Justice Potter Stewart on Racial Equality: What it Means to be a Moderate

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Introduction

The effect of Justice Stewart's participation in constitutional decision-making on the Supreme Court has been particularly significant in cases involving racial discrimination. The importance of Stewart's role during the last two decades in determining the extent of the Constitution's mandate of racial equality might well have been prophesied at the time of his appointment to the Court.[1] Indeed, his views on the Constitution and racial equality were a central factor in the debate on his confirmation.[2]

President Eisenhower nominated Justice Stewart to the Supreme Court four years after it had unanimously decided in *Brown v. Board of Education*[3] that the Fourteenth Amendment proscribes state-imposed racial segregation in schools. In the wake of the *Brown* decision, there was concern about Stewart's position on the equal protection issue raised by de jure racial segregation. Although his nomination was generally acceptable to northern pro-desegregationists, it aroused considerable opposition among the southern conservative establishment in the Senate. Henry Abraham, in his analysis of the Stewart confirmation, suggested that the conservative South viewed Stewart as a "sure vote

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1. Stewart was a recess appointment in October, 1958.

2. He was later confirmed by the Senate on May 5, 1959.

3. 347 U.S. 483 (1954). Although the Court had rendered earlier decisions in the area of segregated education, *e.g.*, McLaurin v. Oklahoma, 339 U.S. 637 (1950), Sweatt v. Painter, 339 U.S. 629 (1950), Missouri v. Gaines, 305 U.S. 337 (1938), it is almost uniformly agreed that the *Brown I* decision was the symbolic, if not practical, start of the role of the federal courts in dismantling the labyrinth of southern segregation.

for racial equality."[4] Similarly, Murphy and Pritchett characterized the hearings on Stewart's nomination as an attempt by southern senators to hold "a debate on the merits of school desegregation."[5] The widespread assumption of Stewart's commitment to constitutionally-mandated racial equality led Senators Russell of Georgia and Eastland of Mississippi to attempt to block the confirmation on the grounds that he would contribute to what they saw as a wrong trend of the Court.[6] The racial segregation issue explains the final confirmation vote in the Senate of seventy to seventeen, a vote reflecting unanimous support with the exception of Senator Holland of Florida and the entire Senate delegations from Alabama, Arkansas, Georgia, Louisiana, Mississippi, North Carolina, South Carolina and Virginia.[7] The fear of Stewart's reputed pro-civil rights stance suggests that his position on the highly controversial issue was likely to make him a significant Court participant. It is therefore pertinent to inquire whether the fears of the southern segregationists concerning the addition of Stewart to the Court have been realized.

Although no cursory examination of Justice Stewart's record on racial equality or any other subject is likely to reveal his true judicial philosophy, a number of legal scholars have attempted to ascertain whether he is more a "liberal" jurist than a "conservative" jurist.[8] The conclusions are by no means uniform, but most commentators have

4. H. ABRAHAM, JUSTICES AND PRESIDENTS 249 (1974) [hereinafter cited as ABRAHAM].

5. W. MURPHY & C.H. PRITCHETT, COURTS, JUDGES AND POLITICS 73 (1961).

6. ABRAHAM, *supra* note 4, at 250.

7. *Id.*

8. Throughout the text, unless otherwise noted, the label "liberal" is applied to Justices prone to support individual liberties against allegations of governmental intrusion. Claims for Bill of Rights and Thirteenth, Fourteenth and Fifteenth Amendment protection of individual freedom and equality are generally supported by this group. Liberals, however, are not prone to find violations of individual liberties in governmental regulations of the economy; New Dealism is also part of the liberal creed. "Conservatives," in contrast, are those who have been unlikely to see governmental actions as violations of individual rights or have been easily persuaded by the government of the advisability of its restrictions on substantive and procedural rights. Conservatives, unlike liberals, are reluctant to read broadly the meaning of constitutional rights or find additional implied or penumbral rights. This conception of a liberal-conservative dichotomy with respect to the Court, with some minor variation, has been adopted by contemporary analysts of the Supreme Court. *See, e.g.*, ABRAHAM, *supra* note 4; S. GOLDMAN & T. JAHNIGE, THE FEDERAL COURTS AS A POLITICAL SYSTEM (1971) (though declining to use the terms liberal and conservative in their analysis of data on Supreme Court voting blocs, they have delineated the same phenomenon in the voting behavior of the Justices); D. ROHDE & H. SPAETH, SUPREME COURT DECISION MAKING (1976); G. SCHUBERT, THE JUDICIAL MIND REVISITED: PSYCHOMETRIC ANALYSIS OF SUPREME COURT IDEOLOGY (1974); R. SCIGLIANO, THE SUPREME COURT AND THE PRESIDENT (1971); R. STEAMER, THE SUPREME COURT IN CRISIS (1971); Schubert, *Judicial*

shared a common frustration in assessing Stewart and have settled for rather vague conclusions. No one has sought to study Stewart's performance in depth.[9] The most comprehensive statement offered by scholars about Stewart's performance as a Justice is that he has been a "moderate." But what does it mean to be a moderate? To Schubert, it is a reflection of one's voting behavior and perhaps voting coalitions;[10] to Spaeth and Rohde, the term has a similar meaning.[11] To conclude, however, that Stewart is moderate because his vote swings[12] from presumed liberal to presumed conservative positions and because his voting alignments are the most fluid of all contemporary Justices[13] is to capture only part of what moderation has meant with respect to Stewart.

Having a mixed voting record in support of the claims of racial minorities is one aspect of Justice Stewart's moderation, but being the centrist or middle member of the Court in racial discrimination cases has had other manifestations. His pattern of voting, although mixed, is neither inconsistent nor random; rather, it appears to be a function of Stewart's adoption of a moderate theoretical approach to the resolution of cases. Thus, it will be argued that when Stewart appears to have shifted positions unpredictably in cases on school desegregation, state action, or the interpretation of federal statutes (especially the Voting Rights Act of 1965), he has in fact voted consistently because his approach to decision-making and his theoretical orientation have been

Attitudes and Voting Behavior: The 1961 Term of the Supreme Court, 28 LAW & CONTEMP. PROB. 100-42 (1963).

9. Although little detailed attention has been paid to Stewart by legal scholars, there has been a debate about where to place him on the ideological scale. Steamer has concluded that Stewart has been more liberal than Justices Harlan and Whittaker. R. STEAMER, THE SUPREME COURT IN CRISIS 262 (1971). Alternatively, Rodell has argued that Stewart is more likely than not to be among the liberals. Rodell, *It Is the Earl Warren Court*, in THE SUPREME COURT UNDER EARL WARREN 148 (L. Levy ed. 1972). Abraham takes a somewhat more tentative position in viewing Stewart as a "progressive-conservative or moderately liberal." ABRAHAM, *supra* note 4, at 126. Other analysts, however, have concluded that Stewart is definitely neither liberal nor conservative. *See, e.g.*, Schubert, *Judicial Attitudes and Voting Behavior: The 1961 Term of the Supreme Court*, 28 LAW AND CONTEMP. PROB. 126 (1963). Similarly, Rohde and Spaeth have viewed Stewart as "neutral." D. ROHDE & H. SPAETH, SUPREME COURT DECISION MAKING 144 (1976).

10. Schubert, *supra* note 8.

11. D. ROHDE & H. SPAETH, *supra* note 8.

12. The term "swing" voter is used to describe a Justice who on some occasions is supportive of particular values and interests and on other occasions votes against similar claims.

13. For analyses of Stewart's voting alignment, see November issues of the Harvard Law Review, 1959 through 1977. Stewart's voting behavior displays a uniquely high level of independence. As measured over time, Stewart has been the least aligned of the contemporary Justices.

qualitatively different from those of either the liberal or conservative wings of the Court. His voting pattern merely reflects his unique standards for resolving conflicts before the Court; standards which are not as result-oriented, pro-civil rights as the liberals' nor as restrictive of the judicial power to promote racial equality as those of the conservatives.

Perhaps the most important element of Justice Stewart's approach to the judicial function is his commitment to a narrow and deliberate approach to constitutional decision-making. Stewart once commented in a personal interview that "the law is a careful profession" and Justices as lawyers ought not to reach issues not necessarily before them.[14] His commitment to the Justice-as-lawyer model has influenced his approach to constitutional adjudication. He stands out among his contemporaries for his tendency to narrow the issue, decision, and remedy in the racial equality cases he has decided. This narrow approach has, in recent years, often led Stewart to cast the pivotal fifth vote in racial equality cases.[15] Thus, although the anti-desegregationists' assumption that Stewart would contribute to the Court's "wrong course" was premature in anticipating that Stewart's vote would immediately alter the course of Supreme Court decisions, it may be argued that with time their fears have been at least partially realized.

In Part I of this article—Data Analysis—it will be shown that Justice Stewart has been considerably less supportive of civil rights than has the Court as a whole. In Part II—Analysis of the Issues—it will become clear that the numbers reflecting Stewart's voting record are but a small part of his significant role in civil rights litigation. The analysis of racial equality cases which appears in Part II has been divided into four sections: (1) decisions based on the Constitution; (2) cases in which the primary issue was the presence or absence of state action; (3) decisions based on federal statutes; and (4) decisions involving racial equality in the electoral system.

I. Data Analysis

The data included in this article are derived from all of the cases

14. Oral interview with Justice Potter Stewart in Washington, D.C. (April 19, 1976).

15. The term "pivotal" is used to indicate that the vote securing a majority of the Court was cast by the Justice least strongly associated with the substantive implications of a decision over which the other Justices are evenly divided. While one might argue that any Justice who votes with a Court decision which has only a one-vote majority is the pivotal vote, through careful analysis of prior decision-making one can ascertain which Justice, if any, is least closely associated with the decision. In situations in which the "fifth vote" is a narrow concurring opinion, the identity of the pivotal Justice is obvious.

decided during the past twenty years in which racial equality was the major issue. Although the selection of cases for analysis involved some degree of judgment, since many of the decisions are arguably subject to various classifications, in practice the difficulties were very few. Included in the analysis are all of the cases decided by the Court from the time of Stewart's appointment in 1958 to July 1978[16] involving segregation along racial lines, racial discrimination in voting, denials of equal opportunity because of race, as well as cases involving criminal prosecutions based on the race of the defendant. Most of the cases were decided under the equal protection clause of the Fourteenth Amendment; others were treated by the Court as raising due process questions or requiring interpretation of federal statutes designed to ensure racial equality. Accordingly, the analysis of Justice Stewart's participation in racial equality cases over a period of two decades is aimed at assessing his role in the Court's protection of racial equality and is not limited to assessing his role in the interpretation of the equal protection clause.

TABLE 1

Racial Equality Cases

Total decided	109 cases	
Court pro-racial equality decisions	77 cases	71% of total decided
Stewart pro-racial equaltiy decisions	69 cases	63% of total decided
Average Justice*	71% pro-racial equality	
Difference between average Justice and Stewart = 8%		

* Average Justice is the mean of all votes cast in the relevant cases.

16. A note is in order here about the methodology used in the data analysis presented in this paper. The votes of all of the Justices participating in the 109 racial equality cases decided since 1958 have been compiled and analyzed on a case-by-case basis. It should be noted that a "case" is conceived as involving a new principle, a new application, and a situation that can be differentiated; thus, the data presented reflect no multiple counts of what were essentially the same case. For example, the three "freedom of choice" plans for desegregation of public schools rejected by the Supreme Court in 1968 were counted as only one case; *i.e.* Monroe v. Board of Comm'rs, 391 U.S. 450 (1968), Raney v. Board of Educ., 391 U.S. 443 (1968), and Green v. County School Bd., 391 U.S. 430 (1968).

The Appendix specifies all of the cases analyzed within each of the categories. The tables presented in the text display the level of support for racial equality in the voting behavior of the Justices and in the decisions of the Court as a whole. Thus, each table shows the total number of cases of a particular type decided by the Supreme Court during the last 20 years. Each table also shows the number (and percentage) of those cases in which Justice Stewart cast a vote supportive of racial equality. The decisions of the Court (majority) as a whole are similarly indicated. The term "average justice" refers to the average of all of the votes cast by the Justices in the relevant cases. For example (as displayed in Table 1), between 1958 and 1978, the Court decided 109 cases involving racial equality. In 77 of these cases the Court decided in favor of the litigant advancing the racial equality claim. Stew-

TABLE 1A

Non-Unanimous Racial Equality Cases

Total decided	62 cases	
Court pro-racial equality decisions	34 cases	55% of total decided
Stewart pro-racial equality decisions	23 cases	37% of total decided
Average Justice	54% pro-racial equality	
Difference between average Justice and Stewart = 17%		

TABLE 2[17]

Rank Order of Justices on Support for Racial Equaltiy

Goldberg/Fortas	Harlan
Douglas	Stevens
Marshall/Warren	Blackmun
Brennan	Frankfurter
Clark	Burger
White	Powell
Black	Rehnquist
Stewart	Whittaker

Rank Order of Justices on Support for Racial Equality By Court Years

(A) *1962-1965*	(B) *1965-1967*	(C) *1967-1969*
Douglas	Douglas	Douglas
Goldberg	Brennan/Fortas	Marshall
Warren	Warren	Warren/Brennan/Fortas
Brennan	White	Harlan
Clark	Clark	White *Stewart*
Stewart	Black	Black
Black/White	*Stewart*/Harlan	
Harlan		

(D) *1969-1972*	(E) *1972-1975*	(F) *1976-1978*
Douglas/Brennan/Marshall	Douglas/Brennan/Marshall	Marshall
Stewart/White/Blackmun	White	Brennan

art's vote promoted racial equality in only 69 of these cases. A total of 952 judicial votes were cast in the 109 cases; 672 of these votes were supportive of racial equality. Thus, the theoretical average Justice, or more precisely, the average judicial vote, was "liberal" on race 71% of the time.

17. Tables 2A, B and C, are from G. SCHUBERT, THE JUDICIAL MIND REVISITED: PSYCHOMETRIC ANALYSIS OF SUPREME COURT IDEOLOGY 163 (1974). Tables 2D, E and F were developed on the basis of racial equality cases decided during the time periods specified.

Burger/Black	*Stewart*	White
Harlan	Blackmun	Stevens
	Burger	Blackmun
	Powell	*Stewart*
	Rehnquist	Powell
		Burger
		Rehnquist

Tables 1 and 2 both suggest that Justice Stewart has never been among the vanguard of the Court in voting to support racial equality under law. Table 2 shows Stewart to rank in the middle of the Court in terms of his support for racial equality (tenth among eighteen Justices), though, as Tables 2A-2F indicate, his relative position has varied over time. Stewart ranked consistently in the bottom third of the Warren Court in supporting decisions promoting racial equality. With the changes in membership from the Warren to the Burger Courts, Stewart's rank within the Court on support for racial equality has risen to a middle position. This change is due to the appointment of more conservative Justices to the Court and not to any significant shift in Stewart's approach in these cases. Chief Justice Burger and Justices Powell and Rehnquist have been consistently less supportive of racial equality than were their respective predecessors; Justice Blackmun's support for racial equality has been similar to that of Stewart.

The data presented in Table 1 indicate that while the Court as an institution has supported racial equality 71% of the time, Justice Stewart's support has been a full 8% lower. When compared to the theoretical average Justice—the mean or average vote cast in these cases—Stewart is also 8% less supportive of equality. The differences between Stewart and the Court as an institution become even more pronounced when one examines voting behavior in only the non-unanimous racial equality cases. As Table 1A demonstrates, in cases where there has been disagreement among the Justices as to whether the law could sustain a finding of discrimination, Stewart has taken a pro-civil rights stance only 37% of the time. Thus, while there was an 8% difference between Stewart and the Court when all racial cases are considered, in those engendering disagreement Stewart's support level is 18% lower than that of the Court. Similarly, the difference between the average Justice and Stewart increases from 8% in all racial cases decided to 17% in non-unanimous cases.

Justice Stewart's low level of support for civil rights vis-a-vis the Court as an institution is also suggested by the fact that he has never dissented in support of civil rights. In two decades of rather intensive civil rights litigation, there has not been even one occasion when Stew-

art was more supportive of racial equality than a majority of the Court; no case prompted Stewart to case a vote for civil rights which had not so persuaded at least four other Justices. Stewart's rank on Tables 2A, B and C of between six and 8.5 of the nine Justices indicates that during the years of the Warren Court he would have been unlikely to be in dissent when voting in support of racial equality. Similar data for the Burger Court (Tables 2D, E and F) show that in recent years Stewart's rank within the Court has been relatively higher in support of racial equality; he has been at or near the center of the Court in aggregate support. During the period between 1969 and 1975 (Tables 2D and E) he often cast the pivotal fifth vote determining whether an otherwise equally divided Court would support a particular litigant's position.

After the retirement of Justice Douglas and the appointment of Justice Stevens in 1975, Justice Stewart's centrism has been increasingly marked by his role as the most constant member of majority coalitions in a Court not prone to five-to-four divisions. In racial equality cases decided during this period he has been in dissent but once, in *Castaneda v. Partida*,[18] a record matched by no other contemporary Justice. Since 1976, moreover, Justice Stewart has played an active role in race cases. Of the thirty-seven decisions handed down by the Court since Justice Stevens' appointment in 1975, nine were *per curiam*, with the remaining twenty-eight attributable to individual Justices. Stewart wrote for the Court in eleven of these signed opinions, a figure which suggests both his importance as a contributor to the Court's decision-making in this area and, perhaps, his moderating influence in the formation of majority coalitions.[19]

TABLE 3

Constitutional Racial Equality Cases

Total decided	63 cases	
Court pro–racial equality decisions	41 cases	65% of total decided
Stewart pro–racial equality decisions	35 cases	56% of total decided
Average Justice	66% pro–racial equality	
Difference between average Justice and Stewart = 10%		

18. 430 U.S. 482 (1977).

19. Stewart wrote the majority opinion in the following cases: Christiansburg Garment Co. v. EEOC, 434 U.S. 42 (1978); Hazelwood School Dist. v. United States, 433 U.S. 299 (1977); Connor v. Finch, 431 U.S. 407 (1977); Runyon v. McCrary, 427 U.S. 160 (1976); Chandler v. Roudebush, 425 U.S. 840 (1976); Brown v. General Servs. Adm'n, 425 U.S. 820 (1976); NAACP v. Federal Power Comm'n, 425 U.S. 662 (1976); Francis v. Henderson, 425 U.S. 536 (1976); Hills v. Gautreaux, 425 U.S. 284 (1976); Beer v. United States, 425 U.S. 130

TABLE 3A

Non-Unanimous Constitutional Racial Equality Cases

Total decided	37 cases	
Court pro-racial equality decisions	18 cases	49% of total decided
Stewart pro-racial equality decisions	12 cases	32% of total decided
Average Justice	52% pro-racial equality	
Difference between average Justice and Stewart = 20%		

TABLE 4

Racial Equality Cases Based on Statute[20]

Total decided	46 cases	
Court pro-racial equality decisions	36 cases	78% of total decided
Stewart pro-racial equality decisions	34 cases	74% of total decided
Average Justice	76% pro-racial equality	
Difference between average Justice and Stewart = 2%		

TABLE 4A

Non-Unanimous Racial Equality Cases Based on Statute

Total decided	27 cases	
Court pro-racial equality decisions	16 cases	59% of total decided
Stewart pro-racial equality decisions	15 cases	56% of total decided
Average Justice	57% pro-racial equality	
Difference between average Justice and Stewart = 1%		

Whereas Table 1 shows Justice Stewart's lower-than-average support for racial equality in all cases, Table 3 indicates that when considering only cases decided directly on the basis of constitutional provisions, Stewart's support level relative to the Court declines even

(1976). The other 17 opinions for the Court were authored by the following Justices: Powell (4), Rehnquist (4), Marshall (3), Brennan (2), White (2), Burger (1), and Blackmun (1).

20. These Tables (4 and 4A) include, *inter alia*, cases on racial discrimination in the electoral system litigated under federal statutes. It should therefore be noted that Tables 4 and 4A include all of the cases listed in Appendix C and those cases listed in Appendix D which were decided under federal statutory provisions. The inclusion of the statutory voting cases does not significantly alter the data obtained without them, but it should be noted that the substantive discussion in Part IIC (Racial Equality Under Statute) refers to federal laws covering non-voting issues. Part IID (Racial Equality in the Electoral System) includes a discussion of both the constitutional and statutory challenges to discrimination in voting.

further. When Stewart's voting behavior in cases based on the Constitution is compared with those based on statutory interpretation (Tables 3 and 4), however, it is clear that not only has he been much more supportive of racial equality when Congress has previously acted (74% compared to 56%), but he also comes much closer to the Court as a whole in his support level with respect to both majority decisions and the average Justice. The absence of unanimity on cases significantly alters Stewart's relative place on the Court in constitutional cases (Tables 3 and 3A), but it is not influential in statutory cases (Tables 4 and 4A). In non-unanimous constitutional cases, Stewart falls 20% below the average Justice (Table 3A), while in non-unanimous statutory cases he is but 1% less supportive of racial equality than is the average Justice (Table 4A). The absolute decline vis-a-vis the Court, as distinguished from the relative decline, is also far more dramatic in the area of constitutional law where, as Tables 3 and 3A demonstrate, Stewart falls from support in 56% of the total cases to support in only 32% of cases engendering dispute among the Justices. The implication to be drawn from Tables 3, 3A, 4 and 4A is clear: Stewart has been much more supportive of racial equality under statutes than under the Constitution, and while this is true of the Court as a whole, it is considerably more pronounced with Stewart. Furthermore, in cases based on the Constitution where dissenting votes were cast, Stewart is a very likely candidate to have opposed a pro-racial equality decision. In contrast, his support for racial equality in statutory cases is actually closer to that of the Court in cases generating dissenting votes.

One explanation for the pattern of greater support for individual rights under statute than under the Constitution is Justice Stewart's general approach to decision-making on the Court, a topic which will be explored further in Part IIC. Not only has he preferred to rest decisions on statutory grounds where possible—as in *Board of Regents of the University of California v. Bakke*[21]—but his reluctance to make decisions which could be described as either too broad or too indelible has led him to exhibit greater caution in constitutional cases than in those involving the interpretation of statutes. Decisions supportive of racial equality under the Constitution almost always require an act of positive judicial review in which the Court denies state authorities the power to discriminate against minorities on the basis of race. These decisions restrict states' flexibility because change would require either a constitutional amendment overruling the precedent or a new Court

21. 438 U.S. 265 (1978).

decision to the same effect. Thus, in constitutionally-based racial equality cases which have engendered disagreement among the Justices, as measured by the casting of dissenting votes, Stewart has been very unlikely to support a pro-racial equality result.

In contrast to his approach to constitutional adjudication, Justice Stewart's greater apparent willingness to support claims for racial equality under statute, even in cases where members of the Court disagree, is, perhaps, a function of his greater comfort with decisions which need not be as binding in the future. Though some Justices might be very supportive of statutory protection of civil rights based on the belief that Congress, and not the Court, possesses the greater responsibility for protecting civil rights (through its legislative power under section 5 of the Fourteenth Amendment),[22] in Stewart's case it is not clear that deference to Congress has been a particularly important factor in his decision-making. Stewart, in an oral interview as well as in many of his written opinions, has conveyed the belief that there is a very limited level of social knowledge upon which to base decisions. "No one," he suggested, "is wise enough to see around the next corner"; whether one is a citizen, a judge or a Congressman, the prudent course to follow is therefore one which least restricts the future options for change.[23]

In general, statutes are more easily changed than is the Constitution; decisions of great import reached through statutory interpretation are less restrictive of future alternatives than are similarly broad constitutional decisions. Through legislative amendment, Congress is free to alter the course set by Supreme Court decisions which are based entirely on federal statutes, whereas constitutional amendment involves a considerably more arduous process. Thus, Stewart's belief in flexibility for change has rendered him considerably more amenable to using statutes to promote racial equality in ways he would not use the Constitution.

The quantitative data reviewed in this section suggest that Justice Stewart, relative to the other Justices, has been only marginally supportive of racial equality. Statistics, however, convey only one aspect of his participation in the racial equality cases. The full significance of Stewart's role in this area of constitutional and statutory litigation can only be derived from an analysis of the issues raised by the cases, the decisions and the remedies involved. Although the quantitative data suggest the general outlines, detailed analysis of the cases involving the

22. U.S. CONST. AMEND. XIV, § 5 provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

23. *See* note 14 *supra*.

Constitution and racial segregation, state action, racial equality under statute and racial discrimination and the electoral system, all discussed in Part II, leads to the conclusion that Stewart's importance stems more from the narrow, centrist, often pivotal quality of the substance of his opinions than from the mere fact of his vote in a particular decision.

II. Analysis of the Issues

A. The Constitution and Racial Segregation: School Desegregation and Beyond

As has been noted,[24] the issue of school desegregation was a key factor accompanying Justice Stewart's elevation to the high Court. Though it was assumed by southern Senators that he would contribute to the further dismantling of the dual school system that the South sought to preserve, his vote was not regarded as likely to result in a shift in constitutional doctrine. The Court had already spoken on the issue of desegregation, and the significant foundations for change had been laid with unanimity. The three rudimentary but far-reaching precedents of *Brown I*,[25] *Brown II*,[26] and *Cooper v. Aaron*[27] had been established, and there was no indication but that the Court would continue to rule accordingly on challenges to de jure racial segregation in public education.

Prior to Justice Stewart's nomination to the Court, he was involved in one of the first tests of the effectiveness of *Brown II* with respect to lower court interpretation and application. In *Clemons v. Board of Education of Hillsboro*,[28] the Sixth Circuit was faced with a school district's attempt to delay desegregation for two to three years until new school buildings could be constructed. One judge in the *Clemons* case was opposed to any delay in desegregation and another was unwilling to enjoin delay. Circuit Judge Stewart believed that the desegregation process should begin the following fall so as not to disrupt classes then in progress. New students entering the school district prior to the fall, however, were to be assigned without respect to race since no disruption in their school routine would thereby be occasioned. This middle view of the proper course for school desegregation in Hillsboro prevailed, resolving the dispute.

Justice Stewart's position in this case generated contradictory com-

24. *See* notes 1-5 and accompanying text *supra*.
25. Brown v. Board of Educ., 347 U.S. 483 (1954).
26. Brown v. Board of Educ., 349 U.S. 294 (1955).
27. 358 U.S. 1 (1958).
28. 228 F.2d 853 (6th Cir. 1956).

mentary on his philosophy concerning the role of the judiciary in ensuring racial equality under the Constitution. Jerold Israel viewed his vote in *Clemons* as proof of a strong commitment to the use of judicial power to promote racial equality,[29] while J. Francis Paschal cited the case as evidence of Stewart's pragmatism and unwillingness to order immediate desegregation without consideration of the facts and mitigating circumstances.[30] These varying interpretations of Stewart's judicial philosophy indicate that his approach was not entirely obvious from a philosophical standpoint, even if his position in *Clemons* can now be seen as a percursor to the centrist, pivotal position he was later to play in Supreme Court school desegregation cases.

Reminiscent of *Clemons* was Justice Stewart's brief dissent from the Supreme Court's summary reversal of *Singleton v. Jackson Municipal Separate School District*.[31] Stewart thought it appropriate for the Supreme Court to defer to the findings and orders of the lower court on the question of delay. He took the position that without a full hearing on the facts of the case, the Court should have given greater deference to the Fifth Circuit's postponement of school desegregation. Stewart, while expressing no opinion on the merits of the case, has often chided the Court for not hearing fuller arguments on various questions. In *Singleton*, and possibly other cases,[32] Stewart seemed prepared to allow desegregation to proceed at a slower pace, provided the record did not suggest egregious abuse of discretion by the lower court.

In 1972, the Court's united front in fully considered school desegregation cases came to an abrupt end in *Wright v. Emporia*.[33] That Justice Stewart's participation was pivotal in this case seems evident not only because he wrote the five-to-four majority opinion, but also from the content of the narrowly-drawn, situationally-based opinion. At issue was whether the City of Emporia, Virginia, could withdraw from an educational contract with Greensville County and operate its own school district, thereby removing itself from the federal court desegregation plan for Greensville County. Stewart rejected the circuit court's reliance on the "dominant purpose test" and reinstated the district court's injunction against the operation of a new school district, on the grounds that the splintering of Emporia into a separate district

29. Israel, *Potter Stewart*, in THE JUSTICES OF THE UNITED STATES SUPREME COURT: THEIR LIVES AND MAJOR OPINIONS 2923 (F. Israel & L. Friedman eds. 1969).

30. Paschal, *Mr. Justice Stewart on the Court of Appeals*, DUKE L.J., 328-29 (1959).

31. 396 U.S. 290 (1970). Stewart also registered a dissenting vote from the Court's summary reversal in Sweet Briar Institute v. Button, 387 U.S. 423 (1967).

32. *See* note 31 *supra*.

33. 407 U.S. 451 (1972).

would have the *effect* of impeding school desegregation in Greensville County. In rejecting the circuit court's approach, he stated:

> This "dominant purpose" test finds no precedent in our decisions. . . . Though the *purpose* of the new school districts was found to be discriminatory in many . . . cases, the courts' holdings rested not on motivation or purpose, but on the *effect* of the action upon the dismantling of the dual school systems involved. That was the focus of the District Court in this case, and we hold that its approach was proper.[34]

Relying heavily on statistical data for Greensville County (the withdrawal of Emporia would have had the effect of reducing the white school population from 34% to 28%), Justice Stewart nevertheless stressed that a combination of circumstances contributed to the finding that Emporia's attempt to establish an independent school district was a violation of the equal protection clause. In addition to the statistical factors, other relevant considerations included the timing of the city's decision to withdraw from Greensville County schools—shortly after the final desegregation order—the fact that the originally all-white and better-equipped schools were located within the City of Emporia, as well as the intangible effect of loss of community support on the chances for a successful desegregation plan. The opinion closed by reiterating that the holding was limited to cases where creation of a new school district would impede the process of dismantling a dual system.[35] Rather than striking down the practice of splintering wherever there was school segregation, (whether or not the district was under a direct desegregation order), Justice Stewart relied on the existence of such an order in Greenville County, thereby limiting the decision's impact. Such reliance on factual context highlights his tendency not to write an opinion any more broadly than necessary to dispose of the actual case before the Court.

Although Justice Stewart's opinion in *Emporia* is perhaps more limited than Justices Douglas, Brennan, Marshall or White might have preferred, it is significant in that the effect on desegregation generated by the division of a school district was found to be only minimal (in this case 6%) and yet was held to be constitutionally proscribed. The dissenting opinion, written by Chief Justice Burger[36], applied the same "effect" test and concluded that the effect of the change proposed in *Emporia* was de minimis. The majority interpretation of the "effect" of

34. *Id.* at 461-62 (emphasis in original).

35. *Id.* at 470.

36. *Id.* at 475-76 (Burger, C.J., dissenting, joined by Blackmun, Powell and Rehnquist, JJ.).

a 6% change in white enrollment suggested that there was little room for similar maneuvers by school districts in the future.

The significance of municipal school district boundary lines in desegregation cases, important in *Emporia* and the companion case of *United States v. Scotland Neck Board of Education*,[37] took on an added dimension in *Milliken v. Bradley*.[38] In this challenge to a district court's insistence on a metropolitan plan for desegregating the Detroit city schools, the State of Michigan argued successfully that the lower court had exceeded its discretion and equitable powers. While Justice Stewart's position in the *Emporia* case was implicitly that of the fifth vote, in *Milliken* his concurrence, which explicitly constituted the fifth vote, left no doubt as to his desire to narrow or limit the majority's nearly total rejection of the "metro" remedy. The opinion by Chief Justice Burger stressed the tradition of local control of education in America, the practical difficulties of merging fifty-four school districts into one, as well as the presumed "innocence" of the suburban districts—hence the injustice of including them within a desegregation plan.[39] The Court's opinion would allow for an inter-district remedy only upon a finding of either an interdistrict cause of segregation or an intentional drawing of segregative district boundary lines. Stewart, however, left open the possibility of allowing a metro remedy if state officials had contributed to the segregation situation through boundary drawing, school transfer policies, or "purposeful, racially discriminatory use of state housing or zoning laws."[40] The dissenters, in contrast, thought the metro remedy appropriate because it was deemed necessary to effectuate the equal protection rights of the Detroit students. It was, for the dissenters, irrelevant that the suburban districts were not themselves defendants in the law suit.

The sanctity of local government boundaries is one of the key

37. 407 U.S. 484 (1972). The situation in Scotland Neck, North Carolina was quite similar to that in Emporia, except that an act of the state legislature was required to give Scotland Neck the authority to have an independent school district. Despite the great similarity between the two cases, in *Scotland Neck* Chief Justice Burger concurred with the Court opinion because he saw the splinter district as creating a practical impediment to school desegregation. 407 U.S. at 491 (Burger, C.J., concurring, joined by Blackmun, Powell and Rehnquist, JJ.).

38. 418 U.S. 717 (1974). While it may be argued that the Court had already spoken on this issue in School Board of Richmond v. State Board of Education of Virginia, 412 U.S. 92 (1973) (*aff'd per curiam*), the Court there provided no insight into the precise factors which were relevant in this four-to-four decision. Also, *Milliken* may be distinguishable because of the flexibility of Michigan school district boundaries and greater power of state government to control educational policies statewide, factors not present in the Richmond situation.

39. 418 U.S. 717, 742-45 (1974).

40. *Id.* at 755 (Stewart, J., concurring).

questions in effectuating school desegregation.[41] Justice Stewart's ambivalence toward this question has created a curious situation in which there is a lack of predictability as to precisely when the federal courts may order cross-district assignments as means of desegregating school districts where the existing segregation is attributable at least in part to the actions of public officials. As the only vote change between *Emporia* and *Milliken*, Stewart secured the majority of five in each case. His *Milliken* concurrence suggested that that case could be distinguished from *Emporia*.[42] Perhaps a key consideration was the lack of interest in achieving district autonomy displayed by the City of Emporia until it was faced with a desegregation order; there was no pre-existing operative school district boundary that had to be respected.[43] Rather than district boundary inaction where the consolidation of districts might promote desegregation as in *Milliken*, the *Emporia* situation was one of purposive action to operate a new district. In addition, the Greensville County district, of which Emporia was a part, had previously promoted segregation.[44] Stewart suggested that, in contrast, there was an absence of any segregationist "guilt" in the Wayne County, Michigan suburbs.[45] While this factor, if the central one,[46] would be relatively easily and predictably applied by taking note of historical evidence as the Court did in *Emporia*, it was not the major consideration in Stewart's concurrence. A more significant element in Stewart's opinion, and the one creating a basis for future unpredictability, was his willingness to open a constitutional Pandora's box and consider the contribution of state housing and zoning policies to segregation as between city and suburb.[47] Thus, while in *Milliken* Stewart's position was in the middle since the dissenters were more willing to accept metropolitan plans as a practical measure to accomplish desegregation, in fact this middle position has far-reaching implications. Not only has Stewart appeared to adopt Justice Douglas' view that the state can cause segregation in the schools through very subtle demographic manipulations,[48] but he has also not precluded the possibility that a metro plan could eventually be

41. For a discussion of this issue, see Binion, *Racial Discrimination by Alteration or Refusal to Alter School District Boundaries*, 54 U. DET. J. URB. L. 811 (1977).

42. 418 U.S. 717, 755 (Stewart, J., concurring).

43. 407 U.S. at 455-57.

44. *Id.* at 455.

45. 418 U.S. at 757 (Stewart, J., concurring).

46. The absence of segregationist history in Michigan appears to have been given substantial weight by the majority opinion. *See id.* at 748-49.

47. *Id.* at 755 (Stewart, J., concurring).

48. *See, e.g.*, Douglas' dissent from summary affirmance in Spencer v. Kugler, 404 U.S. 1027 (1972). The major difference between Stewart and Douglas on this point would seem

reinstated in Detroit if evidence were introduced showing such involvement of state officials. Although Stewart's contribution in *Milliken* was to create a situation of unpredictability by issuing a multifaceted opinion, he has subsequently proven to be supportive of interdistrict remedies when state or federal officials have created boundaries which result in segregation.[49]

Since *Milliken*, Justice Stewart's centrism has been marked by his consistent support of decisions restricting judicial discretion to order large-scale desegregation plans. These decisions, however, have been tentative rulings in which desegregation orders in Austin,[50] Dayton,[51] Omaha[52] and Milwaukee[53] were reversed and remanded for reconsideration in light of the racially-discriminatory purpose required in *Washington v. Davis*[54] and the underlying principle in *Milliken* that the "punishment"—a desegregation plan—should not exceed the extent of the "crime" of purposeful segregation. Thus, Stewart appeared to alter his course in school desegregation cases when he concurred in *Davis* as to the necessity of proving clear intent to discriminate in constitutional cases.[55] A key factor, perhaps, in his support for the majority position in the progeny of *Davis* is the narrowness of these opinions.[56]

Beyond School Desegregation

Just as the foundation for school desegregation had been laid before Justice Stewart's arrival on the Court, so also were there equal protection proscriptions of state-mandated racial segregation in other publicly-run institutions and accommodations. On the basis of *Brown*

to be Douglas' assumption that segregationist intent is ordinarily the case, while Stewart was merely willing to entertain evidence on the subject.

49. Stewart's position in *Milliken* allowed him to vote to uphold cross-district desegregation in the Wilmington, Delaware case, Buchanan v. Evans, 423 U.S. 963 (1975). Also relevant in his opinion for the Court in Hills v. Gautreaux, 425 U.S. 284 (1976), in which he supported an extra-jurisdictional remedy in a housing discrimination case against HUD and the Chicago Housing Authority.

50. Austin Independent School Dist. v. United States, 429 U.S. 990 (1976).

51. Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977).

52. School Dist. of Omaha v. United States, 433 U.S. 667 (1977) (*per curiam*).

53. Brennan v. Armstrong, 433 U.S. 672 (1977) (*per curiam*).

54. 426 U.S. 229 (1976). *Davis* held that the racially disproportionate impact of a government practice, neutral on its face, did not render the practice unconstitutional absent a finding of discriminatory purpose.

55. *See* notes 33-34 and accompanying text *supra*.

56. *See, e.g.*, Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252 (1977) and notes 50-53 and accompanying text *supra*. It should be noted that Stewart's concurring opinion in *Davis* was more limited than that of the majority, written by Justice White, since Stewart did not join in the portion which considered whether Title VII of the 1964 Civil Rights Act had been violated.

II, the Court in 1955 ordered desegregation of state-run recreational facilities in a number of cases receiving only summary consideration.[57] Various other aspects of state-mandated racial separation, however, remained in force.

In most of these cases, Justice Stewart's role has been that of one vote in unanimous condemnation of racially-segregative state policies. Thus, for example, in *Watson v. Memphis*,[58] *Johnson v. Virginia*[59] and *Lee v. Washington*,[60] he voted with a unanimous Court ordering desegregation of public parks, courtrooms and prisons, respectively. Nevertheless there was still some evidence of Stewart's measured approach to constitutional equality. In *Lee v. Washington*, though agreeing with the Court that racial segregation in prisons violated equal protection, he joined Justice Black's concurrence, which suggested that under certain circumstances racial separation could be a legitimate policy. In emergency situations, for example, Alabama could, in good faith, "consider racial tensions" in maintaining prison security.[61] In a sense one could argue that the concurrence did not really depart from the majority position in *Lee* in that it considered factors other than those raised in the case. The departure, however, is inherent in the suggestion that there may be circumstances in which the Court's blanket proscription would be inappropriate.

Bearing a resemblance to Justice Stewart's position in *Lee* is his opinion for the Court in *Carter v. Jury Commission of Greene County, Alabama*,[62] which illustrates his commitment to the principle of the limited remedy. *Carter* challenged Alabama jury selection statutes requiring "honest repute" and "good character" for jury service. These requirements gave jury selection commissions sufficient discretion to keep blacks off jury rolls.[63] Despite the gross disparity between the percentage of black population in the county and the percentage of blacks on the jury rolls,[64] Stewart stopped short of either declaring the jury selection statute unconstitutional or ordering the governor to put

57. *See, e.g.*, Mayor and City of Baltimore v. Dawson, 350 U.S. 877 (1955) (*per curiam*) and Muir v. Louisville Park Theatrical Ass'n, 347 U.S. 971 (1954) (*per curiam*).

58. 373 U.S. 526 (1963).

59. 373 U.S. 61 (1963) (*per curiam*).

60. 390 U.S. 333 (1968) (*per curiam*).

61. *Id.* at 334. (Black, J., concurring, joined by Stewart and Harlan, JJ.).

62. 396 U.S. 320 (1970).

63. *Id.* at 322-23.

64. In 1960 blacks constituted 75% of the population but only 7% of the jury rolls. In 1964 a federal district court enjoined the commission from discriminating on the basis of race. In 1967 blacks constituted 65% of the population but only 32% of the jury rolls. 396 U.S. at 327-28 (1970).

blacks on the jury selection commission. He noted that the requirements were not unusual:

> Statutory provisions such as those found in [section] 21 are not peculiar to Alabama, or to any particular region of the country. Nearly every State requires that its jurors be citizens of the United States, residents of the locality, of a specified minimum age, and able to understand English. Many of the States require that jurors be of "good character" or the like; some, that they be "intelligent" or "well informed."[65]

The Court upheld the district court remedy of enjoining the Commission from discriminating against blacks in the future.[66] *Carter* may represent Stewart's commitment to a federalism in which states retain maximum authority. Although federalism appears to be a very secondary consideration for Stewart in most cases where the balance had already been struck against state autonomy, such as in school desegregation, there are strains suggesting that Stewart has been reluctant to order state and local authorities to perform any positive action solely on the basis of prima facie evidence. In the *Carter* case this orientation was shared by all but Justice Douglas, who would have invalidated the entire jury selection system.[67]

Not entirely unrelated to Justice Stewart's stance in *Carter* was his position in *Mayor of Philadelphia v. Educational Equality League*,[68] a challenge to the racially exclusive appointment practices of the mayor of Philadelphia. It was alleged that the mayor's failure to appoint blacks to the school board nominating panel proportionate to the black school population constituted prima facie evidence of unconstitutional racial discrimination. The Court denied an injunction against the Mayor, evidencing its unwillingness to interfere with the day-to-day operations of local government. Although in *Carter* the issue was whether to grant a writ of mandamus or an injunction, in *Mayor of Philadelphia* the choice was between an injunction or no remedy at all. In this five-to-four decision it would be a fair assumption that Stewart was the critical fifth vote because the four Nixon appointees with whom he joined[69] had been consistently less likely than he to use federal judicial power to effect racial desegregation.[70] The four dissenters, alternatively, suggested that the Court should show greater deference to the

65. *Id.* at 333 (citations omitted).
66. *Id.* at 336-37.
67. *Id.* at 345 (Douglas, J., dissenting in part).
68. 415 U.S. 605 (1974).
69. Chief Justice Burger and Justices Powell, Rehnquist and Blackmun.
70. *See* Tables 2D, E and F *supra*.

findings of fact in the circuit court.[71] Recalling Stewart's dissent in *Singleton*,[72] where he recommended such deference to a lower court decision which slowed desegregation, it would seem, in racial equality cases, that his deference should be interpreted as directed toward the narrower, more limited remedy, or to the denial of a remedy rather than toward preserving lower courts' factual assessments.

Given Justice Stewart's commitment to judicial restraint, an unexplained departure from his consistently narrow opinions in racial segregation cases is particularly interesting. This departure from the limited opinion principle occurred in *McLaughlin v. Florida*[73] in 1964 and has proven to be an important harbinger of the position Stewart was later to take in *Bakke*. The ultimate in segregation laws was challenged in *McLaughlin* and *Loving v. Virginia*,[74] where the states imposed criminal sanctions on interracial cohabitation and marriage, respectively. Justice White for the majority in *McLaughlin* suggested that a criminal law focusing on the race of the actor is difficult to sustain under the equal protection clause, stating that "[s]uch classifications bear a far heavier burden of justification."[75] He concluded, "In short, it has not been shown that section 798.05 is a necessary adjunct to the State's ban on interracial marriage. We accordingly invalidate section 798.05 without expressing any views about the State's prohibition on interracial marriages, and reverse these convictions."[76] Despite the fact that Justice White's opinion bears the mark of the limited, non-anticipatory Stewart opinion, Stewart's concurrence went considerably further:

> But the court implies that a criminal law of the kind here involved might be constitutionally valid if a state could show "some overriding statutory purpose." This is an implication in which I cannot join, because I cannot conceive of a valid legislative purpose under our Constitution for a state law which makes the color of a person's skin the test of whether his conduct is a criminal offense. . . . Discrimination of that kind is invidious *per se*.[77]

Stewart's position would dispose of all criminal cases in which a racial element is involved; race would be an impermissible classification in

71. 415 U.S. at 647-48 (White, J., dissenting, joined by Brennan, Marshall, and Douglas, JJ.).

72. *See* note 31 and accompanying text *supra*.

73. 379 U.S. 184 (1964).

74. 388 U.S. 1 (1967).

75. 379 U.S. 184, 194 (1964). Although Justice White did not speak of suspect classification, this aspect of the *McLaughlin* opinion differs in import from Chief Justice Warren's in *Loving* only in that White did not use the word "suspect."

76. *Id.* at 196.

77. *Id.* at 198.

criminal law. As this would obviously include criminally punishable interracial marriage, Stewart could concur in *Loving* merely be referring to his *McLaughlin* opinion.[78] The explanation for this unexpectedly broad position may well lie in Stewart's commitment to the doctrine proffered by the senior Justice Harlan that the Constitution is color-blind.[79] In an oral interview Stewart suggested that "[d]espite Professor Shockley to the contrary, under the Constitution black and white are identical."[80] The Florida and Virginia laws challenged in *McLaughlin* and *Loving*, respectively, were perhaps too overt as racial classifications to be sustainable under any circumstances. Thus, Stewart may have wished to foreclose such a possibility.

Justice Stewart, as well as Justice White, spoke only of the criminal law in *McLaughlin*; at that time it was not affirmative action or benign quotas he sought to preclude. One might argue, however, that Stewart's philosophy of color blindness, dispositive of *McLaughlin* and *Loving*, was also the foundation for his position in the *Bakke* case. As discussed in section C of part II of this article, in joining Justice Stevens's partial dissent in *Bakke*, Stewart extended the dictum of his *McLaughlin* concurrence from the criminal to the civil law, from constitutional to statutory proscription, and from a classification disadvantaging minorities to one arguably disadvantageous to Caucasians. Thus, his concurrence in *McLaughlin*, although broader than was necessary to resolve that case, did not of itself preordain his position in *Bakke*. With an appreciation of Stewart's commitment to the legal identity of black and white, however, one may understand the principle underlying his *McLaughlin* and *Loving* concurrences, as well as their extension to his position in *Bakke*.

B. The State Action Requirement

Whether particular discriminatory activity is attributable to state action, and as such, prohibited by the equal protection clause of the Fourteenth Amendment, has been one of the key problems confronting the Supreme Court in a generation of intensive civil rights litigation. While there were some foundations for determining when state action had in fact occurred where no state or local law mandated racial discrimination, there were few guiding principles for Supreme Court decision-making during the civil rights revolution of the 1960's. Several prior decisions had generated state action ideas such as: administrative

78. Loving v. Virginia, 388 U.S. 1 (1967) (Stewart, J., concurring).
79. Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).
80. *See* note 14 *supra*.

action is state action;[81] official activity violative of state law is state action;[82] political parties in a primary are state action;[83] streets in a company town serve a public function, hence company action is state action;[84] and the use of the judicial process to interfere with otherwise willing sellers and buyers is state action.[85] These precedents existed prior to Stewart's appointment to the Court, but the real tone of the state action doctrine was set by *Burton v. Wilmington Parking Authority*[86] in 1961.

In *Burton* the Court spoke of "sifting facts and weighing circumstances"[87] in order to determine when there is sufficient state involvement in allegedly private denials of equal treatment to blacks to render the discrimination constitutionally proscribed. Finding that the Eagle Coffee Shoppe had forfeited its freedom to discriminate when it entered into particular leasing arrangements with the state, the Court suggested that the mutual benefits derived from the relationship between the coffee shop and the State of Delaware tipped the balance in favor of government responsibility.

Justice Stewart's concurring opinion was significantly narrower than Justice Clark's opinion for the Court, despite the latter's reliance on the combination of various circumstances. Whereas the Court sifted and weighed to determine state involvement, Stewart viewed the state action element as arising from the Delaware court's interpretation of a statute allowing refusal of service to anyone "offensive to the major part of the customers."[88] Since there was no evidence that Burton was offensive, the use of that statute by the judge to justify Eagle's decision to expel him, according to Stewart, was discriminatory state action. Stewart saw the state court interpretation of the statute "as authorizing discriminatory classification based exclusively on color. Such a law seems to me clearly violative of the Fourteenth Amendment."[89] What made Stewart's position especially narrow was the limited remedy available under his approach to the state action issue. In viewing the Delaware statute as unconstitutional if interpreted to authorize discrimination, Stewart could vote to overturn the instant conviction for

81. Yick Wo v. Hopkins, 118 U.S. 356 (1886).
82. Screws v. United States, 325 U.S. 91 (1945).
83. Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944).
84. Marsh v. Alabama, 326 U.S. 501 (1946).
85. Shelley v. Kraemer, 334 U.S. 1 (1948).
86. 365 U.S. 715 (1961).
87. *Id.* at 722.
88. *Id.* at 726-27 (Stewart, J., concurring).
89. *Id.*

trespass, but his opinion could in no way justify an injunction against the coffee shop's *future* discrimination. All that Delaware and other states would need to do to avoid a finding of state action would be to refrain from using statutes as authorization for proprietors' racial discrimination.

The Court's behavior in the state action area since *Burton* may fairly be characterized as tentative—carefully attempting to avoid obliterating the distinction between public and private action while at the same time not denying relief to blacks who have in fact suffered from racial discrimination. The situationally-based, ambiguous approach of sifting and weighing in this fashion may explain the large number of dissenting votes cast in decisions in this area.

TABLE 5

Court Unanimity on Racial Equality Cases
By Type of Issue Involved

	Total # of Cases	# unanimous	percentage unanimous
A. Racial Segregation and the Constitution	43	18	42%
B. State Action	13	3	23%
C. Racial Equality Under Statute	28	16	57%
D. Racial Equality and the Franchise	25	10	40%

Table 5 demonstrates that the issue of state action has produced the lowest degree of unanimity and thus the lowest degree of consensus within the Court of any of the racial equality problems. Multi-factor, non-specific guidelines by their nature invite disagreement as to their applicability. Cases in which the key issue was the appropriate constitutional standard for state policies involving racial separation or exclusion were decided unanimously 42% of the time. Similarly, cases in the areas of interpretation or construction of federal statutes (excluding

Voting Rights Act cases),[90] as well as those involving the constitutional and statutory protection of the black elective franchise, produced unanimity rates of 57% and 40%, respectively. In contrast, only 23%, or fewer than one in four, of the state action cases were decided by a unanimous Court. Even in the three cases which were unanimous decisions, there was no unanimous opinion for the Court. Thus, while *Peterson v. City of Greenville*,[91] *Gilmore v. City of Montgomery*[92] and *Adickes v. S.H. Kress & Co.*[93] generated no votes against a finding of state action, these were concurring or partially dissenting opinions in which different arguments from those of the Court were advanced. It is therefore a justifiable preliminary conclusion that one of the most difficult areas for the Court has been the determination of precisely when the threshold state action requirement of the Fourteenth Amendment has been met.

Since the Burger Court has shifted away from a perception of state action in many cases,[94] it may be argued that Justice Stewart is the pivotal vote when a disagreement arises over this issue. The Court may be viewed as dividing into three blocs with relatively greater or lesser standards for finding state action. The liberals, including, at various times, Justices Douglas, Warren, Brennan, White (generally), Goldberg, Fortas and Marshall, took the approach that any indication of state endorsement, support or subtle encouragement of discrimination infected the allegedly private discrimination with official responsibility.[95] On the conservative wing of the Court, there were, and are, Justices espousing the view that state action requires a showing that government officials were likely to have caused the discriminatory acts against blacks which, save for the involvement of the state, would probably not have occurred.[96] This bloc usually included Justices Harlan, Frankfurter, Whittaker and Black (toward the end of his term), and later Chief Justice Burger and Justices Blackmun, Powell and Rehnquist. Between these qualitatively different conceptions of state action are Justices Stewart and Clark, whose votes on state action cases have generally been less predictable. This does not imply that their votes

90. For purposes of this analysis, statutory voting rights cases are included in the category "Racial Equality and the Electoral System."

91. 373 U.S. 244 (1963). *Peterson* was the basis for a finding of state action in Robinson v. Florida, 378 U.S. 153 (1964).

92. 417 U.S. 556 (1974).

93. 398 U.S. 144 (1970).

94. *See, e.g.*, Hudgens v. NLRB, 424 U.S. 507 (1976); Moose Lodge v. Irvis, 407 U.S. 163 (1972).

95. *See, e.g.*, notes 109-11 and accompanying text *infra*.

96. *See, e.g.*, note 102 and accompanying text *infra*.

were random; rather, their votes reflected the view that the state action requirement is met whenever it is shown that official actions could have caused the resulting discrimination against blacks. Therefore, unlike the liberals, these moderates have not thought it sufficient to show that the state subtly encouraged discrimination; but conversely, they have rejected the conservatives' requirement of proof that the state's involvement was a more likely cause of the discrimination than was the personal decision of a private citizen. The judicial divisions in the sit-in cases of *Peterson* and *Lombard v. Louisiana*[97] serve to illustrate the point, especially when contrasted with, for example, *Evans v. Newton*[98] or *Reitman v. Mulkey*.[99]

In the sit-in cases, the Court was faced with trespass convictions of blacks arising out of the civil rights movement. In each of these decisions, rendered prior to the enactment of the Civil Rights Act of 1964, the Court found the measure of official involvement in the decision to evict blacks from lunch counters sufficient to render the racially-motivated orders to leave, as well as the subsequent trespass convictions, violative of equal protection. In *Peterson* and *Robinson v. Florida*[100] the continued existence of a city ordinance and state regulation, respectively, encouraging racial segregation in restaurant facilities was viewed by the Court as sufficient evidence of state action. The Court in *Robinson* concluded that "the State through its regulations has become involved to such a significant extent in bringing about restaurant segregation that appellants' trespass convictions must be held to reflect that State policy and therefore to violate the Fourteenth Amendment."[101] Justices Stewart and Clark voted with the Court, presumably because the existence of a state regulation or city ordinance supporting segregation could cause the decision to expel blacks. Justice Harlan, on the other hand, was able to concur in *Peterson* only because the private perpetrator of discrimination referred during the trespass trial to the existence of the ordinance as grounds for his decision to refuse to serve blacks.[102] Harlan's condition that it must be likely that the state's action, not the individual's private decision, was the proximate cause of the discrimination was thus met. If it was clear that the individual would have discriminated even if no ordinance existed, then Harlan would refuse to treat the discriminatory conduct as state action. Simi-

97. 373 U.S. 267 (1963).
98. 382 U.S. 296 (1966).
99. 387 U.S. 369 (1967).
100. 378 U.S. 153 (1964). *See* note 91 *supra*.
101. 378 U.S. at 156-57.
102. Peterson v. Greenville, 373 U.S. at 253 (Harlan, J., concurring).

larly, in *Lombard v. Louisiana*,[103] the Court, joined by Justice Stewart, maintained that the statements of public officials, including the mayor and police chief, supported segregation by suggesting that blacks should be expelled from white lunch counters, and that the merchants' expulsion of blacks therefore constituted state action. The decision was in keeping with the outlook attributed to Stewart that the official actions could have prompted private citizens to take a hard line against desegregation. Justice Harlan, however, dissented because he did not think it likely that the decision to expel was due to comments of public officials, in the absence of which the discrimination would not have occurred.[104] Unlike *Peterson*, the record in *Lombard* did not suggest that the merchants had specifically obeyed the recommendations of the city fathers.

As noted, Justice Stewart joined the majority of the Court in the sit-in cases, where there was the possibility that discrimination would not have occurred save for the actions of governmental personnel. This conception of state action, however, caused him to dissent in those cases where the Court relied on subtle official endorsement or encouragement of privately-made decisions as its basis for a finding of state action. Thus, while the majority in *Evans v. Newton*[105] spoke of the public function served by parks, Justice Stewart, in joining Justice Harlan's dissent, endorsed the idea that the Fourteenth Amendment could not frustrate a private will once the state was no longer involved in the administration of the estate. The park in question had been bequeathed to Macon, Georgia by Senator Bacon with the proviso that it be used by whites only. The majority of the Court ruled that the city's attempt to withdraw from official control of the park (in order to allow it to remain segregated) did not divest the park of its public character; the state therefore bore official responsibility for the continuing discrimination.[106] The dissent contended that it was not possible for the city to have caused the discrimination; the city was simply effecting the terms of a totally private decision contained in the will.[107] Similarly, Stewart constituted the theoretical fifth vote against a finding of state action in *Palmer v. Thompson*,[108] where the facts could support the conclusion that it was not possible for the state to cause segregation in the

103. 373 U.S. 267 (1963).

104. Justice Harlan's dissent in *Lombard* appears in his opinion concerning a group of segregation decisions. Peterson v. Greenville, 373 U.S. at 254 (Harlan, J., dissenting).

105. 382 U.S. 296 (1966).

106. *Id.* at 301-02.

107. *Id.* at 316-17 (Harlan, J., dissenting, joined by Stewart, J.).

108. 403 U.S. 217 (1971).

once public swimming pools which it no longer controlled. Just as the decision to segregate the park in *Evans* was a private one, so also was the decision to segregate privately-owned pools which had been purchased from the government in *Palmer*.

Once again, in *Reitman v. Mulkey*,[109] Justice Stewart joined a Harlan dissent against the Court's view that California's Proposition 14 was unconstitutional state action. The Court viewed the repeal of the Unruh and Rumford open housing laws through a statewide voter initiative as subtle encouragement by government of those who would deny housing to blacks based on racial bias. According to the dissenters, the State of California had chosen to remain neutral with respect to housing discrimination;[110] it was therefore neither the proximate nor a possible perpetrator of discrimination which might result from the state constitutional amendment under review.

The Court's process of sifting and weighing state action questions did not create a serious unpredictability as to the decisions that were likely to be made during the Warren Court era. Given the commitment of the liberals to a very broad notion of state action, and their relative dominance on the Court on civil rights issues, it was to be expected that their sifting and weighing was likely to yield a decision discerning official support for allegedly private acts of discrimination. What was not entirely predictable was the substance of the argument, the particular facts of the case that would be deemed to have constituted the requisite official involvement. That the thread needed to be only gossamer during the 1960's is evidenced by the fact that of the eight differentiable racial discrimination state action cases decided during the Warren years, in only one case did the Court not attempt to remedy fully a state action.[111]

The one departure, in 1960, was a five-to-four decision in which the Court opinion was authored by Justice Stewart. In *Wolfe v. North Carolina*,[112] a decision based on procedural grounds, Stewart held that a state court need not consider as definitive in a criminal case a federal civil court finding of state responsibility for discrimination by its lessees. Refusing to bar a trespass conviction on the rationale that the state had power under the Constitution to set its own rules of evidence

109. 387 U.S. 369 (1967).

110. *Id.* at 389 (Harlan, J., dissenting, joined by Black, Clark and Stewart, JJ.).

111. *See* Appendix B. Of the first eight cases listed therein, relief was denied only in Wolfe v. North Carolina, 364 U.S. 177 (1960), a Stewart opinion decided on procedural grounds.

112. 364 U.S. 177 (1960).

and review, he deferred consideration of the trespass statute and its applicability under the Constitution.[113] Thus, while the possibility of Supreme Court reversals of trespass convictions involving state complicity in segregation was not precluded by Stewart in *Wolfe*, his vote with the majority in the *Peterson, Robinson*,[114] *Lombard*[115] and *Griffin v. Maryland*[116] decisions could not have been predicted with any certainty on a reading of *Wolfe*.

The opinions which Justice Stewart joined in the sit-in cases were based narrowly on the record of involvement of public officials. They carefully avoided the broader constitutional issue of state responsibility for public accommodations which are licensed, inspected, and in various other ways controlled by state and local government. *Moose Lodge v. Irvis*,[117] however, unavoidably decided the issue of whether state liquor licensure clothes a private club with public officialdom, resulting in state action. Although the Court answered the state action question in the negative and reversed the district court's decree that Moose Lodge's liquor license was invalid, it found that state enforcement of the lodge's discriminatory policy would violate the Fourteenth Amendment.[118] Later, in *Gilmore v. City of Montgomery*,[119] a unanimous decision denying exclusive use of public recreational facilities to segregated schools, Stewart was the theoretical fifth vote for the Court's narrow approach to the issue. The four liberals' partial concurrences were more prone to consider and restrict even non-exclusive use by segregationist groups.[120] Justice Blackmun's opinion for the Court, in which Stewart joined, held that the lower court, on remand, "by sifting facts and weighing circumstances" should determine if non-exclusive use violated the equal protection clause.[121] Although it is arguable that non-

113. *Id.*

114. *See* notes 91, 100-02 and accompanying text *supra*.

115. *See* notes 103-04 and accompanying text *supra*.

116. 378 U.S. 130 (1964) (employee of private park who was also a deputy sheriff acted under color of state law in enforcing racially discriminatory policy).

117. 407 U.S. 163 (1972).

118. The state of Pennsylvania required clubs granted liquor licenses to observe all of their charter provisions and regulations. In the case of the Moose Lodge, this included their "white only" membership and guest policy. Justice Rehnquist, who wrote the Court's opinion, therefore concluded that Pennsylvania might be partially responsible for the actual enforcement of the racially exclusive policy, and might properly be enjoined from such activity. Thus the state sanctions would be unavailable to aid Moose Lodge in enforcing the policy, but the Lodge could retain its license as well as its discriminatory policy. *Id.* at 177-79.

119. 417 U.S. 556 (1974).

120. *Id.* at 576.

121. *Id.* at 574-75.

exclusive use would fail to correct the constitutional infirmity of discriminatory state action which existed with exclusive use,[122] Stewart's predeliction not to decide any more than was necessarily before him may explain his vote with the four Nixon appointees.

Justice Stewart's moderate approach, which has involved narrowing the question, the decision, and the remedy, has characterized his participation in the state action cases just as it has marked his approach to racial segregation issues in general. His voting in these cases appears to be less predictable than that of the other members of the Court in that he swings from voting with liberals to joining the conservatives in the key cases on state action. This pattern is the result of his espousal of a middle theoretical position on the conditions necessary to find state responsibility for allegedly private acts of discrimination.

C. Racial Equality Under Statute

The third category of racial equality cases generating a sizable volume of litigation during the past twenty years has been the interpretation and application of federal statutes protecting individual civil rights. In contrast with the adjudication of state action cases, the interpretation of federal statutes has occasioned considerably less discord among the Justices. As Table 5 indicates, cases involving the constitutionality of state segregation and the cases on racial discrimination in voting produced unanimity 42% and 40% of the time, respectively, while state action decisions resulted in a low unanimity rate of 23%. Of the statutory construction cases, more than half—57%—produced no dissents.[123] As was suggested by Tables 3 and 4,[124] the Court as an institution has been more likely to render pro-civil rights decisions on statutory grounds than on constitutional grounds. It was also noted that this pattern was considerably more pronounced with Justice Stewart's performance than it was with the behavior of the Court as a whole or with the hypothetical average Justice.

That the Court as a whole should be more supportive of individual rights based on statute than on the Constitution directly is not surprising. Any Justice who is philosophically committed to judicial restraint would hesitate to exercise judicial review and declare laws and practices of state or local governments unconstitutional. While this ten-

122. This point was emphasized in the concurring opinions. *See id.* at 576-77 (Marshall, J., concurring in part and dissenting in part); *id.* at 581-82 (White, J., concurring, joined by Douglas, J.).

123. *See* Table 5, Part IIB, *supra*.

124. *See* Tables 3 & 4, Part I, *supra*.

dency was often overcome by the momentum of *Brown* and the ensuing desegregation cases, in later cases the Court has shown greater reluctance to exercise positive judicial review. In statutory cases, however, a commitment to restraint is no barrier; no decision of constitutional magnitude is involved in a vote supportive of racial equality under statute. In the case of Justice Stewart specifically, his 18% higher support rate on statutory cases than on racial equality cases decided under the Constitution[125] is arguably attributable to his slow, one step at a time, approach.

When dealing with constitutional issues, any decision is relatively indelible, theoretically requiring the arduous task of constitutional amendment to alter the judicial pronouncement. Alternatively, when statutes are construed, a different result can be reached by mere legislative revision. The assessment of Justice Stewart's voting pattern as reflecting caution would certainly seem reasonable given his general reluctance to preclude future alternatives in constitutional cases. His more liberal votes in statutory cases, however, are not necessarily a function of deference to Congress since deference can be the basis for decisions non-supportive of equality if statutes are interpreted to that effect. While Stewart, when authoring an opinion supportive of individual rights, often referred to the task at hand as solely that of carrying out congressional intentions,[126] he has likewise been prone to rest a non-supportive position on the same argument. His dissent in *Hamm v. Rock Hill*[127] indicated his view that congressional silence in the Civil Rights Act of 1964[128] on abatement of prosecutions of civil rights protesters, leaving state abatement laws to govern the issue, was evidence that Congress did not intend to abate. Similarly, writing for the Court in *City of Greenwood v. Peacock*,[129] Stewart rejected a broad reading of provisions for removal of state prosecutions involving civil rights to federal courts.[130] He reasoned that Congress intended removal to federal court of state prosecutions for activity covered by the Civil Rights Act of 1964,[131] but did not intend removal of all prosecu-

125. Justice Stewart supported racial equality under statute in 74% of the cases and racial equality in 56% of the constitutional interpretation cases. *See* Tables 3 & 4, Part I, *supra*.

126. *See, e.g.*, Albemarle v. Moody, 422 U.S. 405, 415-17 (1975), Love v. Pullman, 404 U.S. 522, 525 (1972), Georgia v. Rachel, 384 U.S. 780, 786 (1966).

127. 379 U.S. 306, 326-27 (1964) (Stewart, J., dissenting). Justices Harlan and White also filed separate dissents.

128. 42 U.S.C. §§ 2000a-2000a-6 (1976).

129. 384 U.S. 808 (1966).

130. 28 U.S.C. § 1443 (1976).

131. Such activity would include that undertaken by federal officers and persons assisting such officers in performing their duties under federal law providing for civil rights. 28

tions of private civil rights workers. As Stewart's opinions in *Hamm* and *Greenwood* indicate, his deference to Congress does not of itself explain his relatively high level of support for individual rights under federal statutory law. The task of statutory construction and application involves, for the most part, a decision as to congressional intentions but does not of itself ensure a liberal result.

In contrast with the constitutional and state action issues discussed above, Justice Stewart's vote in statutory cases has rarely been pivotal. There has been little dissent in the latter cases, and only three were decided by five-to-four votes.[132] Although not a pivotal vote in statutory construction cases, Stewart's moderate approach to these questions may nonetheless be discerned. With only a few exceptions the statutory cases have not evoked significant philosophical or theoretical pronouncements, given the nature of the task, but there are still three positions which may be identified.

The conservative approach in statutory construction cases consisted of questioning whether Congress had the constitutional authority to regulate or prohibit the behavior covered by the statutes. In this category, at various times, were Justices Black and Harlan—the former with respect to the abuse of the interstate commerce power and the latter with respect to his staunch rejection of the Fourteenth Amendment bases for legislation absent clear state action.[133] In contrast, the liberals questioned only whether the situation giving rise to the case was actually covered by the statute as written by Congress.[134] Stewart,

U.S.C. § 1443(2) (1976). Also covered by removal statutes were specific rights granted by preemptive federal statutes, such as the right to violate state trespass laws under certain conditions. 28 U.S.C. 1443(1); Civil Rights Act of 1964, 42 U.S.C. § 2000a(a) and 2000a-2(c) (1976), *construed in* Hamm v. City of Rock Hill, 379 U.S. 306 (1964). *See* City of Greenwood v. Peacock, 384 U.S. at 824, 826.

132. City of Greenwood v. Peacock, 384 U.S. 808 (1966); Hamm v. City of Rock Hill, 379 U.S. 306 (1964). Stewart dissented in *Hamm* and wrote the Court's opinion in *Greenwood*. The third case decided by an almost evenly divided Court was Regents of the University of California v. Bakke, 438 U.S. 265 (1978). In *Bakke* the pivot of the Court was Justice Powell, in that he had the support of a different group of four Justices for each of the two main points of the Court's opinion. The significance of Stewart's vote in *Bakke*, however, lies in the fact that he was the only Warren Court carry-over to vote against support for the interests of racial minorities.

133. *See, e.g.*, Griffin v. Breckenridge, 403 U.S. 88, 107 (1971) (Harlan, J., concurring); Sullivan v. Little Hunting Park, 396 U.S. 229, 241-57 (1969) (Harlan, J., dissenting); Daniel v. Paul, 395 U.S. 298, 309-15 (1969) (Black, J., dissenting); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 449-50 (1968) (Harlan, J., dissenting); United States v. Guest, 383 U.S. 745, 762-74 (1966) (Harlan, J., dissenting).

134. *See, e.g.*, Hamm v. City of Rock Hill, 397 U.S. 306, 310 (1964); *id.* at 317 (Douglas, J., concurring, joined by Goldberg, J.); City of Greenwood v. Peacock, 384 U.S. 808, 844 (1966) (Douglas, J., dissenting, joined by Warren, C.J., Brennan and Fortas, JJ.)

like the liberals, saw the issue as one of the applicability of statutes to facts rather than of whether Congress had the authority to reach the behavior in question. However, his somewhat more rigorous analysis of the applicability of statutes than was generally undertaken by the more liberal members of the Court evidenced a middle course, one in which he has been joined variably by Justices White and Harlan.[135]

What is interesting and enlightening about Justice Stewart's statutory interpretation opinions is that, as a rule, his close analysis of the applicability of statutes failed to protect the individual only in situations where this deprivation would not be final.[136] Stewart's opinions were thus limited in the sense that in the four cases in which he voted against relief, these denials of a remedy, practically speaking, were only tentative. In *Hamm v. Rock Hill*,[137] Stewart refused to assume a congressional intent to abate prosecutions for breach of the peace and trespass before the passage of the Civil Rights Act of 1964. The position taken in his dissent, however, would not have precluded future relief for the civil rights protestors. There were left open at least two possibilities: (1) the South Carolina courts might, on remand, find their own abatement laws applicable; and (2) a habeas corpus proceeding could be brought in federal court on due process grounds that there was no evidence of actual illegal activity on the part of the protesters. Similarly, in *City of Greenwood v. Peacock*,[138] Stewart's opinion for a majority of five distinguished the case on a technicality from *Georgia v. Rachel*[139] in which removal was upheld.[140] Justice Stewart's finding in

135. *See, e.g.*, notes 127-31 and accompanying text *supra*.

136. International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977), was the only statutory case involving race discrimination in which Stewart voted, in effect, to preclude the possibility of ultimate vindication of the rights of those involved. Although one would not define Stewart's position in that Title VII suit as entirely anti-civil rights, some of the workers whose interests were at stake in the case were left without a federal remedy. Stewart wrote in broad terms of the reach and remedies possible under Title VII, including the possibility of retroactive grants of seniority for those who were victims of discrimination in employment. What Stewart refused to uphold was the position of the Department of Justice (the plaintiff in *Teamsters*) that remedies should be granted to those who suffered discrimination prior to the passage of the law in 1964. Thus, while many workers would nevertheless be eligible for relief on the theory that the discrimination continued after the passage of the Act, for those who had suffered discrimination only prior to that time, federal remedies were effectively precluded.

137. 379 U.S. 306 (1964). *See* notes 127-28 *supra*.

138. 384 U.S. 808 (1966). *See* notes 129-31 and accompanying text *supra*.

139. 384 U.S. 780 (1966).

140. *Rachel* involved a criminal prosecution for trespass based solely on the race of defendants. While the prosecutions were pending, the Civil Rights Act of 1964 was passed, precluding state prosecution for peaceful attempts to be served in establishments on an equal basis. Since the *Rachel* defendants' acts were covered by the statute, Stewart reasoned

Greenwood that the removal statute was inapplicable did not preclude ultimate relief. Neither *Rachel* nor *Peacock* had yet gone to trial. Perhaps the *Peacock* defendants would be acquitted; if not, there was always the possibility of a federal habeas corpus remedy.

In *Johnson v. Railway Express Agency*,[141] Justice Stewart joined Justice Blackmun's opinion for the Court holding that the filing of an employment discrimination suit under Title VII of the Civil Rights Act of 1964[142] did not toll the one year statute of limitations on a section 1981[143] suit based on the same discrimination. Although the Court barred the suit for damages under section 1981, the possibility of a remedy under the Title VII action remained. Finally, in *Furnco Construction Corp. v. Waters*,[144] although Stewart voted against the interests of black construction workers in a Title VII dispute, the decision did not reach the ultimate question of discrimination under Title VII. Rather, the Court held that a prima facie case of discriminatory refusal to hire was not to be confused with a finding of fact on that issue for purposes of Title VII relief. The case was then remanded to the lower court for trial on the merits of the discrimination claim.

What is clear in three of the four cases involving Justice Stewart's refusal to grant relief is that only somewhat tortured constructions of the Civil Rights Act of 1964 in *Hamm* and *Johnson*, and of section 1443 in *Peacock*, could have permitted the remedies sought. While the liberals found it possible to read the law to give the requested remedy, Stewart, arguably, was moved to see the setback to civil rights as only temporary. If it seemed possible that further litigation of the cases would ultimately produce a result compatible with racial justice, Stewart apparently believed it preferable not to stretch statutory interpreta-

that the mere pendency of the prosecutions could enable federal courts to predict that the defendants would be denied rights conferred by the Act, thus making the removal statute applicable. 384 U.S. at 793-94, 803-04, construing, respectively, the Civil Rights Act of 1964, 42 U.S.C. §§ 201(a), 203, 2000a, 2000a-2, and 28 U.S.C. § 1443(1) (1976). *Peacock*, on the other hand, involved a claim that the defendants' right of free expression under the First Amendment would be violated by their prosecution for obstructing the public streets of Greenwood during demonstrations. Since the First Amendment claim did not fall within the scope of "equal civil rights" as provided in § 1443(1), Stewart concluded that the removal statute did not apply. 384 U.S. at 824-25.

141. 421 U.S. 454 (1975).

142. Civil Rights Act of 1964, 42 U.S.C. § 2000e-6(a).

143. 42 U.S.C. § 1981 (1976): "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

144. 438 U.S. 567 (1978).

tion, thus maintaining the Court's credibility. It is in this sense that Stewart represented a middle course within the Court. While his opinions never discussed the issues in quite these terms, it is significant that in these four cases his lack of support for civil rights involved situations in which there was the potential of rectification in the future.

It may be inferred that Justice Stewart's commitment to using the Court's resources to promote racial equality through statutory interpretation, which is considerably less indelible than constitutional construction, has been nearly as strong as that of the liberal wing of the Warren Court. The one recurrent difference has been Stewart's commitment to do so with the least possible alteration of constitutional standards or the least strained construction of statutes to reach the politically or legally desired result. In cases like *Love v. Pullman*,[145] *Albermarle Paper Co. v. Moody*,[146] *Christianburg Garment Co. v. EEOC*[147] and *Chandler v. Roudebush*,[148] where liberal readings of the Civil Rights Act of 1964 and the Equal Employment Opportunity Act of 1972 provisions were plausible, Stewart spoke in rather broad language of the courts fashioning remedies to give full effect to the goals and purposes of the Acts.[149] Analogously, in *Griffin v. Breckenridge*,[150] by viewing section 1985[151] as based on the Thirteenth Amendment, Stewart foreclosed the argument that conspiracies to interfere with the right of interstate travel must be entered into under color of state law to merit relief. Thus, the statute could be applied broadly to the conduct of private individuals.

145. 404 U.S. 522 (1972).

146. 422 U.S. 405 (1975).

147. 434 U.S. 412 (1978).

148. 425 U.S. 840 (1976).

149. It should be noted, however, that in another Title VII case, International Union of Electrical Workers v. Robbins & Myers, 429 U.S. 229 (1976), Stewart also evidenced his commitment to the limited decision principle by declining to reach the question of whether the pursuit of union grievance procedures tolls the running of time limits under Title VII. Although narrowness has not been as critical a value for Stewart in statutory cases, the majority in *IUEW* had already settled the case in favor of the appellants by applying the extended time limits under Title VII. Stewart, in a concurring opinion, thought it unnecessary, therefore, to reach the tolling question.

150. 403 U.S. 88 (1971).

151. 42 U.S.C. § 1985(3) (1964): "If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving . . . any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

In situations, however, where the Court had a choice between relying on a questionable application of statute or upon a broadened interpretation of constitutional protections to effect a pro-equality result, Justice Stewart opted for the former. Three key cases exemplifying this point are *United States v. Guest*,[152] *Jones v. Alfred H. Mayer Co.*[153] and *Runyon v. McCrary*.[154] In the *Guest* case, Stewart, for the Court, held sustainable an indictment based on section 241,[155] alleging conspiracies to violate the right to travel freely from state to state and to intimidate black citizens in the free and equal exercise of their rights. Though rejecting the defendants' contention that section 241 applied only to rights protected by laws of the United States against infringement by private individuals, and not to rights protected by the Fourteenth Amendment, Stewart stressed that application of section 241 to Fourteenth Amendment rights was possible only because the indictment contained allegations of state action.[156] Stewart was thus willing to read section 241 as covering rights which are protected against state infringement, such as Fourteenth Amendment rights, provided state involvement could be shown. The *Guest* opinion also stated that the right to travel interstate was fundamental to the Union and that Congress had the power to legislate against impingements of that right.[157] Congress may protect federally secured rights from invasion by private individuals, but where the Constitution guarantees a right against infringement by the state, Congress cannot enact legislation punishing private interference with the right.[158] Stewart indicated that the right to travel interstate was protectable by Congress against private interfer-

152. 383 U.S. 745 (1966).

153. 392 U.S. 409 (1968).

154. 427 U.S. 160 (1976).

155. 18 U.S.C. § 241 (1968) provides: "If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—

They shall be fined not more than $10,000 or imprisoned not more than ten years, or both; and if death results, they shall be subject to imprisonment for any term of years or for life."

156. 383 U.S. at 754-56.

157. *Id.* at 758.

158. United States v. Williams, 341 U.S. 70, 77 (1951). A prime example of such a secured right is the right to vote in congressional elections, a right which arises from the relationship between an individual and the federal government as compared to the right to trial by jury in a criminal case which is protected only against governmental, not private infringement. *Id.*

ence, suggesting that this right is federally secured.[159] The major thrust of *Guest* lay in its incorporation of Fourteenth Amendment rights into those protected by section 241. Through this statutory construction device, the Court could sustain the federal indictment without an expanded interpretation of the Fourteenth Amendment.[160] The majority approach was criticized by Justice Clark for its failure to suggest that Congress had the power to protect citizens from private infringement of Fourteenth Amendment rights,[161] and by Justice Brennan who thought that Congress already had done so.[162] Stewart's opinion, therefore, represented the narrowest way to reach the desired result.

Similarly, in *Jones v. Alfred R. Mayer Co.*,[163] where petitioners sought relief under section 1982[164] for respondents' refusal on racially-discriminatory grounds to sell them a home, the Court had three alternatives: (1) to deny any relief under federal law; (2) to view the actions of the Alfred H. Mayer Co. as state action, thus triggering Fourteenth Amendment protections; or (3) to interpret section 1982 as applicable to private discrimination in the sale of housing. As has been suggested, Justice Stewart has evidenced a commitment to ensuring ultimate racial justice when it was possible to do so without a constitutionally-based decision. It is, therefore, not surprising that he would choose statutory construction as preferable to either denying the possibility of a remedy to Jones or granting a remedy at the cost of expanding the state action doctrine under the Fourteenth Amendment. Stewart's opinion looked to the Thirteenth Amendment,[165] which is not limited to conduct in-

159. This characterization of the right to travel was criticized by Justice Harlan. 383 U.S. at 763-74 (Harlan, J., concurring in part and dissenting in part).

160. It should also be noted that the penalties provided by § 241, *see* note 155 *supra*, are heavier than those provided by § 242 which explicitly protects rights which are "protected" or "secured." Section 242 provides only for a fine of up to $1,000 or imprisonment of not more than one year, or both, where the violation does not result in the victim's death. 18 U.S.C. § 242 (1976). Thus, Stewart's interpretation permits the imposition of a greater penalty for abridgement of a protected constitutional right than would be possible under § 242, as well as avoiding the "under color of state law" requirement of § 242.

161. 383 U.S. at 761-62 (Clark, J., concurring joined by Black and Fortas, JJ.).

162. *Id.* at 777 (Brennan, J., concurring in part and dissenting in part, joined by Warren, C.J., and Douglas, J.).

163. 392 U.S. 409 (1968).

164. 42 U.S.C. § 1982 (1976) provides: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

165. The Thirteenth Amendment provides: "Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Section 2. Congress shall have power to enforce this article by appropriate legislation."

volving state action, as the basis for section 1982.[166] By tracing section 1982 to Thirteenth Amendment roots, the Court could find that Congress had the power to determine what constituted a "badge or incidence of slavery" and to pass appropriate legislation. The ultimate question in *Jones*, as framed in Stewart's opinion, gives an indication of the broad scope of the decision: "The constitutional question in this case, therefore, comes to this: Does the authority of Congress to enforce the Thirteenth Amendment 'by appropriate legislation' include the power to eliminate all racial barriers to the acquisition of real and personal property? We think the answer to that question is plainly yes."[167] *Jones*, therefore, was no short step; the implications of a section 1982 right against private, as well as public entities, with the attendant prospect of a judicially defined remedy are yet to be fully realized.[168] Given Justice Stewart's reluctance to take long constitutional steps, however, especially if they require expanding doctrines of state action, the *Jones* opinion was understandable because it was based on a statute.

Sullivan v. Little Hunting Park Inc.[169] went on to apply *Jones* to a refusal to approve the assignment of membership shares in recreational facilities at a housing development to blacks, thus demonstrating the broad applicability of section 1982. Again relying on Thirteenth Amendment underpinnings in *Runyon v. McCrary*,[170] Justice Stewart applied section 1981[171] to reach racial discrimination in private schools. His opinion for the Court made no attempt to narrow its applicability or potential import; it was not really possible to do so.[172] If this decision were based on the Constitution, it would have been highly un-

166. 392 U.S. at 437-43.

167. *Id.* at 439.

168. *Jones* infused § 1982 with new force. Previously, similar deprivations of rights found redress only in § 1983, which requires a showing of state action. 42 U.S.C. § 1983 (1976).

169. 396 U.S. 229 (1969).

170. 427 U.S. 160 (1976). *Runyon* involved private schools practicing racial exclusion. The Court, per Stewart, held that § 1981 was violated because it declares that race shall not be the basis for refusals to contract. Given that the Court had held in *Jones* that § 1982 did not pertain only to state action, it may have been expected that § 1981 would be interpreted in a similar manner. As in *Jones*, Stewart's opinion for the Court in *Runyon* interpreted federal statutory law broadly.

171. 42 U.S.C. § 1981 (1976). *See* note 143 *supra.*

172. Justice Stewart did, however, note several issues which the case did not present, involving other possibly excludable categories of students. This suggested that race might be, in combination with religion, a permissible basis for exclusion. The explicit excision of such categories from *Runyon*'s interpretation of § 1981 may be further evidence of Stewart's customary narrowing of the issue. 427 U.S. at 167-68.

characteristic. But it was a statutory decision, and no matter what the necessary breadth of the opinion, it was by nature tentative, statutes being more easily changed than are constitutional pronouncements.

Even in *Regents of the University of California v. Bakke*,[173] Justice Stewart, in joining Justice Stevens' opinion which favored the interests of a white medical school aspirant, took the position which avoided constitutional interpretation.[174] In this sense, he aligned himself with what might be viewed as the middle course. He could have voted to reverse the California Supreme Court ruling which had found the University's affirmative action plan unconstitutional.[175] This approach would have denied Bakke relief, perhaps not the just result in Stewart's view. Alternatively, Justice Stewart could have joined Justice Powell in finding that the University of California violated Bakke's Fourteenth Amendment rights by excluding him from consideration on the basis of his race, the quota system being unnecessary to further the compelling interest in achieving a diverse student body.[176] He chose instead to join the partial dissent in which Bakke was granted relief through interpretation of the scope of Title VI of the Civil Rights Act of 1964. In language reminiscent of many of Justice Stewart's past opinions, Justice Stevens asserted, "Our settled practice . . . is to avoid the decision of a constitutional issue if a case can be fairly decided on a statutory ground."[177] He then pointed out that because the University received federal funds, its affirmative action program was subject to Title VI prohibitions. Title VI provides: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of; or be subjected to discrimination under any program or activity receiving Federal financial assistance."[178] Justice Stevens' reading of the statutory language led him to conclude that Title VI prohibits exclusion of *any* group, including whites, from federally-funded programs solely on the basis of race.[179]

There are two problems with this analysis. First, it was not shown that Congress intended to cover discrimination against non-minority

173. 438 U.S. 265, 408 (1978).

174. *Id.* at 411-21 (Stevens, J., concurring in part and dissenting in part, joined by Burger, C.J., Stewart and Rehnquist, JJ.).

175. 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1977), *aff'd in part and rev'd in part*, 438 U.S. 265 (1978).

176. 438 U.S. at 287-320.

177. *Id.* at 411 (Stevens, J., concurring in part and dissenting in part, joined by Burger, C.J., Stewart and Rehnquist, JJ.).

178. 42 U.S.C. § 2000d (1976).

179. 438 U.S. at 411 (Stevens, J., concurring in part and dissenting in part, joined by Burger, C.J., Stewart and Rehnquist, JJ.).

group members under Title VI. Justice Stevens, in examining legislative intent, relied upon repeated assurances during the House and Senate floor debates that the Act would be color-blind in its application[180] as authority for his view that the broad language of the Act should be given its "natural meaning."[181] Somewhat more convincingly, the Brennan opinion delineated the purpose of Title VI as expressed in the debates: "to eradicate a very specific evil: federal financial support of programs which disadvantaged Negroes by excluding them from participation or providing them with separate facilities."[182] Second, it was not conclusively shown that Bakke's race was the basis for his exclusion from the school. When the burden of proving that Bakke would not have been admitted to the medical school even in the absence of the special admissions program was placed on the University, the University conceded it could not meet that burden.[183] Thus, the issue was never fully litigated. Conceivably, even though Bakke met the threshold requirements for consideration, he might have been passed over for admission in favor of other qualified candidates.[184] As in the *Guest* and *Jones* cases, Stewart's position in *Bakke* involves an interpretation of federal law and congressional intent which is not entirely persuasive. It must be remembered, however, that it is only a question arising under Title VI which was reached in Justice Stevens' opinion, and not the scope of a constitutional protection. Congress, theoretically, might rewrite Title VI.

Justice Stewart's decision-making under civil rights statutes is marked both by his continued separation from the liberal and conservative blocs on the Court as well as by some departures from his apparent standards for constitutional exegesis. While continuing to show a commitment to the limited opinion principle, and exhibiting some reluctance to "torture" federal statutes, particularly when a desired result may be reached without resort to such tactics, he is, nevertheless, far more likely to "stretch" the purview of a federal statute than to develop new constitutional doctrine.

180. *Id.* at 414-15.

181. *Id.* at 418.

182. *Id.* at 334 (Brennan, J., concurring in part and dissenting in part, joined by White, Marshall and Blackmun, JJ.).

183. *Id.* at 280.

184. This point is evidenced by the trial court's finding that Bakke had not shown that he would have been admitted in the absence of a special admission program. As Justice Tobriner noted, other preferences acknowledged by the school, such as regional preferences, might have also operated to preclude Bakke's admission. 18 Cal. 3d 34, 86, 553 P.2d 1152, 1188, 132 Cal. Rptr. 680, 716 (1978) (Tobriner, J., dissenting).

D. Racial Equality and the Electoral System

It has been suggested thus far that Justice Stewart has not been in the vanguard of support for racial equality, at least where such support would require expanding concepts of constitutional protection. Ironically, it is in voting equality cases, where Stewart has shown rather strong support for equality—72% pro-racial equality,[185] that he has displayed the greatest ambivalence about using judicial authority to promote equal voting rights. The ambivalence is probably due to Stewart's commitment to federalism and the greatest possible autonomy for the states. This commitment has not seriously affected his approach to non-electoral racial equality cases because, unlike voting cases, they seldom involve judicial interference with an inherent governmental function—conducting elections. Thus, while Stewart's approach to voting equality cases bears his characteristic mark of narrow decision-making, the influence of his federalist philosophy is unmistakable. In the development from the Warren to the Burger Courts of case law involving racial equality in the electoral system, Stewart went from being one vote in a series of unanimous decisions to being the pivotal fifth vote determining the Court's decision in a series of cases interpreting the Voting Rights Act of 1965. It is only with a full appreciation of both his narrow approach to decision-making and his federalist philosophy that one could have predicted his role in the Voting Rights Act decisions.

The development of case law on racial discrimination in voting includes three eras of decision-making during the Warren and Burger Courts. The first era, from 1958 to 1965, was marked by a series of unanimous decisions in which the Court in all cases except *Lassiter v. Northampton Election Board*[186] found violations of Fourteenth and Fifteenth Amendment provisions in obvious state schemes to prevent blacks from voting. Thus, in *Gomillion v. Lightfoot*,[187] a unanimous Court invalidated the redrawing of the city boundaries of Tuskegee which had eliminated from the city all but four of its black voters. The only point of contention within the Court was whether the decision should properly be based on the Fourteenth or the Fifteenth Amendment. Then in *United States v. Mississippi*[188] and *Louisiana v. United*

185. While this datum is not displayed in table format, the 72% figure is derived from Stewart's votes in cases listed under Appendix D (Racial Equality and the Electoral System).

186. 360 U.S. 45 (1959).

187. 364 U.S. 339 (1960).

188. 380 U.S. 128 (1965).

States,[189] the Court found Fourteenth and Fifteenth Amendment violations in state-mandated "constitutional interpretation" tests used to qualify voters. The *Lassiter* decision, the one exception to this trend, was limited in that the Court found that it could not hold literacy tests unconstitutional on their face.[190] The Court left open the possibility of finding unconstitutional on equal protection or Fifteenth Amendment grounds literacy tests or other discriminatory voter qualification mechanisms.[191] In the Mississippi and Louisiana litigation, the discretion accorded registrars to administer constitutional interpretation tests and to adjudge voting competency on the results raised the specter of discriminatory misuse sufficient to overcome the Court's normal presumption of state authority over the franchise.[192] Justice Stewart's vote with the Court in these cases is not difficult to understand. There was no explanation for the states' actions except their desire to discriminate on the basis of race. Given that the autonomy of the state over the conduct of elections does not extend to the denial of Fourteenth Amendment rights, the autonomy principle could not justify such a discriminatory effect.

The second era of racial equality in voting decisions was marked by dissension within the Court. This turning point in constitutional decision-making occurred during 1966 and involved challenges to the Virginia state poll tax[193] and to Congress' authority to enact the Voting Rights Act of 1965.[194] It is in these cases that Justice Stewart began to show his ambivalence toward the role of the Court in promoting equal access to the franchise for blacks. The root of Stewart's conflict appears to lie in his commitment to federalism. In *Harper v. State Board of Elections*,[195] Stewart joined Justice Harlan's dissent, which is most significant for its rejection of strict scrutiny of claimed equal protection violations.[196] The majority opinion, written by Justice Douglas, held that equal protection was violated by making "the affluence of the voter or payment of any fee an electoral standard."[197] This broad conclusion was undoubtedly influenced by evidence in the record that the poll tax

189. 380 U.S. 145 (1965).

190. Lassiter v. Northampton Election Bd., 360 U.S. 45, 50-53 (1959).

191. *Id.* at 53.

192. Louisiana v. United States, 380 U.S. 145, 152-53 (1965); United States v. Mississippi, 380 U.S. 128, 143-44 (1965).

193. Harper v. Bd. of Elections, 383 U.S. 663 (1966).

194. Katzenbach v. Morgan, 384 U.S. 641 (1966); South Carolina v. Katzenbach, 383 U.S. 301 (1966).

195. 383 U.S. 663 (1966).

196. *Id.* at 670-80 (Harlan, J., dissenting, joined by Stewart, J.).

197. *Id.* at 666.

was, in contemporary design and effect, a restriction on the black franchise.[198] Although the Court found that the state's prerequisite of a poll tax bore *no* relation to voter qualifications, it also indicated that classifications restraining voting, a fundamental right must be "closely scrutinized and carefully confined."[199]

Justices Harlan and Stewart rejected the implication that the Court might require anything more of the states than that their electoral policies be rational. In their opinion the poll tax could be deemed rational because "property qualifications and poll taxes have been a traditional part of our political structure."[200] They viewed the near demise of the poll tax as a sign of slowly evolving changes in concepts of equality.[201] For Harlan and Stewart, however, this evolution was not a signal for the Court to enshrine "political doctrines popularly accepted at a particular moment"[202] as constitutional proscriptions. In contrast with the pre-1966 cases, in *Harper* Harlan and Stewart found an explanation other than racial discrimination for the poll tax: the tradition of requiring property ownership, as evidence of one's "deeper stake in community affairs,"[203] to qualify for the franchise. Given the existence of this alternate explanation for the poll tax, and their identification of the disfavored parties as indigents rather than as racial minorities,[204] Harlan and Stewart opted for their usual presumption of state autonomy over elections.[205]

Justice Stewart joined Justice Harlan's dissent again in *Katzenbach v. Morgan*,[206] in which the majority upheld congressional power to enact provisions of the Voting Rights Act of 1965.[207] The decision was

198. During oral argument it was pointed out by counsel for Harper that blacks were distinctly more affected by the poll tax than were whites, but the Court's interest also ran to questions about economic discrimination per se. 34 U.S.L.W. 3261 (U.S. Feb. 1, 1966).

199. 383 U.S. at 670.

200. *Id.* at 684 (Harlan, J., dissenting, joined by Stewart, J.).

201. By the mid-1960's only four states—Alabama, Texas, Mississippi and Virginia—still imposed poll taxes as a prerequisite for voting. *Id.* at 666 n.4.

202. *Id.* at 686 (Harlan, J., dissenting, joined by Stewart, J.).

203. *Id.* at 683 (Harlan, J., dissenting, joined by Stewart, J.).

204. The Court has not subjected classifications based on indigency to strict scrutiny unless they also implicate a fundamental interest. *Compare, e.g.*, San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973) (relative, not absolute, deprivation of the benefits of education because of wealth discrimination does not trigger strict scrutiny) *with* Kramer v. Union Free School Dist., 395 U.S. 621 (1969) (state law limiting voting in school elections to property owners or lessees, or parents of pupils, impinged on a fundamental right, thus triggering strict scrutiny).

205. 383 U.S. at 680-86 (Harlan, J., dissenting, joined by Stewart, J.).

206. 384 U.S. 641 (1966).

207. The Voting Rights Act of 1965, 42 U.S.C. § 1973-4(e) provides: "[N]o person who has successfully completed the sixth primary grade in a [school] accredited by the Common-

premised on the idea that voting is an area of primary competence of the states not to be interfered with by Congress, nor overridden by the judiciary, without very strong constitutional bases.[208] In rejecting the conclusion that Congress had legislative power to suspend English language literacy tests,[209] Harlan and Stewart viewed the test, like the poll tax, as presumptively founded on some state rationale other than the intent to discriminate.[210]

While it is no doubt possible that there is a relationship between English language literacy and the ability to understand the ballot fully, the dissenters may have exaggerated the precedential value of *Lassiter*.[211] Two anomalies may be discerned in their assumption that *Lassiter* had held literacy tests constitutional and their implicit accusation that the majority in *Morgan* was guilty of ignoring this fact. First, *Lassiter* was a narrow opinion: it held only that literacy tests were not on their face unconstitutional as probative of voting qualifications.[212] It is ironic that Justice Stewart, a proponent of the narrow, tentative decision, should rely on precedent as broadly controlling. Second, the challenge in *Lassiter* was made, by potential voters against the registrars, directly on the constitutional guarantees of the Fourteenth and Fifteenth Amendments.[213] In *Morgan*, however, at issue was the validity of a determination by Congress that section 4(e) of the Voting Rights Act was needed to remedy equal protection violations by states.[214] Advocates of judicial restraint ordinarily draw a distinction between the propriety of Court determinations of constitutional violations and the Court's passive acceptance of such decisions already made by the Congress, evidencing a preference for the latter.[215] Harlan

wealth of Puerto Rico in which the language of instruction was other than English shall be denied the right to vote in any election because of his inability to read or write English."

208. 384 U.S. at 670-71 (Harlan, J., dissenting, joined by Stewart, J.).

209. The majority found this power in § 5 of the Fourteenth Amendment. U.S. CONST. amend. XIV § 5. *See* note 21 *supra*.

210. The dissent emphasized the need for a judicial determination of unconstitutionality of state voting regulations and clear-cut evidence of racial discrimination to support remedial congressional action. 384 U.S. at 666-70 (Harlan, J., dissenting, joined by Stewart, J.).

211. *See* notes 186-92 and accompanying text *supra*.

212. It will be recalled that in *Lassiter*, the Court indicated it would invalidate such tests if evidence showed they were propounded for the purpose of discrimination. Lassiter v. Northhampton, 360 U.S. 45, 53 (1959).

213. *Id.* at 46.

214. 384 U.S. at 665.

215. The principle is that declaring a state practice unconstitutional is a *positive* act of judicial review, whereas upholding Congressional legislation prohibiting state practices avoids active judicial review. For a judge who espouses the traditional restraint philosophy, the distinction is an important one. *See, e.g.*, Harper v. Bd. of Elections, 383 U.S. 663, 675-80 (Black, J., dissenting).

and Stewart seemed to view congressional acts regulating the franchise as *more* destructive of federalism than similar pronouncements by the federal courts directly under the Constitution.[216] It has already been suggested that Stewart has not been an advocate of the "deference to the legislature" school of jurisprudence.[217] His position in *Morgan* provides further support for this assertion.

In addition to viewing section 4(e) as an incursion into state authority inimical to the federal system, the dissenters also argued that the section violated separation of powers in that the legislature had encroached upon the judicial function. While acknowledging the power of Congress to take corrective action under section 5 of the Fourteenth Amendment when states have infringed on federally protected rights, they maintained that "it is a *judicial question* whether the condition with which Congress has thus sought to deal is in truth an infringement of the Constitution, something that is the necessary prerequisite to bringing the § 5 [of the 14th Amendment] power into play at all."[218] Why the determination of Fourteenth Amendment rights and violations is exclusively a judicial function, given the implicit delegation of such power to Congress under section 5 of the Fourteenth Amendment, is not satisfactorily explained by the Harlan and Stewart dissent. One is left with the impression that they viewed intrusions into, or restrictions on, state authority as more questionable when perpetrated by Congress, whose decisions may reflect interest group politics, than when imposed by a federal court. The idea that judicial decisions, even constitutional ones, are simply objective legal decisions is a pronounced theme in Stewart's jurisprudence. It is evident in *Morgan* that this view precluded trusting a political body like the Congress with the power to override state laws on constitutional grounds. Stewart's federalist principles with respect to the franchise and his satisfaction with alternate, non-racist explanations for the alleged state discrimination in *Harper* and *Morgan* explain his decisions to join Justice Harlan's dissents against federal intrusions, legislative or judicial, into state voting requirements.

A more curious anomaly, however, is Justice Stewart's vote with the majority in *South Carolina v. Katzenbach*.[219] South Carolina challenged the constitutionality of various provisions of the Voting Rights

216. 384 U.S. at 666-68 (Harlan, J., dissenting, joined by Stewart, J.).
217. *See* note 126 and accompanying text *supra*.
218. 384 U.S. at 666 (emphasis added).
219. 383 U.S. 301 (1966).

Act,[220] especially the suspension of tests and devices for voter registration in states in which voter turnout in 1964 was below 50% of the adult residents.[221] The provisions challenged in *South Carolina* seemed to raise all of the serious federalist doubts Stewart had expressed through Justice Harlan in the *Morgan* dissent.[222] Moreover, the provisions challenged in *South Carolina* were in a very real sense more directly intrusive into state electoral procedures than was the provision attacked in *Morgan*. The latter suspended the voter requirement of English language literacy predicated upon Congress' finding that such a requirement was a violation of equal protection.[223] In *South Carolina*, however, the entire administrative machinery of the Voting Rights Act was challenged, including the assignment of federal registrars and the suspension of tests, whether for literacy or otherwise, in states designated by Congress to have been likely to have misused their authority over voting qualifications. States were so designated on the basis of statistical inferences, rather than upon judicial or even congressional finding of unconstitutional practices. Thus, the federalist principle of state autonomy over voting seemed far more seriously jeopardized by the provisions of the Voting Rights Act challenged in *South Carolina* than by those challenged in *Morgan*, yet Stewart dissented only in the latter case.

One explanation for Justice Stewart's apparently contradictory behavior is that he was perhaps as concerned about judicial autonomy as state autonomy. In *Morgan*, Harlan and Stewart criticized what they

220. Voting Rights Act of 1965, 42 U.S.C. § 1973(b), c, d(b), e, g, k(a) (1976).

221. *Id.* § 4(b).

222. Justice Stewart's questions and statements during oral argument on *South Carolina* suggested that the federalist concerns which were to lead him to dissent in *Morgan* would have also prompted him to dissent in this case. He seemed most disturbed by what he viewed as the misuse by Congress of its remedial power under § 2 of the Fifteenth Amendment. U.S. CONST. amend. XV § 2. Implying that Congress may have infringed upon the constitutionally-reserved power of the states, Stewart asked Attorney General Katzenbach, "You're not suggesting that Congress could override the privilege against self-incrimination though appropriate to Fifteenth Amendment enforcement?" 34 U.S.L.W. 3251 (U.S. Jan. 25, 1966). He also appeared concerned that the Act encroached on state authority over voting without clear and appropriate relationship to Fifteenth Amendment principles. Because the law suspended literacy tests wherever they may have been a tool for racial discrimination, Stewart feared the law would "[result in] the registration of illiterates," not a purpose of the Fifteenth Amendment. 34 U.S.L.W. 3252 (U.S. Jan. 25, 1966). Similarly, he expressed concern that the voting turnout in 1964 was the statistic used to presume the existence of discriminatory voter registration procedures, questioning whether low voter turnout could reasonably be the basis for triggering the test suspension provisions of the law when low voter turnout was not necessarily reflective of low voter registration levels, discriminatory or otherwise. *Id.*

223. *See* note 214 and accompanying text *supra*.

saw as a violation of separation of powers arising from a final determination by Congress, rather than the judiciary that an infringement of equal protection had occurred.[224] In *South Carolina*, Congress had also made a constitutional determination, but there was room left for judicial action. States covered by the Act's suspension of tests and devices could resume their use if they could prove to a federal district court that the tests had not been a tool for racial discrimination during at least the previous five years.[225] The burden of proof was placed entirely on the state and the chances for success were quite limited given the strong statistical presumption against the state, but there was nevertheless the opportunity to utilize objective judicial processes on the constitutional issue. Judicial power would seem to be the only important principle differentiating *South Carolina* from *Morgan* and reconciling the apparent contradiction in Stewart's positions. The mere three months between the *South Carolina* and *Morgan* decisions renders Harlan's and Stewart's attempts to justify the apparent inconsistencies in their position difficult to understand, on any other basis.[226]

Legal analysts have called the Voting Rights Act of 1965 " 'an unprecedented abridgement of the [states'] power to set voting qualifications.' "[227] The statute and its later amendments, however, have become the most significant means of enfranchising blacks in the South. In their revealing analysis of the effect of the passage and implementation of the Voting Rights Act, Rodgers and Bullock underscored the political importance of the Court's having upheld the constitutionality of the law challenged in the two 1966 cases.[228]

Justice Stewart at the Pivot

The third era of voting equality decisions, dating from the late

224. 384 U.S. at 665-71. *See* notes 213-17 and accompanying text *supra*.

225. 42 U.S.C. § 1973 (1976).

226. Justice Harlan attempted to distinguish *South Carolina* in his *Morgan* dissent. He maintained that the provisions challenged in *South Carolina* were constitutional because Congress had volumes of evidence about the use of tests and devices to deny blacks the vote in contravention of the Fifteenth Amendment. Harlan suggested, however, that § 4(e), challenged in *Morgan*, was not based upon comparable congressional research. 384 U.S. at 667. The constitutional significance of this argument is questionable. Once one peels away the political explanations for § 4(e), it may be understood as reflecting Congress' belief that a Puerto Rican, educated in American schools and literate in Spanish, should not be denied equal voting privileges under the equal protection clause. Research equivalent to that showing the discriminatory use of tests and devices is hardly relevant to § 4(e).

227. P. KURLAND, POLITICS, THE CONSTITUTION AND THE WARREN COURT at 35 (1970) quoting C. PRITCHETT, THE AMERICAN CONSTITUTION at 756 (2d ed. 1968).

228. H. RODGERS, JR., & C. BULLOCK III, LAW AND SOCIAL CHANGE: CIVIL RIGHTS LAWS AND THEIR CONSEQUENCES ch. 2 *passim* (1972).

1960's to the present, has involved the Court in interpreting the meaning of the provisions of the Voting Rights Act and the practices that come under its purview. It is within this third group of racial equality cases that the true significance of Justice Stewart's role as a pivotal, sometimes swing voter may be seen. With only three exceptions,[229] the voting equality cases decided by the Court from 1967 through 1978 have involved interpretations of section 5 of the Voting Rights Act, which prohibits designated states from altering their electoral systems without the prior approval of the United States Attorney General.[230]

During the last year of Chief Justice Warren's tenure on the Court, two cases interpreting section 5 were decided. The more significant of the two was *Allen v. State Board of Elections*,[231] in which the Court found section 5 applicable to a change from district elections for county supervisors to at-large elections. The case was decided by a seven-to-two vote, with Justice Black dissenting and Justice Harlan dissenting in part, but the substance of the Court opinion was subscribed to completely by only five Justices. Justice Black thought section 5 unconstitutional;[232] Justice Harlan thought it inapplicable to those cases at bar in which the state had not *altered* its election practices.[233] Justices Douglas and Marshall, concurring with the Court, wanted to enjoin the states from holding elections under the at-large plans.[234] The majority opinion, written by Chief Justice Warren, granted only a declaratory judgment upholding the necessity of submitting the new county electoral systems to the U.S. Attorney General or the federal District Court for the District of Columbia for a determination as to whether it would engender voting discrimination.[235] The majority did not reach the mer-

229. Briscoe v. Bell, 432 U.S. 404 (1977); Connor v. Finch, 431 U.S. 407 (1977); and Gaston County, N.C. v. United States, 395 U.S. 285 (1969).

230. 42 U.S.C. § 1973 (1976). While *Connor* did not directly involve the Voting Rights Act, both *Gaston County* and *Briscoe* involved interpretations of § 4 of the Voting Rights Act. 42 U.S.C. § 1973. As in all of the sections of the paper, the data analyzed include all of the cases considered before the end of the October Term 1977.

231. 393 U.S. 544 (1969). The *Allen* case consolidated four cases: Allen v. State Bd. of Elections, Fairley v. Patterson, Bunton v. Patterson, and Whitley v. Williams. *Allen* was an appeal from a decision by the Federal District Court for the Eastern District of Virginia the other three cases appealed decisions of the Federal District Court for the Southern District of Mississippi. The less significant case decided in the same year was Hadnott v. Amos, 394 U.S. 358 (1969), which held that Alabama had unlawfully disqualified independent candidates, most of whom were black, from the ballot for alleged failure to comply with the state's election laws.

232. 393 U.S. at 595-97 (Black, J., dissenting).

233. *Id.* at 591-93 (Harlan, J., concurring in part and dissenting in part).

234. *Id.* at 594-95 (Marshall, J., concurring and dissenting, joined by Douglas, J.).

235. *Id.* at 571-72.

its of the legality of the electoral changes, and the opinion therefore bears the mark of the limited remedy principle, so characteristic of Stewart. Justice Stewart's inclusion in the *Allen* majority may well have been the harbinger of a pivotal position on the Court. With the retirement of Chief Justice Warren and Justice Fortas and their replacement by Chief Justice Burger and Justice Blackmun, the seven Justice coalition for a liberal reading of section 5 had dwindled to five, two of whom in *Allen* had wanted even more far-reaching remedies. It was within this Court and the Burger Court after the appointment of Justices Powell and Rehnquist that Stewart's position frequently determined the Court's focus.

Since the appointment of Chief Justice Burger (and through the spring of 1978) the Supreme Court has interpreted the Voting Rights Act in fourteen cases. Ten of these decisions were non-unanimous and six were decided by five vote majorities.[236] Although both Justice Stewart and Justice White appeared to swing from support for racial equality under the Act to support for the autonomy of southern governments, Stewart's role as the pivotal vote is evident in the fact that he has always been a member of the majority in these cases, while White twice dissented.[237] In fact, between 1969 and the spring of 1978, Stewart has been the only Justice to be in complete accord with the majority opinion in all of the Voting Rights Act cases. Thus, in *Perkins v. Matthews*,[238] the first Burger Court interpretation of section 5, Stewart was part of a five Justice majority which included Justice Brennan, who wrote for the Court, and Justices Douglas, Marshall and White. Justices Harlan and Black took the same positions they had held in *Allen*, in this case with reference to the applicability of the Act to municipal annexations.[239] Chief Justice Burger and Justice Blackmun filed a one-sentence concurrence to the effect that *Allen* was controlling.[240] Similarly, in *Georgia v. United States*,[241] *Richmond v. United States*[242] and *Beer v. United States*[243] Stewart's pivotal role may be inferred from the bare five-vote approval of the substance of the Court's opinions. In *Georgia* and *Beer*, Stewart wrote for the majority, in the former case

236. *See* Appendix D, cases 11-20, 22-25.

237. Justice White dissented in Georgia v. United States, 411 U.S. 556 (1973), and Beer v. United States, 425 U.S. 130 (1976).

238. 400 U.S. 379 (1971).

239. *Id.* at 397-400 (Harlan, J., concurring in part and dissenting in part); *id.* at 401-09 (Black, J., dissenting).

240. *Id.* at 397 (Blackmun, J., concurring in the judgment, joined by Burger, C.J.).

241. 411 U.S. 526 (1973).

242. 422 U.S. 358 (1975).

243. 425 U.S. 130 (1976).

holding section 5 applicable to reapportionment of the Georgia legislature[244] and in the latter holding that section 5 bans only those electoral changes more detrimental to racial equality than the preexisting plan.[245] The *Georgia* decision had the approval of Justice Blackmun and the consistently more liberal members of the Court: Justices Douglas, Brennan and Marshall. Chief Justice Burger concurred on the basis that *Allen* was controlling, but announced that he had reservations about the correctness of that decision.[246] Thus, it appears that Stewart's vote was critical, given Chief Justice Burger's lack of confidence in the *Allen* precedent.

After nine years of consistent support for racial equality under the Voting Rights Act of 1965, albeit usually by very slim majorities, the Court in *Richmond v. United States*[247] and *Beer v. United States*[248] seemed to reverse this trend. *Richmond*, a five-to-three decision, held that section 5 was not necessarily violated by the city's annexation of an adjacent, primarily white area. If Justice Stewart had voted for a more liberal reading of section 5, one which would prohibit boundary manipulations which reduce relative black voting strength, the resulting four-to-four split would have meant affirmance of the district court decision favoring the interests of the black community. Similarly, in *Beer v. United States*,[249] another five-to-three decision, the Court ruled that section 5 did not apply to a New Orleans redistricting plan which retained its former provision for two at-large city council seats and created a distinct possibility that blacks could elect one or two council members. The likely effect of the plan was that blacks would not be able to gain sufficient seats on the council to ensure proportionate political strength of the black community. Justice Stewart, writing for the majority, relied on the allegedly enhanced voting power that blacks would enjoy in at least one district to find that the redistricting did not " 'have the effect of denying or abridging the right to vote on account of race or color.' "[250] As noted by Justice Marshall, however, the redistricting plainly would result in diluting the black vote by making it possible for the city's 34.5% black voters to elect only one, or at best two members of a seven-seat council.[251] Again, as in *Richmond*, had

244. 411 U.S. at 531.
245. 425 U.S. at 141.
246. 411 U.S. at 541 (Burger, C.J., concurring).
247. 422 U.S. 358 (1975).
248. 425 U.S. 130 (1976).
249. 425 U.S. 130 (1976).
250. *Id.* at 142, quoting 42 U.S.C. § 1973(b).
251. *Id.* at 159-62 & n.19 (Marshall, J., dissenting, joined by Brennan, J.).

Justice Stewart opted for a broader interpretation of section 5, the resulting equal division of the Court, affirming the district court decision, would have favored the interests of the black voters of New Orleans.[252]

Given the critical nature of Justice Stewart's vote in *Richmond* and *Beer*, the reasons underlying his change in position from a more liberal perception of section 5, as evidenced by *Allen*,[253] *Georgia*[254] and *Perkins*,[255] to the more restricted scope discerned in the foregoing cases bear examination. It appears significant that in *Richmond* the Court for the first time had to evaluate the merits of the discrimination claim. And in *Beer* the Court had to decide whether the practice challenged was actually the kind of discrimination banned by the Voting Rights Act. In contrast, *Allen, Perkins* and *Georgia* decided only that changes to at-large elections, annexations and reapportionments, respectively, in states covered by the Voting Rights Act must be submitted for the approval of the attorney general or the district court for the District of Columbia. Stewart's parting company with the liberals of the *Allen, Georgia* and *Perkins* coalition was in all likelihood due to his willingness in those cases to interpret broadly what matters must be submitted for judicial and administrative scrutiny under section 5, and to his reluctance in *Richmond* and *Beer* to use section 5 substantively to enjoin the annexation or reapportionment plans adopted by local government.

Generally, narrow procedural opinions, such as those on the Voting Rights Act prior to *Richmond*, need not commit a Justice to any particular position on the merits of the substantive issue. Therefore, there should be no presumption of inconsistency when a Justice decides that a law is applicable to a particular situation but that the law has not been violated. With respect to Justice Stewart's positions in *Richmond* and *Beer*, however, there is an apparent departure from the principles stated in his opinion for the Court in *Georgia*. In *Georgia* he had held that the Attorney General could prevent a reapportionment scheme

252. Although Justices Burger and Blackmun also switched in their voting from support for the equality claim in *Georgia* to a position against equality in *Richmond* and *Beer*, their votes with the Court decision in *Georgia* were based on the *Allen* precedent. Thus, it is reasonable to view Stewart as the member of the *Richmond* and *Beer* majorities with the weakest affinity for the unfavorable racial voting equality position of the Court in these later cases. Justice White also changed positions from *Georgia* to *Beer*, but it was a change which resulted in his remaining a dissenting vote; hence his voting is not a key variable in explaining the Court's changed position in the latter case. It is note-worthy, however, that White wrote the majority opinion in *Richmond*, a fact which raises intriguing questions as to his differentiation between *Richmond* and *Beer*, but which are beyond the scope of this article.

253. *See* notes 231-35 and accompanying text *supra*.

254. *See* notes 244-46 and accompanying text *supra*.

255. *See* notes 238-40 and accompanying text *supra*.

judged to "have the potential for diluting the value of the Negro vote" irrespective of any intention by the state to discriminate.[256] In *Richmond*, however, black voting strength was clearly diluted when, after annexation, the resident black population dropped from 52% to 42%, and the lower court record was replete with evidence of discriminatory intent as well as effect.[257] Yet Stewart voted to reverse the district court and joined Justice White's assertion that the city needed to prove only that the annexation, post hoc, actually resulted in some benefit to the city.[258] Not only had voting dilution been proven in *Richmond*, but far from not requiring a showing of discriminatory intent—as in *Georgia*[259]—the Court actually forgave clear discriminatory intentions and results.[260] Also implicitly contrary to his dicta in *Georgia*,[261] Stewart joined in relieving the city of Richmond, to some extent, of its substantial burden of proving that the proposed change was free of discriminatory purpose or effect.[262]

In *Beer*, Justice Stewart appeared to shift the burden to the black voters to demonstrate that a proposed redistricting plan was retrogressive rather than ameliorative of racial disenfranchisement in order for the court to apply section 5.[263] Perhaps even more important is the idea advanced in *Beer* that only those racial discriminations in voting which are aggravated by change are banned by the Voting Rights Act. Previous to *Beer*, there had never been any suggestion but that objective measures of black resident population, voter registration and potential voting strength, rather than the existing state of discriminatory practices, were the relevant bases for determining dilution.

Justice Stewart thus appears to have been inconsistent in *Richmond* and *Beer*, at least with respect to the implications of his dicta in *Georgia*. In the narrow and strict sense, however, it is only Stewart's

256. 411 U.S. 526, 534 (1973).

257. 422 U.S. at 382-83 (Brennan, J., dissenting, joined by Douglas and Marshall, JJ.), quoting Richmond v. United States, 376 F. Supp. 1344, 1349-50 (D.C. Va. 1974), *vacated and remanded*, 422 U.S. 358 (1975).

258. *Id.* at 373-74.

259. 411 U.S. at 536-38.

260. The district court in *Richmond* found that annexation had been enacted in 1969 with a discriminatory purpose and, therefore, the plan could not stand unless the city could prove: (1) that it had some objectively verifiable, legitimate purpose for the annexation at the time of adopting a ward city council election system in 1973; and (2) that the ward plan effectively eliminated the dilution of black voting power caused by the annexation. 422 U.S. at 372. The Supreme Court declined to approve these requirements. *Id.* at 374-75. *See* note 258 and accompanying text *supra*.

261. 411 U.S. at 536-39.

262. 422 U.S. at 380-81 (Brennan, J., dissenting, joined by Douglas and Marshall, JJ.).

263. 425 U.S. at 140-41.

uniquely clear perception of the severability of questions of the application of procedures mandated by the Voting Rights Act and findings of a substantive violation of the Act that accounts for the pattern of the Court's decisions in the section 5 cases. He was the only member of the Court to subscribe fully to the liberal Court interpretations of the procedural reach of section 5 while also joining Court opinions which narrowly defined what may be considered substantive breaches of the Act. The voting analysis of these bare majority cases illustrates the critical role Stewart has played in this area of litigation.

Conclusion

The evidence suggests that the southern fear of Justice Stewart's appointment to the Supreme Court was perhaps a prophecy of the significance of Stewart's involvement in racial equality cases. While Stewart has never been *the* protector of racial equality—indeed during most of the years of the Warren Court he was among the least supportive of racial equality—in later years, with changes in Court membership, Stewart has become the pivotal vote on some important racial issues. He clearly has become both a swing and a pivotal vote in school desegregation decisions as evidenced by *Emporia* and *Milliken*. He has also constituted the theoretical fifth vote on a number of state action cases. The same pattern has emerged in cases on the Voting Rights Act. In addition to the importance of Stewart's pivotal vote, his moderate philosophy has made an impact on Court decision-making. In desegregation and state action cases, his approach has been consistently narrow and limited with respect to the issues, the decision and the remedy. In cases concerning electoral equality he has also shown a commitment to federalism. His restraint in constitutional decision-making has, in many instances, resulted in a lack of predictability, not because Stewart is especially inconsistent, but rather because short steps allow one more freedom of movement in the future.

Justice Stewart has often appeared to be the member of the Court most committed to the judicial canon of deciding no more than is necessary in the instant case. The effects of this philosophy, however, are not always desirable. Constitutional decisions based on the combination of specific circumstances of a case and the granting of a remedy which is no broader than necessary—the kind of decisions for which Stewart is largely responsible—have often created confusion and inconsistency in the law and among judges of a magnitude that belies the alleged virtues of this approach. Stewart's apparent "tomorrow is another day and case" philosophy, as exemplified by his constitutional

and statutory decisions concerning racial equality, has been a very significant force within the Court during the last two decades. The significance of his vote has changed with time and Court personnel, but his centrist theoretical orientation, the substance of his moderate approach, has remained a potent intellectual force on the Court. Since Justice Stevens' appointment in 1975, the Court has appeared less prone to near-even divisions on the promotion of racial equality. Stewart's vote has, therefore, lost some of its pivotal quality. But it is quite likely that his moderate approach to questions of racial equality will remain. On the unanswered questions of racial equality upon which the Court may desire a more united stance, it is Justice Stewart's approach to issues that may well prove to be the foundation for greater consensus.

Appendix
Cases Comprising Data on Racial Equality

A. The Constitution and Racial Segregation

1. *Garner v. Louisiana*, 368 U.S. 157 (1961).
2. *Johnson v. Virginia*, 373 U.S. 61 (1963).
3. *Watson v. City of Memphis*, 373 U.S. 526 (1963).
4. *Arnold v. North Carolina*, 376 U.S. 773 (1964). *Alexander v. Louisiana*, 405 U.S. 625 (1972).
5. *Griffin v. County School Board*, 377 U.S. 218 (1964).
6. *Bell v. Maryland*, 378 U.S. 226 (1964).
7. *Bouie v. City of Columbia*, 378 U.S. 347 (1964). *Barr v. City of Columbia*, 378 U.S. 146 (1964).
8. *McLaughlin v. Florida*, 379 U.S. 184 (1964).
9. *Swain v. Alabama*, 380 U.S. 202 (1965).
10. *Rogers v. Paul*, 382 U.S. 198 (1965).
11. *Brown v. Louisiana*, 383 U.S. 131 (1966).
12. *Loving v. Virginia*, 388 U.S. 1 (1967).
13. *Sweet Briar Institute v. Button*, 387 U.S. 423 (1967). *Singleton v. Jackson Municipal Separate School District*, 396 U.S. 1032 (1970). *Carter v. West Feliciana Parish School Board*, 396 U.S. 290 (1970).
14. *Lee v. Washington*, 390 U.S. 333 (1968).
15. *Green v. County School Board*, 391 U.S. 430 (1968). *Raney v. Board of Education*, 391 U.S. 443 (1968). *Monroe v. Board of Commissioners*, 391 U.S. 450 (1968).
16. *Carter v. Jury Commission*, 396 U.S. 320 (1970).
17. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).
18. *Ham v. South Carolina*, 409 U.S. 524 (1973).

19. *Wright v. Emporia*, 407 U.S. 451 (1972).
20. *United States v. Scotland Neck Board of Education*, 407 U.S. 484 (1972).
21. *Peters v. Kiff*, 407 U.S. 493 (1972).
22. *Tollett v. Henderson*, 411 U.S. 258 (1973).
23. *Bradley v. School Board*, 412 U.S. 937 (1973).
24. *Keyes v. School District No. 1*, 413 U.S. 189 (1973).
25. *Norwood v. Harrison*, 413 U.S. 455 (1973).
26. *Mayor of Philadelphia v. Education Equality League*, 415 U.S. 605 (1974).
27. *Milliken v. Bradley*, 418 U.S. 717 (1974).
28. *Buchanan v. Evans*, 423 U.S. 963 (1975).
29. *Ristaino v. Ross*, 424 U.S. 589 (1976).
30. *Hills v. Gautreaux*, 425 U.S. 284 (1976).
31. *Francis v. Henderson*, 425 U.S. 536 (1976).
32. *Washington v. Davis*, 426 U.S. 229 (1976).
33. *Pasadena City Board of Education v. Spangler*, 427 U.S. 424 (1976).
34. *Austin Independent School District v. United States*, 429 U.S. 990 (1976).
35. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977).
36. *Castaneda v. Partida*, 430 U.S. 482 (1977).
37. *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977).
38. *Milliken v. Bradley*, 433 U.S. 267 (1977).
39. *Hazelwood School District v. United States*, 433 U.S. 299 (1977).
40. *Dayton Board of Education v. Brinkman*, 433 U.S. 406 (1977).
41. *School District v. United States*, 433 U.S. 667 (1977).
42. *Brennan v. Armstrong*, 433 U.S. 672 (1977).
43. *National Education Ass'n v. South Carolina*, 434 U.S. 1026 (1978). *United States v. South Carolina*, 434 U.S. 1026 (1978).

B. The State Action Requirement

1. *Wolfe v. North Carolina*, 364 U.S. 177 (1960).
2. *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).
3. *Peterson v. City of Greenville*, 373 U.S. 244 (1963). *Robinson v. Florida*, 378 U.S. 153 (1964).
4. *Lombard v. Louisiana*, 373 U.S. 267 (1963).
5. *Griffin v. Maryland*, 378 U.S. 130 (1964).
6. *Evans v. Newton*, 382 U.S. 296 (1966).

7. *Reitman v. Mulkey*, 387 U.S. 369 (1967).
8. *Hunter v. Erickson*, 393 U.S. 385 (1969).
9. *Evans v. Abney*, 396 U.S. 435 (1970).
10. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970).
11. *Palmer v. Thompson*, 403 U.S. 217 (1971).
12. *Moose Lodge v. Irvis*, 407 U.S. 163 (1972).
13. *Gilmore v. City of Montgomery*, 417 U.S. 556 (1974).

C. Racial Equality Under Statute (Excluding Voting Rights)

1. *Boynton v. Virginia*, 364 U.S. 454 (1960).
2. *Colorado Anti-Discrimination Commission v. Continental Air Lines*, 372 U.S. 714 (1963).
3. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).
4. *Hamm v. City of Rock Hill*, 379 U.S. 306 (1964).
5. *United States v. Guest*, 383 U.S. 745 (1966).
6. *United States v. Price*, 383 U.S. 787 (1966).
7. *Georgia v. Rachel*, 384 U.S. 780 (1966).
8. *Greenwood v. Peacock*, 384 U.S. 808 (1966).
9. *Jones v. Alfred H. Mayer, Co.*, 392 U.S. 409 (1968).
10. *Daniel v. Paul*, 395 U.S. 298 (1969).
11. *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969).
12. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).
13. *Griffin v. Breckenridge*, 403 U.S. 88 (1971).
14. *Love v. Pullman Co.*, 404 U.S. 522 (1972).
15. *Lau v. Nichols*, 414 U.S. 563 (1974).
16. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975).
17. *Albemarle Paper Co., v. Moody*, 422 U.S. 405 (1975).
18. *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976).
19. *NAACP v. FPC*, 425 U.S. 662 (1976).
20. *Brown v. GSA*, 425 U.S. 820 (1976).
21. *Chandler v. Roudebush*, 425 U.S. 840 (1976).
22. *Runyon v. McCrary*, 427 U.S. 160 (1976).
23. *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976).
24. *International Union of Electrical Workers v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976).
25. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977).
26. *Christiansburg Garment Co. v. EEOC.*, 434 U.S. 412 (1978).
27. *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

28. *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978).

D. Racial Equality and the Electoral System

1. *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45 (1959).
2. *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).
3. *United States v. Mississippi*, 380 U.S. 128 (1965). *Louisiana v. United States*, 380 U.S. 145 (1965).
4. *Harman v. Forssenius*, 380 U.S. 528 (1965).
5. *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).
6. *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966).
7. *Katzenbach v. Morgan*, 384 U.S. 641 (1966).
8. *Allen v. State Board of Elections*, 393 U.S. 544 (1969).
9. *Hadnott v. Amos*, 394 U.S. 358 (1969).
10. *Gaston County v. United States*, 395 U.S. 285 (1969).
11. *Perkins v. Matthews*, 400 U.S. 379 (1971) (5-2-2).
12. *Johnson v. New York State Education Department*, 409 U.S. 75 (1972) (per curiam).
13. *Georgia v. United States*, 411 U.S. 526 (1973) (4-1-4).
14. *Connor v. Waller*, 421 U.S. 656 (1975) (per curiam).
15. *City of Richmond v. United States*, 422 U.S. 358 (1975) (5-0-3).
16. *East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976) (per curiam).
17. *Beer v. United States*, 425 U.S. 130 (1976) (5-0-3).
18. *Connor v. Coleman*, 425 U.S. 675 (1976) (6-2-1).
19. *United States v. Board of Supervisors of Warren County*, 429 U.S. 642 (1977) (per curiam).
20. *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977) (5-2-1).
21. *Connor v. Finch*, 431 U.S. 407 (1977).
22. *Briscoe v. Bell*, 432 U.S. 404 (1977) (8-1-0).
23. *Morris v. Gressette*, 432 U.S. 491 (1977) (6-0-3).
24. *United States v. Board of Commissioners of Sheffield*, 435 U.S. 110 (1978) (5-1-3).
25. *Berry v. Doles*, 438 U.S. 190 (1978) (4-3-2).