sisters*, 268 U.S. 510 (1925), and *Buchanan v. Warley*, 245 U.S. 60 (1917), for example—were substantive due process cases protecting rights held by any and all individuals from a form of prohibited state interference. It just happened in each case that the probable motive or precipitating factor for the interference was a scheme of persecution against a “minority group.” Strictly speaking, in each case that fact was legally irrelevant. Indeed, *Pierce*'s companion case, *Pierce v. Military Academy*, 268 U.S. 510 (1925), involved no element of a “minority group,” though the claim presented was otherwise in all respects identical to that of the *Society of Sisters*.

In *Buchanan*, the racial character of the zoning did have a plausible relevance to the case, but in a direction precisely opposite to what would be expected under modern equal protection law. For the state contended, in effect, that its affirmative interest in segregation of the races under its police power justified a restriction on property alienation and use that would normally constitute an infringement of due process rights.

23. *Slaughter House Cases*, 83 U.S. (16 Wall.) 36, 81 (1872) (“The existence of laws in the States where the newly emancipated negroes [*sic*] resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this [equal protection] clause, and by it such laws are forbidden.”)

24.

It [the 14th Amendment] was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States

Id.

25. A brief, useful narrative of all the important cases on race and civil rights may be found in L. MILLER, *THE PETITIONERS* (1966). For the period of massive retreat, see, especially, chapters 11-13.

The most important legal history of the race cases in the progressive period to appear in some time

judicial role with respect to minorities and their rights awaited the constitutional reconstruction of 1937-38.

Paragraph three of the footnote rescued that lost opportunity by identifying discrimination against racial minorities as a characteristic vice of majoritarianism in the twentieth century. The paragraph purported to address the most serious of "imperfections" in majoritarian politics—"imperfections" that were highlighted in 1938.

"Discrete and insular" minorities are not simply losers in the political arena, they are perpetual losers. Indeed, to say that they lose in the majoritarian political process is seriously to distort the facts: they are scapegoats in the real political struggles between other groups. Moreover, in their "insularity" such groups may be characteristically helpless, passive victims of the political process. It is, therefore, because of the discreteness and insularity of certain minorities (objects of prejudice) that we cannot trust "the operation of those political processes ordinarily to be relied upon to protect minorities." A more searching judicial scrutiny is thus superimposed upon the structural protections against "factions" relied on by the original Constitution—the diffusion of political power and checks and balances.²⁶

If anything, paragraph three, coming as it did just before the worst excesses of organized racism were to burst upon the world, somewhat understated the significance of racism in majoritarian politics.²⁷ While it clearly expressed the risks in relying upon majoritarian politics to preserve a minority's rights, it did not allude to the distorted shadows that the organized scapegoating of minorities cast upon other elements of politics. In this sense, the concerns of paragraphs two and three of the footnote converge. For organized baiting of minorities has been one of the levers for manipulating masses since the advent of modern politics. It represents, thus, a failure of politics not only in the nonprotection of the victim group, but also in the deflection and perversion of other public purposes. There

is the excellent recent work of Benno Schmidt, Jr. See Schmidt, *Principle and Prejudice: The Supreme Court and Race in the Progressive Era* (pts. 1-3), 82 COLUM. L. REV. 444 (1982), 82 COLUM. L. REV. 646 (1982), 82 COLUM. L. REV. (forthcoming).

26. The Court did not develop the reasons for considering racial, religious, or ethnic minorities to be different from other minorities. But those reasons have been elaborated somewhat by such thoughtful and, in a sense authoritative, *see supra* p. 1291 interpreters of footnote four as Professor Louis Lusky. As Lusky stated in the earliest of his publications on the minorities problem:

The minorities problem springs from the existence of fairly well defined 'out-groups' disliked by those who control the political and other organs of power in society. Such dislike arises not because the members of the groups have done or threatened acts harmful to the community, but because membership in the group is itself considered a cause for distrust or even hostility. Lusky, *supra* note 16, at 2. Lusky later emphasized what he called kinship as the necessary element in making representative government work: the absence of empathy as to certain groups removes the element of self-restraint and fair dealing in pursuing majoritarian interests. See L. LUSKY, *By What Right?* 12 (1975).

27. Decided on April 24, 1938, *Carolene Products* preceded the Krystalnacht by seven months.

Judicial Activism

are ways to block a message besides arresting the speaker, and one of them is to cry nigger.²⁸

In effect, therefore, footnote four suggests two reasons for judicial protection of minorities. The clearest reason is contained in paragraph three: a discrete and insular minority cannot expect majoritarian politics to protect its members as it protects others. Less clearly stated is the additional argument of paragraph two that prejudice and race hatred are also levers of manipulation in the mass political arena.

III. Majoritarian Politics and the "Minorities Problem"

Further analysis of the significance of the Court's pronouncement of judicial protection for minorities must await a brief consideration of the origins of the term "minorities" itself. For that history suggests a proper understanding of the theory behind and the problems within the footnote.

A. *The Theory of Minorities*

No important innovation is without antecedents. In the case of this new use of the term "minorities," the antecedents were so pervasive as to make the novelty barely perceptible. First, beginning in the nineteenth century and proliferating after the peace settlement at Versailles, treaties and conventions invoked the idea of international "protection of minorities" from the domestic political processes of certain nations.²⁹ The term "minorities"

28. By the late 1930's, a literature on the methods of contemporary tyrannies had developed that stressed "hate-mongering" as a typical lever for manipulation of the masses. This interest grew through the war years and became the subject of massive social science research through the 1940's and early 1950's. For important work in the legal literature on this subject, see Loewenstein, *Legislative Control of Political Extremism in European Democracies* (pts. 1 & 2), 38 COLUM. L. REV. 591, 725 (1938); Loewenstein, *Militant Democracy and Fundamental Rights* (pts. 1 & 2), 31 AM. POL. SCI. REV. 417, 638 (1937); Riesman, *Democracy and Defamation: Fair Game and Fair Comment* (pts. 1 & 2), *supra* note 16, at 1085, 1282.

Whether systematic hate campaigns against minorities are part of a common political phenomenon that can be labeled "totalitarianism" remains a subject of controversy among theorists. For an overview of the "totalitarianism" debate, compare H. ARENDT, *THE ORIGINS OF TOTALITARIANISM* (1966) (totalitarianism is a distinct form of government, politics, and social organization that cuts across "Left" and "Right") with A. MAYER, *DYNAMICS OF COUNTERREVOLUTION IN EUROPE 1870-1956* (1971) (asserting that the concept of "totalitarianism" permitted Western liberal intellectuals to obscure the dynamics of and differences between revolution and counterrevolution).

The notion that race hatred could be manipulated to deflect constructive political change is a persistent theme in the history of the American South. See, e.g., W. CASH, *THE MIND OF THE SOUTH* (1941); H. HELPER, *THE IMPENDING CRISIS* (1857); V. KEY, *SOUTHERN POLITICS IN STATE AND NATION* (1949); L. SMITH, *KILLERS OF THE DREAM* (1963); C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (1974). The history of Southern populism is replete with observations of the deflection of innovation via a quite conscious, manipulated reversion to racism to incite the white masses and prevent a political coalition of Blacks and Whites from advancing to power. See L. GOODWYN, *DEMOCRATIC PROMISE, THE POPULIST MOVEMENT IN AMERICA* 276-306, 533-34 (1976); C. VANN WOODWARD, *supra*, at 78.

29. For brief accounts of the histories of such treaties, see, e.g., L. MAIR, *THE PROTECTION OF MINORITIES* 30-36 (1928); J. STONE, *INTERNATIONAL GUARANTEES OF MINORITY RIGHTS* 3-31

was used in these international agreements to include "racial, linguistic or religious minorities."³⁰ Moreover, this concern for protecting minorities carried with it an increasing recognition of a need for judicial protection. As Julius Stone wrote in 1932: "It was in the jurisdiction given [under the League of Nations scheme] to the Permanent Court of International Justice that there appeared the only completely new contribution of the post-war settlement to the machinery of minorities protection."³¹ Thus, by the 1930's, "minorities" in the footnote four sense was already an accepted term of art with a recognized technical meaning in international law. Furthermore, the premise for this international protection was that the nation-state, ordinarily dominated by a single racial, religious, or ethnic group, might fail to afford the benefits of its political processes to the racial, religious, or ethnic minorities within the state. The international law system thus tacitly acknowledged that the twentieth-century nation-state was characteristically built upon the consolidation of a particular racial or ethnic group's political hegemony over a territory that included a mixed population.³²

Second, the term "minority" had also assumed legal and institutional significance in a purely domestic context. The massive increase of federally administered programs during the New Deal required specific attention to the reciprocal impact between these programs and various racial patterns in different parts of the nation. In some programs, such as the Civilian Conservation Corps, federal administration acquiesced to racist local patterns.³³ In other programs, such as the National Youth Administration, a persistent effort was made to influence localities in the direction

(1934). For a comprehensive account of the minorities treaties, see C. MACARTNEY, *NATIONAL STATES AND NATIONAL MINORITIES* (1934); for an interesting hypothesis concerning the ideological and political context for such treaties, see H. ARENDT, *supra* note 28, at 269-290.

30. "The country concerned agrees that the stipulations in the foregoing articles, so far as they affect persons belonging to racial, linguistic or religious minorities, constitute obligations of international law . . ." J. STONE, *supra* note 29, at 273 (quoting League of Nations Council Resolution of Oct. 22, 1920).

31. *Id.* at 8.

32. More precisely, the break-up of the Turkish, Austro-Hungarian, and Russian Empires forced the European nation-state system to confront directly the question avoided through much of the nineteenth-century state-building: what relation does the nation bear to the state. Versailles' purposeful creation, at a stroke, of new states, the demand that these states be of a viable size, and the conflicting claims to hegemony all made it quite impossible to ignore the imperfect fit of population and territorial dominance. While it would be absurd to suggest that such "imperfections" were not noticed in the consolidations of Germany and Italy, they were renewed and accentuated in the process of drawing lines on a map at Versailles.

33. An Office of Minority Affairs was set up in the National Youth Administration under Mary McLeod Bethune. See G. Rawick, *The New Deal and Youth: The Civilian Conservation Corps, the National Youth Administration and the American Youth Congress 137-170* (1957) (unpublished Ph.D. dissertation, University of Wisconsin); see also Salmond, *The Civilian Conservation Corps and the Negro*, in *THE NEGRO IN DEPRESSION AND WAR 78-92* (B. Sternsher ed. 1969).

of equal treatment.³⁴

The significant element in both the international law antecedent and the New Deal experience was the conceptualization of a “minorities problem” that cut across the contingent experiences of any particular minority group. The denomination of a “Jewish problem,” a “Negro problem,” or an “Indian problem” suggests that the “problem” is peculiar to the group’s history, beliefs, or actions as they intersect with the history, beliefs, and actions of others. To generalize to a “minorities problem” suggests the *irrelevance* (or subordinate character) of any group’s particular experience. All minority groups are deemed to have a common element of dominating significance, observable in social structure and social process as they affect politics. All groups that are minorities in the footnote four sense—and in the sense of the international law guarantees protecting minorities—share certain characteristics: they are isolated in the social structure; they occupy positions relatively resistant to change (in particular, resistant to the solvent of shifting interest alignments); and they are vulnerable to attack by others. The belief that there is a similarity or identity of social and psychological processes and structures at work in the otherwise widely different historical experiences of Jews, Blacks, Indians, ethnics (and perhaps women) represents a great intellectual step associated with twentieth-century theories of sociology and social psychology.³⁵ It is also a step of dubious validity.

Prior to footnote four our constitutional categories were historically determined. The Constitution clearly creates historically specific, contingent categories, such as “religions,” and does not speak at all in the psychological or sociological terms of “prejudice” or “outgroups.” There were free exercise and non-establishment rights of religious minorities because of the actual historical experiences of a particular set or group.

One might, therefore, imagine an innovator in constitutional law arguing as follows in 1938: The developing sociological perspective on intergroup relations and the rapidly developing inquiries into the social-psychological processes of “prejudice” support the view that a single phenomenon or family of phenomena is involved in prejudice against “minorities,” whatever the particular history of a given group. It would be

34. See Bethune, *My Secret Talks with FDR*, in *THE NEGRO IN DEPRESSION AND WAR*, *supra* note 33, at 53-65.

35. One of the most frequently cited sociological articles on “minorities” is Wirth, *The Problem of Minority Groups*, in *THE SCIENCE OF MAN IN THE WORLD CRISIS* (R. Linton ed. 1945). Wirth defines a minority “as a group of people who, because of their physical or cultural characteristics, are singled out from the others in the society in which they live for differential and unequal treatment, and who therefore regard themselves as objects of collective discrimination.” *Id.* at 347. For a brief account of the development of a set of related ideas that have been important in analyzing “minorities,” see R. MERTON, *SOCIAL THEORY AND SOCIAL STRUCTURE* chs. 8 & 9 (rev. ed. 1957).

irrational to attempt to deal with these common phenomena, with their common structural implications for politics, solely by means of a set of divergent constitutional phrases that were shaped, in a less scientific age, to meet specific, purely contingent instances of prejudice.³⁶

B. *The Special Problem of Racial Politics*

Whether Justice Stone had such an articulated view I do not know. His language (or that of Lusky³⁷) in any event held these ideas implicit within it. For it is, otherwise, a peculiar notion indeed to suppose that the various situations alluded to by the citations in paragraph three of footnote four support a common response to related problems. In fact, as the next section of this essay suggests, the problems alluded to were sufficiently distinct in their implications to raise very different questions about the propriety of an active judicial role. Put simply, footnote four's paradigm of judicial intervention to avert the political products of prejudice easily accommodated the limited judicial interventions necessary to protect ethnic and religious groups from the legislative excesses associated with xenophobic hysteria or intolerance. But it could not answer the questions about the judicial role presented by the system of American Racial Apartheid—which was, indeed, a *system*.³⁸ Indeed, the questions associated with the Black experience in America raised, as no others could, the spectre of internal conflict between the values of a free and open political life, protected by paragraph two of footnote four, and of fair treatment of “minorities,” protected by paragraph three.³⁹

Consider for a moment the extraordinary differences between the kinds of cases cited in paragraph three. All, apparently, involve “minorities”

36. Presumably, without a concept of “minorities” the treatment of a religious minority would be governed by the particular jurisprudence of the free exercise and establishment clauses; the treatment of immigrant and alien groups would be subject to the jurisprudence governing national powers over commerce, migration, and naturalization; and the treatment of Blacks would be governed by the jurisprudence of the Reconstruction Amendments. Of course, all such groups would be protected by such general clauses as due process and equal protection, but only in the same sense and to the same degree as everyone else. They would have no special position as “minorities.”

37. In 1942 Lusky referred to “out-groups,” though without reference to any specific sociological theory. Lusky, *supra* note 16, at 2. The dichotomous characterization of reference groups implicit in the in-group/out-group terminology is generally traced back to the we-groups/other-groups dichotomy of William Graham Sumner. W. SUMNER, *FOLKWAYS* 12-13 (1906); see R. MERTON, *supra* note 35, at 297. By the time Lusky wrote, of course, the idea and terminology were deeply embedded in the common intellectual culture. I am not suggesting that either Lusky or Stone was applying a specific sociological theory in footnote four, only that the generalization “minority group” as used there and as used previously in international law coincided with a sociological way of thinking about such problems.

38. For the classic presentation of the systematic character of American Apartheid, see G. MYRDAL, *AN AMERICAN DILEMMA* (1st ed. 1944). The date of the book makes it a particularly valuable source for observations of the system's operation made at roughly the same time as footnote four.

39. See *infra* pp. 1309-13.

that are subsumed within the intent of the footnote. The note cites *Nixon v. Herndon*⁴⁰ and *Nixon v. Condon*,⁴¹ two white primary cases, for the proposition that racial minorities may claim special judicial protection. Among the cases cited in the note, only these two involve massive political oppression against the minority. In other cases cited minorities are treated shabbily and may not, as the footnote suggests, be strong enough to defend themselves in the political arena. But here such a result is not left to chance. The suspect law denies to the minority access to the political arena itself. Thus, these two white primary cases are appropriately cited in both paragraphs two and three of the footnote.

It is not coincidental that these disenfranchisement cases involved Blacks. In modern America disenfranchisement has largely been confined to *racial* minorities.⁴² Conversely, oppression of religious minorities (exemplified by *Pierce v. Society of Sisters*⁴³) and of national minorities (exemplified by *Meyer v. Nebraska*,⁴⁴ *Bartels v. Iowa*,⁴⁵ and *Farrington v. Tokushige*⁴⁶), though involving obnoxious, forced assimilation via the state's control over education and unseemly xenophobic reactions to the disfavored foreigner and to his culture,⁴⁷ have not included exclusion from

40. 273 U.S. 536 (1927).

41. 286 U.S. 73 (1932).

42. The mechanism used to disenfranchise orientals was denial of naturalization, which survived challenge throughout the relevant period of large-scale oriental immigration and attendant strong local prejudice.

I fear I am treading on dangerous ground with the statement in the text. Of course, in our early history many of the states relied upon property qualifications to restrict the franchise; for over a century, however, such devices have not been significant. More important, the franchise for women was not federally guaranteed until 1920. Whether or how women should be thought of as a "minority" group is a question I simply cannot attempt to answer within the scope of this essay. There is no indication that Stone intended to include women within the ambit of footnote four. Since I am arguing in part that constitutional responses ought to be somewhat more sensitive to the particular histories and contexts of the experiences of each group, and that the catch-all "minority" is not only an imprecise category but unworkably general as a guide for action with respect to those cases that clearly come within it, I am not troubled by having to treat the category "women" on its own terms and with respect to its particular history.

43. 268 U.S. 510 (1925).

44. 262 U.S. 390 (1923).

45. 262 U.S. 404 (1923).

46. 273 U.S. 284 (1927).

47. For a consideration of the struggle between native and immigrant groups over control of education, see D. RAVATCH, *THE GREAT NEW YORK SCHOOL WARS* (1975). For a sense of the importance of control over private and parochial education, see B. SOLOMON, *ANCESTORS AND IMMIGRANTS* ch. 3 (1956); see also J. HIGHAM, *STRANGERS IN THE LAND* 59-60, ch. 9 (2d ed. 1963) (describing struggle over education in 1880's, early 1900's). For an interesting contemporaneous account, see E. MEAD, *THE ROMAN CATHOLIC CHURCH AND THE PUBLIC SCHOOLS* (1890). For a modern account stressing the assimilationist objectives of the kindergarten movement, see M. LAZERSON, *ORIGINS OF THE URBAN SCHOOL: PUBLIC EDUCATION IN MASSACHUSETTS, 1870-1915* (1971). For an excellent, finely nuanced account of ethnicity and politics in the Midwest that includes attention to the problem of foreign language instruction, see P. KLEPPNER, *THE CROSS OF CULTURE: A SOCIAL ANALYSIS OF MIDWESTERN POLITICS 1850-1900*, at 158-61 (1970). For a good account of one extensive controversy that never reached the Supreme Court, see R. Ulrich, *The Bennett Law of 1889: Education and Politics in Wisconsin* (1965) (unpublished Ph.D. dissertation, University of Wisconsin).

the political arena.

If we are to distinguish the laws burdening Catholics, such as those in *Pierce*, or those burdening German-Americans, in *Meyer*, from the regulations burdening bond-holders, creditors, and so on, it is only because the interest trod upon is more vital, authentic, or important in the one than in the other. For the cleavages between Catholic and non-Catholic, German ethnic and non-German have proven resistant to the solvent of self-interest only locally or in the short run. Catholics, for example, have almost always prevailed through political processes, to a degree acceptable to themselves, on this issue of public controls over parochial education. The courts have had little to do with it; *Pierce* itself came after many of the major political battles were over.⁴⁸ It is quite appropriate, therefore, to think in this context of judicial intervention as a limited adjunct to a political process that usually works.

If one asks why the political process has served Catholics (or Jews or Germans) despite significant prejudice and virulent hatred directed against them, the answer is that in a competitive political arena the votes of such groups will—rather sooner than later—appear too desirable a plum to leave unplucked. One or another party will befriend them and with their aid will entrench itself. This in fact was the strategy of Democratic machine politics in urban areas throughout the period of mass immigration.⁴⁹

It was also the early Republican and early Populist strategy with respect to Blacks; but it failed.⁵⁰ The strategy failed because of white terror

48. Anti-Catholic feeling remained high in much of the Midwest and South throughout the 1920's, as the Smith campaign of 1928 indicated. But a prevalent pattern of relatively loose controls over parochial education had been established in the 1880's and 1890's, when the great expansion of parochial education took place. The revived Ku Klux Klan led a campaign against parochial schools in the 1920's. The Klan's single success in this campaign came in Oregon. There the outlawing of private schools was accomplished by direct democracy—an initiative that won a narrow victory after a vicious campaign.

Foreign-language instruction was another matter. There were two very distinct periods of effort to stop or limit the spread of foreign-language instruction; in both instances German was the primary target. In the late 1880's and early 1890's some midwestern states were concerned with the phenomenon of German Lutheran schools, and legislation was passed to outlaw or restrict the use of German as the principal language of instruction. See P. KLEPPNER, *supra* note 47, at 158; R. Ulrich, *supra* note 47. In World War I a quite different movement to restrict or outlaw the use of German was instituted. In the first case, despite overtones of particular prejudices, the legislation was intended to serve the goal of Americanization or assimilation. In the second, the objective of the legislation, which forbade even instruction in German as a second language, was a symbolic expression of hate for an enemy and obliteration of its culture. *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Bartels v. Iowa*, 262 U.S. 404 (1923), were both products of the second anti-German campaign.

49. See B. SOLOMON, *supra* note 47; J. HIGHAM, *supra* note 47.

50. For the Republican strategy during reconstruction, see L. COX & J. COX, *POLITICS, PRINCIPLE AND PREJUDICE* (1963); K. STAMPP, *THE ERA OF RECONSTRUCTION, 1865-1877* (1965); A. TRELEASE, *WHITE TERROR* (1971) (especially introduction). For the populist strategy, see L. GOODWYN, *supra* note 28, at 276-306; C. VAN WOODWARD, *supra* note 28.

and the failure of will to control it.⁵¹ But the strategy also failed because—for a time—too few southerners could perceive any issue or set of issues as more important than preventing Blacks from enjoying the advantages that would have come from full political participation. The temptations for a political solution have always been there, however, and are often quite strong. Whether in a one, two, or three-party system, the probable losers, who perceived an alliance with Blacks as the road to victory and power, confronted a powerful temptation to cheat on the White bargain. Precisely because that tension was present, racist domination required that the politics of the region be violent and extreme. In a more civilized context the bargain would not have been kept, as it has not been kept since 1965. Thus, terror has always been part of southern regional politics; and the “social” pressures among Whites, which are indispensable to the community politics paragraph two seeks to protect, rightly seemed ominous.

Only in special circumstances and with an adequate animus can the requisite terror be organized to keep the political bargain from occurring. In the North, despite race hatred that has often exceeded that of the South and despite specific and effective violence against integrated housing, political violence has simply not been an issue. But in the South, until recently, conditions have been right for terrorism. Gunnar Myrdal brilliantly sketched them in 1944.⁵² First, law enforcement was almost exclusively local, political, and non-professional. Second, organized political violence had been sufficiently frequent to bring with it cadres of white hoods who stood ready to act when change threatened. Third, and most important, the region had exhibited many characteristics of colonized areas. Like many colonies, the South expended a great deal of social energy in drawing and maintaining lines between master and servant classes. The distinction between White and Black, between colonist and native, was reinforced so prevalently that the political distinction seemed but part of a natural pattern. The resonance of society and politics in this respect was critical. It accounted in part for the peculiar intransigence of the state-action problem.

In contrast to the deep societal roots of governmental action against Blacks—the close fit between private terror, public discrimination, and political exclusion, directed against Blacks for a century—action against other minorities has usually been sporadic, transitory, and local.⁵³ Other minorities are not systematically victimized by a widespread system of discrimination or by the politics that create and enforce it. As a result, in-

51. See A. TRELEASE, *supra* note 50.

52. G. MYRDAL, *supra* note 38.

53. Again, the oriental experience in the western states was closer to that of Blacks.

stances of oppression of religious and national minorities have about them a sense of the extraordinary; they appear to be hysterical outbreaks attributable to special times (such as war, with its accompanying hysteria) or places.

C. *The Dilemma of Racial Politics and Footnote Four*

Why should it matter whether we distinguish between a minority subject to occasional mistreatment and one subject to a pervasive pattern of oppression? The answer should be obvious, arising as it does from the very considerations footnote four is designed to highlight. Intermittent judicial intervention may be justified in (and suited to) correcting oppression identified as an aberration, a single perversion of majoritarian politics. But when the oppression of a minority comes to constitute the essence of those politics or—still worse—when the constitutional structure for political activity has been arranged to facilitate the pattern of oppression,⁵⁴ judicial intervention will necessarily entail either inefficacy or a compromise of the constitutional structure itself. What starts as a modest principle justifying limited review will become the basis for bending general structural elements to fit the morally antecedent condition of non-discrimination.

The ramifications of this distinction have, indeed, become manifest in post-1938 history. We can sketch, if you will, a line from *Pierce* and *Meyer* through footnote four to Stone's dissent in *Gobitis*,⁵⁵ to *Barnette*,⁵⁶ and on to *Sherbert v. Verner*⁵⁷ and *Yoder*.⁵⁸ In the forty years since footnote four none of these or of a host of other religion or nationality cases has entailed complex remedial questions, or drastic alterations of federal-

54. At almost every critical juncture in our constitutional history, the structure of authority has been tailored to meet the contemporaneous needs of the prevailing patterns of racial domination. The three-fifths clauses, part of the North-South (or, more accurately, slave-free) compromise at the Convention of 1787, were the Constitution's most serious qualification of the principle of popular government, extending to the popular house of Congress itself. The fugitive-slave clause was an important limitation on state powers; the importation-and-migration clause, an unspeakable, unique limitation upon the commerce power of Congress. See generally S. LYND, *supra* note 20.

With the Reconstruction Amendments, the very idea of federalism became closely associated with race. The state-action limitation upon the Fourteenth Amendment, for example, was from the outset associated with impact upon patterns of racial domination. Most important, both the compromise of 1877, which created the political condition that encouraged the judicial retreat from Reconstruction in the late 1870's and 1880's, and the judicial retreat itself were informed by a vision of federalism whose central notion was the illegitimacy of the imposition of a national norm upon local patterns of racial domination. See Soifer, Book Review, 54 N.Y.U. L. REV. 651 (1979) (reviewing R. BERGER, *GOVERNMENT BY JUDICIARY*).

55. *Minersville School Dist. v. Gobitis*, 310 U.S. 586, 601 (1940).

56. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

57. *Sherbert v. Verner*, 374 U.S. 398 (1963) (holding Seventh Day Adventist could not be denied unemployment compensation because of her refusal to take Saturday work).

58. *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (holding state could not force Old Order Amish parents to send their children to public or private school after completion of eighth grade).

ism, or serious inroads on the requirement of state action, or dramatic confrontations between paragraph two's "political" values and paragraph three's protection of minorities.⁵⁹

In sharp contrast, the protection of Blacks has entailed all of these elements. And a case of sorts could be made that the distinction was already clear before 1938. There were, at the time *Carolene Products* was written, three areas in which some changes had already occurred in the lamentable constitutional position of Blacks. One was housing. In 1917 the Court had held in *Buchanan v. Warley* that the property rights of white owners to sell to Blacks required invalidation of a Louisville racial zoning ordinance.⁶⁰ Since the Court refused to decide the case in terms of the rights of Blacks, *Buchanan* could hardly have been cited in footnote four, but it was one of the few areas in which the Court had already acted to protect Black interests, if not rights.⁶¹

Impartial administration of criminal justice was a second area of limited progress. Although the Court had never treated them as race cases, there can be little doubt that the decisions in *Moore v. Dempsey*,⁶² *Powell v. Alabama*,⁶³ and *Brown v. Mississippi*⁶⁴ made new criminal procedure

59. The closest brushes with complex remedial problems or intensive interference with state schemes associated with religion have been with regard to public-school prayer and aid to parochial schools. These applications of the modern establishment clause have not involved judicial protection for religious minorities in any simple sense (unless atheists are so classified). The difficult remedial questions associated with the school-prayer cases arise primarily from the dilemma of enforcing a symbolic norm in the absence of a victim group. It has been, in many communities, a constitutional "victimless crime."

60. *Buchanan v. Warley*, 245 U.S. 60 (1917).

61. The Court had refused, however, to break the state-action barrier, apparently upholding the enforcement of restrictive covenants. *Corrigan v. Buckley*, 271 U.S. 323 (1926), distinguished in *Shelley v. Kraemer*, 334 U.S. 1 (1948). Actually, the Court stated only that the covenants themselves were not void as violative of the Constitution. Because the Court held it had no jurisdiction to review the judgment of a District of Columbia court in awarding specific enforcement of the decree, it did not reach the question of whether the enforcement of the covenant was itself valid. But since it affirmed the order of a court that thought it was deciding the question of enforcement in deciding the question of validity of the covenant, the natural conclusion was that the Supreme Court would not forbid enforcement of the restrictive covenant.

It might further be pointed out that petitioners explicitly argued that what was beyond the power of the legislature could not be rendered enforceable by judicial action. "This Court," petitioners argued, "has repeatedly included the judicial department within the inhibitions against the violation of the constitutional guaranties which we have invoked." 271 U.S. at 324-25 (reporter's summary of petitioner's argument—not part of opinion). The Court ignored these claims, perhaps because they were not raised in the lower courts. Whatever its holding, the effect of *Corrigan* was certainly to license restrictive covenants and their enforcement for another two decades. See C. VOSE, *CAUCASIANS ONLY* (1959).

62. *Moore v. Dempsey*, 261 U.S. 86 (1923) (overturning mob-dominated conviction on due process grounds). For an interesting account of the underlying events in *Moore* (a riot in Helena, Arkansas), see A. WASKOW, *FROM RACE RIOT TO SIT-IN, 1919 AND THE 1960'S* chs. 7 & 8 (1966).

63. *Powell v. Alabama*, 287 U.S. 45 (1932) (Scottsboro Boys case—applying to states constitutional right to counsel in some cases).

64. *Brown v. Mississippi*, 297 U.S. 278 (1936) (requiring, via Fourteenth Amendment, exclusion of coerced confessions by states). The defendant had been whipped, but, in the words of the deputy sheriff, "not too much for a negro [*sic*]." *Id.* at 284.

law in part because the notorious facts of each case exemplified the national scandal of racist southern justice. This conclusion is reinforced by Holmes' famous letter to Laski, in which he replied to Laski's lament on the execution of Sacco and Vanzetti:

Your last letter shows you stirred up like the rest of the world on the Sacco Vanzetti case. I cannot but ask myself why this so much greater interest in red than black. A thousand-fold worse cases of negroes [*sic*] come up from time to time, but the world does not worry over them.⁶⁵

In a letter six days earlier Holmes had told of denying a writ in the Sacco-Vanzetti case, because it had not come within the rule of *Moore v. Dempsey*.⁶⁶ Of course, as Holmes' dissent in *Frank v. Mangum*⁶⁷ indicates, it was not the racial element in *Moore* that controlled his decision but the phenomenon of mob-dominated justice. Yet, in the letter to Laski, Holmes recognized that as a social fact such perversion of justice was a widespread epiphenomenon of Apartheid. The revolution in federal habeas that started with *Moore* should be viewed as at least undertaken with full knowledge of its racial implications.⁶⁸

The Court had also taken steps before 1938 to protect the franchise of Blacks, especially in the white primary cases. In 1915 the Court had invalidated the grandfather clause as a device for disenfranchisement of Blacks.⁶⁹ *Guinn v. United States* and its companion cases were in some respects the first since Reconstruction to protect Black rights.⁷⁰ The two *Nixon* cases later forged the principle that the *state* could not deny Blacks the opportunity to participate in a primary election. *Grovey v. Townsend*, however, upheld the white primary when it was the product of a party

65. 2 HOLMES-LASKI LETTERS 974 (M. Howe ed. 1953) (letter of August 24, 1927).

66. *Id.* at 970.

67. 237 U.S. 309, 345 (1915) (did not involve Black petitioner).

68. The primary issue in *Frank* and *Moore* was the power of federal courts to exercise *collateral* review to pierce a record unobjectionable on its face to find the reality of mob domination. An expanded writ of habeas corpus was one of the primary strategies available for coping with a completely racist system of criminal justice that both worked unfairness against Black victims and defendants when no special political element was present and served as an adjunct to the political forces of Apartheid whenever necessary. For a discussion of more recent problems in supervising state criminal justice systems, see Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. PA. L. REV. 793 (1965); Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1977).

69. *Myers v. Anderson*, 238 U.S. 368 (1915); *Guinn v. United States*, 238 U.S. 347 (1915).

70. Isolated exceptions exist in the areas of discrimination in jury service and of peonage. *See, e.g., Carter v. Texas*, 177 U.S. 442 (1900) (grand jury). *But cf. Bailey v. Alabama*, 219 U.S. 219 (1911); *Franklin v. South Carolina*, 218 U.S. 161 (1910). *Guinn*, however, is the first case that might be said to mark a new departure, a reversing of a trend. *Compare Guinn v. United States*, 238 U.S. 347 (1915) (protecting the franchise) *with Giles v. Harris*, 189 U.S. 475 (1903) (going to great lengths to find procedural basis for refusing to intervene to protect the franchise).

convention decision.⁷¹ Thus, the Court, as in *Corrigan*, refused to pierce the state-action barrier that was the formal embodiment of a distinction between state and society—a distinction that was meaningless when custom and terror could be expected to enforce what the state could not.

Stone, as a participant in *Grovey*, was obviously aware of the magnitude of the lurking state-action problem, and even as he wrote footnote four he was apparently preparing to attack it. Stone's decision a year later in *United States v. Classic*⁷²—though not a race case—was immediately understood to be a breakthrough for minority rights, and it was soon followed by renewed NAACP attacks on the rule of *Grovey*—attacks that ended with success in *Smith v. Allwright*.⁷³ Stone, then, was (or should have been) aware that such “neutral” dimensions of constitutional law as state action were at risk in pursuing the protection of Blacks to an extent that they were not at risk in the protection of other minorities.

In 1938, however, Stone may not have sensed the potentially paradoxical relationship that paragraphs two and three of the footnote could bear to one another. On the one hand, part of the strategy of Apartheid was exclusion of Blacks from both political life and political machinery. When exclusion operated at the level of formal electoral machinery, the two paragraphs were mutually reinforcing: *Nixon v. Herndon* and *Nixon v. Condon* are cited in both paragraphs. At a different level of politics, however, such racial exclusions could also be understood to be exercised by individuals or groups operating within the autonomous political space protected by paragraph two. Guaranteeing the participation of minorities in all political organizations can hardly be understood as purely neutral regulation of the political process when the processes are mainly *about* the maintenance of Apartheid.⁷⁴ As we shall see, it could not have been clear in 1938 whether the objective of protecting minorities could be achieved without circumscribing the political space and cleansing the political machinery to free it of racist objectives.

IV. The Fate of Majoritarianism in the Programmatic Protection of Minorities

Footnote four coined the phrase “discrete and insular minorities” and staked out a territory for vigorous judicial action. The forty years since 1938 have repeatedly tested the meaning of the phrase and the strength of the Court's commitment to act. More often than not, the Court has had to

71. *Grovey v. Townsend*, 295 U.S. 45 (1935).

72. *United States v. Classic*, 313 U.S. 299 (1941).

73. *Smith v. Allwright*, 321 U.S. 649 (1944).

74. See W. CASH, *supra* note 28; V. KEY, *supra* note 28; P. WATTERS & R. CLEGHORN, *CLIMBING JACOB'S LADDER, THE ARRIVAL OF NEGROES IN SOUTHERN POLITICS* (1967).

measure its commitment to protection of minorities against its obligation to constitutional doctrines and values not, on their face, directly concerned with minorities at all. Thus, the Court has frequently tested its adherence to the values of local autonomy (implicit in federalism) and of distinguishing the state from society (implicit in the constitutional concept of state action). The clash of new commitment and old obligations defined the great "neutral principles" problem. It was a dilemma inherent in the commitment to protect Blacks, though not in the commitment to protect other minorities. For the apparently neutral structural characteristics of the Constitution had never been neutral concerning race.⁷⁵ It was therefore foreseeable that if judicial action were to be effective it would have to undo the structural underpinnings of Apartheid.

In *An American Dilemma*, Myrdal draws two conclusions from essentially the same facts, conclusions that make for an interesting juxtaposition. In his discussion of the "Inequality of Justice," Myrdal describes "[t]he American tradition of electing, rather than appointing, minor public officials" with the result of direct or indirect local political control over "[j]udges, prosecuting attorneys, minor court officials, sheriffs, the chief of police, . . . sometimes the entire police force . . ."⁷⁶ This tradition, together with the jury system, Myrdal concludes, "turns out . . . to be the greatest menace to legal democracy when it is based on restricted political participation and an ingrained tradition of caste suppression. Such conditions occur in the south with respect to Negroes."⁷⁷ Myrdal also notes that: "The vote would be of less importance to groups of citizens in this country if America had what it does not have, namely, *the tradition of an independent and law-abiding administration of local and national public affairs.*"⁷⁸

Thus, Myrdal points to the sociological dimension of basic constitutional law: the local political controls of federalism and the subjugation of administration to politics inherent in a national charter that carefully organized political government while barely suggesting that there might come to exist "departments" or "officers"⁷⁹ that would have to administer something. As Myrdal recognized, these elements supported and facilitated southern Apartheid. Nonetheless, in answering the question "is the South fascist?"—a question with a real bite in 1944—Myrdal pointed to precisely the same characteristics of the political order to return a negative response: "The South entirely lacks the centralized organization of a fas-

75. See S. LYND, *supra* note 20; see also *supra* note 54.

76. G. MYRDAL, *AN AMERICAN DILEMMA* 523 (20th anniv. ed. 1964).

77. *Id.* at 524.

78. *Id.* at 432.

79. Contrast the highly developed Article I of the Constitution with the very sketchy Article II.

cist state. . . . The Democratic party is the very opposite of a state party in a modern fascist sense. It has no conscious political ideology, no tight regional or state organization and no centralized and efficient bureaucracy.”⁸⁰

This, then, is the paradox suggested to me by these Myrdal observations. Southern Apartheid was in large part a creation of fragmented, weak administration, of local autonomy and politics. To break the system necessarily meant destroying or vitiating this decentralized political structure. But it was precisely that structure that was inconsistent with fascism—and, by extension, with the other horrors of a centrally dominated party apparatus. Could the real political values inherent in local autonomy survive the penetration of national norms in the interest of destroying Apartheid? This question, I believe, had to be uppermost in the mind of any justice—if any justice there was—who understood footnote four not as a maxim but as a program.

Whether Stone or any of his colleagues had such a programmatic ambition in 1938, I am not prepared to say.⁸¹ But developments after 1938 were surely informed by the tension between protection for Blacks and respect for the prevailing structures of political life. That tension revealed itself in several ways; the remainder of this paper presents two. The first was the competition between a “sanitized” political process and vigorous Black protest politics as the chief instrument for penetrating the political defenses of Apartheid. The second was the emergence of the federal judiciary as a co-ordinate form of federal pseudo-administration that, though capable of penetrating to a limited extent the local screen of lawless race politics, did not present any of the dangers of a centralized bureaucratic machinery that could be shaped to the uses of a party apparatus.

A. *Competing Solutions to Political Apartheid*

Shortly after footnote four, Justice Stone wrote the majority opinion in *United States v. Classic*,⁸² which, emphasizing the integral part that primaries play in a state-regulated electoral scheme, upheld congressional

80. G. MYRDAL, *supra* note 76, at 458.

81. Just a hint that some of the Court may have formulated an ambition to destroy Apartheid may be garnered from the fact that *United States ex. rel. Gaines v. Canada*, 305 U.S. 337 (1938) was decided the same term as *Carolene Products*. In *Gaines* the Court insisted that if a state were to provide separate but equal facilities, such facilities must be available regardless of demand; in the absence of equal facilities, Blacks would have a right of access to White facilities. Professor Gunther has called *Gaines* “[t]he first in the sequence of modern school segregation cases that culminated in *Brown v. Board of Education*” G. GUNTHER, *CONSTITUTIONAL LAW* 711 (9th ed. 1975). Of course, in 1938 *Gaines* had not revealed what was to follow. But Gunther is not alone in seeing *Gaines* as a turning point. See R. KLUGER, *SIMPLE JUSTICE* 213 (1975) (“*Gaines* was a tremendous milestone.”)

82. 313 U.S. 299 (1941).

power to punish fraud in a primary election for Congress. Three years later, *Smith v. Allwright*⁸³ relied on the reasoning of *Classic* to overrule *Grovey v. Townsend* and hold that a white primary violated the Fifteenth Amendment even when the racial restriction was imposed by the party, not by the state.⁸⁴

But even *Allwright* proved susceptible to evasion; it was, in any event, inadequate to enfranchise Blacks in many places.⁸⁵ One response from those seeking to end Apartheid was an effort to require Black participation even at levels of politics antecedent to those constituting "state machinery." In *Terry v. Adams*,⁸⁶ a local association, the Jaybirds, had held pre-primaries limited to white Democrats. Obviously, the whites had developed a "shadow" party to evade the formal line drawn by the Court in *Allwright*. What the Jaybirds regulated had no formal legal status at all; their success, so far as the record revealed, was entirely attributable to the acquiescence in their racist scheme of the great majority of the county's white voters in the subsequent official elections. To revert to the dichot-

83. 321 U.S. 649 (1944).

84. "[R]ecognition of the place of the primary in the electoral scheme [as in *Classic*] makes clear that state delegation to a party of the power to fix the qualifications of primary elections is delegation of a state function that may make the party's action the action of the State." 321 U.S. at 660. For a good discussion of *Classic*, see Bixby, *The Roosevelt Court, Democratic Ideology, and Minority Rights: Another Look at United States v. Classic*, 90 YALE L.J. 741 (1981).

85. Actually, the ruling in *Smith v. Allwright* reversed a long-standing downward trend in Black voting in the South. A very substantial increase in Black registration and voting, concentrated mainly in the upper South and in large cities, occurred in the wake of *Allwright*. V.O. Key, a leading analyst of Southern politics, concluded that "[i]n one sense the most remarkable consequence of the decision has been the degree of its acceptance and the extent to which Negroes have come to vote." V. KEY, *POLITICS, PARTIES AND PRESSURE GROUPS* 612 (3rd ed. 1952). But Key goes on to document the evasion, resistance, and intimidation that took place in South Carolina, Alabama, and Mississippi. *See id.* at 612-616; *see also* V. KEY, *supra* note 28, ch. 29 (analyzing *Allwright* in still more detail).

In Georgia, where Blacks had substantial voting power in Fulton County (which included Atlanta), an extraordinarily liberal Governor, Ellis Arnall, was elected in 1942. Unable to succeed himself, Arnall supported another liberal, James Carmichael, who won a plurality of the popular votes in the election of 1946. Nonetheless, Carmichael was defeated by Eugene Talmadge under the Georgia "county unit" system of voting. Talmadge won through a combination of an appeal to White racial solidarity and a counting system that by 1960 afforded voters in the smallest rural counties as much as 100 times the voting power of voters in Fulton County. *See* V. KEY, *supra* note 28, at 125-29. The Georgia county unit system was declared unconstitutional in *Gray v. Sanders*, 372 U.S. 368 (1963). It was, needless to say, in the overrepresented rural counties to which *Smith v. Allwright* had not yet penetrated that White terror continued effectively to disenfranchise Blacks. *See* V. KEY, *supra* note 28, at ch. 29; P. WATTERS & R. CLEGHORN, *supra* note 74, at 26-27 (concluding that, after initial spurt, Black voting in South had actually begun to decline by early 1960's).

86. *Terry v. Adams*, 345 U.S. 461 (1953). *Terry* had something more than local significance. As Key shows, one possible strategy in the wake of *Allwright* was for a state to attempt to divest the primary of its "delegated state function" character by ceasing to require or regulate it. Thus, in 1944 South Carolina repealed all laws relating to primaries. The lower federal courts nonetheless held exclusion of Negroes as a political party to be unconstitutional. *Elmore v. Rice*, 72 F. Supp. 516 (E.D.S.C. 1947), *aff'd*, 165 F.2d 387 (5th Cir. 1947), *cert. denied*, 333 U.S. 875 (1948). V. KEY, *supra* note 28, at 613. While the decision in *Terry v. Adams* came some years after the disappearance of any formal semblance of White primaries, a contrary holding might well have tempted some states to go the route South Carolina tried in the mid-40's.

Judicial Activism

omy alluded to at the outset, the problem with the Jaybird scheme lay not in a rigged electoral machinery but in a public politics perverted by racism. The decision to regulate the Jaybirds could not, in itself, bring the Republic down; but pursuit of the general strategy of attacking racist politics by regulating groups like the Jaybirds could have gone far along the road towards contradicting the political values expressed in paragraph two of footnote four. Justice Minton, in dissent, struck this precise note:

We have pressure from labor unions, from the National Association of Manufacturers, from the Silver Shirts, from the National Association for the Advancement of Colored People, from the Ku Klux Klan and others. Far from the activities of these groups being properly labeled as state action, . . . they are to be considered as attempts to influence or obtain state action.⁸⁷

One might go even further than Minton. Only by protecting the right of these groups to associate, to communicate, and to seek to influence government can one have a community life that is antecedent and superior to the acts of the state. Without such non-governmental space for public politics, it is impossible to avoid the dangers addressed by paragraph two. If all political life must pass a test of healthfulness, those who control the testing apparatus have the means to substitute party and state for political society.

But, on the eve of *Brown*, the possibility that a sanitized politics might be the only or the best hope for protecting minorities yet seemed reasonable. Black direct action had not yet begun, and Black participation in electoral politics, though in hindsight expanding, appeared to have reached a plateau.⁸⁸ It is during this same period that the Court upheld group libel laws in *Beauharnais v. Illinois*,⁸⁹ thus endeavoring to purify not only our political organizations but also our political discourse.

Although the Court never repudiated *Beauharnais* and *Terry*, neither has it pursued the directions they suggested.⁹⁰ Instead, the Court began protecting certain characteristic forms of renewed Black political organization. As Harry Kalven pointed out, it was the expansion of speech and associational freedoms against the state (in cases like *NAACP v. Ala-*

87. 345 U.S. at 494 (1953).

88. P. WATTERS & R. CLEGHORN, *supra* note 74.

89. 343 U.S. 250 (1952). *Beauharnais* was analyzed at great length in an exquisite essay by the late Henry Kalven. See H. KALVEN, *THE NEGRO AND THE FIRST AMENDMENT* ch. 1 (1965).

90. The Supreme Court, in particular, has refused to forbid racial exclusion with respect to private clubs, even though they may well enclose the networks of personal political influence. See *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972). While *Terry v. Adams* might well be decided today as it was in 1953, most commentators are convinced that *Beauharnais* would not be.

bama,⁹¹ *NAACP v. Button*,⁹² *Shelton v. Tucker*,⁹³ and *New York Times v. Sullivan*⁹⁴) that characterized the "Negro and the First Amendment" in the decade following *Brown*. Later there came a still more dramatic shift in emphasis from protecting the "minority," Blacks, to protecting the political activity and movements of that "minority."⁹⁵ This shift cannot be explained simply, but I should like to offer two observations.

The first derives from Hannah Arendt's long maintained—at least since her own experience as a refugee from Hitler—conviction that the most debilitating dimension of European Jewish self-consciousness was its insistence that anti-semitism was a wholly exogenous element of life, unrelated to anything save the existence of Jews.⁹⁶ As a result of this perspective, she reasoned, Jews did not understand their existence as political. They had relinquished responsibility for their political world. Arendt's view was the harsh one that the victims whose politics may well fail are nonetheless required to act if they are legitimately to stake a claim to the social world they inhabit.

In one sense Arendt's views strike me as having direct application to America. Without vigorous Black protest politics—a claim to be essential participants in the public choices of the day—American race politics might have become like the European Jewish question: politics about the victim group. Such a politics cannot help but betray, even at its best, a dehumanizing pattern. Fortunately, the spectre of some grotesque federalized extension of the doctrines approved in *Beauharnais* never constituted a serious threat.⁹⁷ For the civil rights movement instead confronted the courts with the problem of the limits of public protest, and in so doing reunited paragraphs two and three of the *Carolene Products* footnote.

A second observation derives from the vivid memory I have of the force-

91. 357 U.S. 449 (1958) (holding unconstitutional state's demand that NAACP reveal names and addresses of Alabama members and agents).

92. 371 U.S. 415 (1963) (holding unconstitutional Virginia's ban against improper solicitation by lawyers as applied to NAACP's litigation campaign).

93. 364 U.S. 479 (1960) (holding unconstitutional Arkansas law requiring teachers to disclose all organizations to which they had belonged or contributed within five years).

94. 376 U.S. 254 (1964) (prohibiting state from imposing civil liability for publications concerning public figures unless published with actual malice, with knowledge of falseness, or in reckless disregard of whether false or not).

95. See, e.g., *Walker v. City of Birmingham*, 388 U.S. 307 (1967); *Cox v. Louisiana (II)*, 379 U.S. 559 (1965); *Cox v. Louisiana (I)*, 379 U.S. 536 (1965); *Hamm v. City of Rock Hill*, 379 U.S. 306 (1965); *Bell v. Maryland*, 378 U.S. 226 (1964); *Lombard v. Louisiana*, 373 U.S. 267 (1963). For Kalven's discussion of many of these cases, see H. KALVEN, *supra* note 89, at 123-214; Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1.

96. H. ARENDT, *supra* note 28; see H. ARENDT, *THE JEW AS PARIAH* (1978).

97. Lest one dismiss too cavalierly such a possibility, consider carefully David Riesman's three articles, *Democracy and Defamation* (pts. 1, 2, & 3), 42 COLUM. L. REV. 727, 1085, 1282 (1942). Admittedly written amidst the war, they are, nonetheless, an imposing monument to the seriousness with which group libel was treated by a "new" generation of scholars. For a cautious rejection of Riesman, see Z. CHAFEE, 1 GOVERNMENT AND MASS COMMUNICATION ch. 5 (1947).

Judicial Activism

ful image of the Mississippi Freedom Democratic Party in 1964. Of course, the Freedom Democratic Party and the Council of Federated Organizations never acquired in Mississippi the power that the Texas Jaybirds had in their little county; nor was the Party racially exclusive in character. But the extension of the power of scrutiny into shadow political parties and the development of a doctrine of vicarious state responsibility for their objectives and methods might well have provided a handle for harrassment and destruction of one of the most dramatic symbols of the civil rights movement's struggle. It seems to me somewhat ironic that the vehicle for the second Reconstruction of Mississippi was itself a shadow political party that organized its own unofficial elections and hoped to transform them eventually into effective political power.⁹⁸

B. *The Federal Judiciary and Constrained Administration*

The fear of damage to political values in the course of destroying Apartheid was, then, not entirely frivolous. It may be, of course, that a sanitized political discourse—one free of racist invective—and a hygienic principle of political organization that would not tolerate racial exclusion at any level would produce at least as good a political system as we now have. But, certainly, candor requires recognition of the risks entailed.

I feel a similar ambivalence about a second dimension of the judicial undertaking to protect minorities. Though we still do not have a national, law-oriented bureaucracy and administration—especially not in law enforcement, we are appreciably closer to such a goal (or fear) than we were when Myrdal wrote in 1944. It is certainly beyond my capacity to undertake a separation of cause and effect; but it seems that the changes in race relations are not unrelated to this increasing penetration of national administration in the past thirty-five years.

Despite the growth of national bureaucratic and administrative penetration, I would suggest that the judiciary's special, active role in protecting minorities may well have resulted in a less intrusive and pervasive centralized administration than would have been the case with other, alternative courses to integration. Put differently, *given* the objective of ending Apartheid, the activist federal judiciary as spearhead was the mode of action least likely to destroy the ultimate values served by fragmentation of political power and local political control over administration. Government by injunction⁹⁹ may often appear highhanded, undemocratic, even

98. See H. ZINN, SNCC, *THE NEW ABOLITIONISTS* (1965); see also P. WATTERS & R. CLEGHORN, *supra* note 74, at 289-92. The Mississippi Freedom Democratic Party achieved recognition by the national party in 1968, precipitating a recognition conflict within the state. See Riddell v. National Democratic Party, 508 F.2d 770 (5th Cir. 1975).

99. For starkly different attitudes to "government by injunction," compare F. FRANKFURTER & L.

tyrannical; but, in fairness, one must always ask compared to what. Representative bodies make decisions, but they do not carry them out. Political decisions to destroy Apartheid would necessarily have been made with less particularity and would have confronted the implementation dilemma in the most acute of forms: whether to entrust the job to locals—a virtual concession of defeat—or whether self-consciously to rule one region with natives of another.¹⁰⁰

The transformation of the federal district courts into quasi-administrative bodies overseeing school desegregation and occasional other tasks¹⁰¹ in the dismantling of Apartheid may appear from one perspective to have been a radical institutional step at the borderland of legitimacy;¹⁰² and surely it did change the courts and their relation to their milieu. But from a different perspective it was, to paraphrase *Shelton v. Tucker*,¹⁰³ the least intrusive alternative. Because of the tradition of privately initiated law suits and case-by-case adjudication, the dismantling of Apartheid could and did proceed piecemeal over an extended period of time and with varying rates of speed from state to state, county to county, and school district to school district. Of course, the role of the NAACP Legal Defense Fund rendered the process a good deal less fragmentary and more coordinated than a purely private-law model would predict.¹⁰⁴ But the civil rights movement itself was never controlled by the Fund, and litigation assumed

GREENE, THE LABOR INJUNCTION (1930) (treating the injunction as presumptively illegitimate device for shaping complex relations) with O. FISS, THE CIVIL RIGHTS INJUNCTION (1978) (injunction should often be favored remedy when underlying substantive claim is just). See also Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

100. The traditional calumny against Reconstruction governments—"rule by Carpetbaggers, Negroes and Scalawags"—had a great deal of truth to it. And it is no accident that accusations of "outside agitation" continued to play an important part in White southerners' perceptions of the civil rights movement. If federal administrators rather than the courts had cracked Apartheid, one may be sure that carpetbaggers and Negroes would have been prominent among them; and, by definition, any native White southerners who joined them would have become scalawags.

There is an important sense in which even the tasks of the courts were implemented by carpetbaggers. The lawyers who were initiators of litigation and who subsequently served as the courts' eyes and ears were frequently outsiders working either for the Justice Department or for the NAACP Legal Defense Fund.

101. The courts attempted to cope with the problem of recalcitrant registrars in a manner analogous to the school suits. This approach did not achieve notable success prior to 1965. Thereafter, the Voting Rights Act provided the courts with more powerful and blunter instruments of intervention. See P. WATTERS & R. CLEGHORN, *supra* note 74, chs. 8 & 9; C. HAMILTON, THE BENCH AND THE BALLOT (1973). For examples of complex remedies in voting rights, see, e.g., *Hamer v. Campbell*, 358 F.2d 215 (5th Cir. 1966).

102. Professor Chayes sees the innovation as a harbinger of a new model of public litigation and does not view the legitimacy of the change as problematic. See Chayes, *supra* note 99.

103. 364 U.S. 479 (1960).

104. Much has been written of the Fund as grand strategist for landmark decisions. Too little has been written concerning its role in day-to-day financial support and back-up work for "ordinary" litigation after *Brown*. To a large extent the initiative in such suits came from grass-roots people and local lawyers, though the Fund certainly had its targets and timetables. See Rabin, *Lawyers for Social Change: Perspectives on Public Interest Law*, 28 STAN. L. REV. 207, 216-17 (1976).

Judicial Activism

a pace and character other than that planned in New York. The Justice Department also exercised a role in coordination of litigation, but not an overwhelmingly important one until after 1964.¹⁰⁵

Any legislatively imposed program creating or extending the administrative apparatus necessary for success would have been quicker, less sensitive to variations, and overwhelmingly coercive. When legislative programs finally did come, long after the ground had been broken and the worst shocks absorbed by the judiciary, they were more pervasive, even-handed, and effective than the courts had been.¹⁰⁶ Had such programs been the spearheads of integration, it is doubtful whether they could have been as effective as the courts without becoming far more coercive.¹⁰⁷

The federal courts proved to have some but not all of the defects that Myrdal attributed to local law enforcement. Loosely tied, administratively uncoordinated bodies, their personnel varied considerably in fidelity to the centrally promulgated norms. But the federal judges were politically more independent, identified with a more genteel elite, and better educated and professionally trained than local law enforcement.¹⁰⁸ They thus drew upon the prestige and values associated with what Weber called rule by "honoratiore."¹⁰⁹ Despite their prominence in destroying Apartheid (and, in a few cases, their obvious relish for the task) none of these judges was killed or seriously injured—a fact that probably is due in some measure both to the position of the judges in their communities and to the perception that such an act would have precipitated armed federal intervention.

Conclusion

Only with respect to Blacks could so dramatic and far-reaching a change in the judiciary's role and in its relation to state government be understood as a "least intrusive alternative." For only with respect to

105. The Civil Rights Act of 1964 and the Voting Rights Act of 1965 gave the Department statutory powers to intervene and initiate law suits. The "standing" of the United States to initiate lawsuits to enforce the rights of specific persons in the absence of such statutory powers has long been doubtful. Compare *United States v. United States Klans*, 194 F. Supp. 897 (M.D. Ala. 1961) (upholding power) with *United States v. Solomon*, 516 F.2d. 1121 (4th Cir. 1977) (denying power).

106. The Voting Rights Act of 1965 had an almost immediate, cataclysmic effect on areas where the numbers of Blacks voting had been particularly low. See C. HAMILTON, *supra* note 101, at vi; P. WATTERS & R. CLEGHORN, *supra* note 74, at ch. 9. A major watershed in public education was HEW's definition in 1968 of qualifying levels of integration for federal aid to education. These guidelines were considerably more effective than the courts had been; in advancing desegregation many school districts rushed to bring themselves into compliance. See G. ORFIELD, *THE RECONSTRUCTION OF SOUTHERN EDUCATION* (1969).

107. It is particularly doubtful whether HEW's carrot approach could have worked until after the principle of desegregation had already been established. After all, many communities in the South accepted substantial financial hardship during the period of "massive resistance" to preserve segregation.

108. For portraits of the southern federal bench, see *SOUTHERN JUSTICE* (L. Friedman ed. 1965).

109. *Max Weber on Law*, in *ECONOMY AND SOCIETY* 198-223 (M. Rheinstein ed. 1967).

Blacks was it truly impossible to see the events generating the cases that reached the courts as isolated instances of impropriety or as transitory hysteria. Against hysterical politics it is necessary to offer protection, make amends, award compensation, but not to remake the political structure itself.¹¹⁰

Apartheid was not, however, hysteria. It was the governing system that pervaded half the country, and like any such system it was implicitly and explicitly supported by the Constitution. It is clear to me that when Stone wrote footnote four he intended to protect against transitory hysteria. It is not clear to me whether he knew he had also embarked on a program to rewrite the Constitution. The critical importance of *Brown v. Board of Education*¹¹¹ was that it removed any doubt about the Court's commitment to just such a program—whatever its implications. By 1964 Congress and the President had joined the battle against Apartheid. Judicial activism in support of the rights and interests of Blacks no longer would raise the special questions it once had.

Each constitutional generation organizes itself about paradigmatic events and texts. For my generation, it is clear that these events are *Brown v. Board of Education* and the civil rights movement and that the text is footnote four. For, whether or not the footnote is a wholly coherent theory, it captures the constitutional experience of the period from 1954 to 1964. And that experience, more than the logic of any theory, is the validating force in law.

110. I am not suggesting that the victims of an hysterical outbreak maintain equanimity with respect to the political system that spawned the attack.

111. 347 U.S. 483 (1954).